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COMMENTARIES

ON THE

LAWS OF ENGLAND.

IN FOUR BOOKS.

BY

SIR WILLIAM BLACKSTONE, KNT.

ONE OF THE JUSTICES OF HIS MAJESTY'S COURT OF COMMON PLEAS.

WITH

NOTES SELECTED FROM THE EDITIONS OF ARCHBOLD, CHRISTIAN, COLERIDGE, CHITTY, STEWART, KERR, AND OTHERS,

BARRON FIELD'S ANALYSIS,

AND

Additional Notes, and a Life of the Author,

BY

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IN TWO VOLUMES.

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COMMENTARIES

ON

THE LAWS OF ENGLAND.

BOOK THE THIRD.

Of Private Wrongs.

CHAPTER I.

OF THE REDRESS OF PRIVATE WRONGS BY THE MERE ACT OF THE PARTIES.

At the opening of these commentaries,(*a*) municipal law was in general defined to be, "a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong."(*b*) From hence therefore it followed, that the primary objects of the law are the establishment of rights, and the prohibition of wrongs. And this occasioned(*c*) the distribution of these collections into two general heads; under the former of which we have already considered the *rights* that were defined and established, and under the latter are now to consider the wrongs that are forbidden and redressed, by the laws of England.

*In the prosecution of the first of these inquiries, we distinguished rights into two sorts: first, such as concern, or are annexed to, the persons of men, and are then called *jura personarum*, or *the rights of persons;* which, together with the means of acquiring and losing them, composed the first book of these commentaries: and secondly, such as a man may acquire over external objects, or things unconnected with his person, which are called *jura rerum*, or *the rights of things:* and these, with the means of transferring them from man to man, were the subject of the second book. I am now therefore to proceed to the consideration of *wrongs;* which for the most part convey to us an idea merely negative, as being nothing else but a privation of right. For which reason it was necessary, that before we entered at all into the discussion of wrongs, we should entertain a clear and distinct notion of rights: the contemplation of what is *jus* being necessarily prior to what may be termed *injuria*, and the definition of *fas* precedent to that of *nefas*. [*2

Wrongs are divisible into two sorts or species: *private wrongs* and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries:* the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misde-*

(*a*) Introd. § 2.
(*b*) *Sanctio justa, jubens honesta, et prohibens contraria.* Cic. 11. *Philipp.* 12.[1] Bract. *l.* 1, c. 3.
(*c*) Book i. ch. 1.

[1] I imagine this to be a misquotation of the following passage:—"Est enim lex nihil aliud, nisi recta et a numine Deorum tracta ratio, imperans honesta, prohibens contraria." Phil. xi. 12.—Coleridge.

meanours. To investigate the first of these species of wrongs, with their legal remedies, will be our employment in the present book; and the other species will be reserved till the next or concluding one.

The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined and wrongs prohibited. This remedy is therefore *principally* to be sought by application to these *courts of justice; that is, *3] by civil suit or action. For which reason our chief employment in this book will be to consider the redress of private wrongs by *suit* or *action* in courts. But as there are certain injuries of such a nature that some of them furnish and others require a more speedy remedy than can be had in the ordinary forms of justice, there is allowed in those cases an extrajudicial or eccentrical kind of remedy; of which I shall first of all treat, before I consider the several remedies by suit: and, to that end, shall distribute the redress of private wrongs into three several species: first, that which is obtained by the *mere act* of the *parties* themselves; secondly, that which is effected by the *mere act* and operation of *law;* and, thirdly, that which arises from *suit* or *action* in courts, which consists in a conjunction of the other two, the act of the parties co-operating with the act of law.

And *first* of that redress of *private* injuries which is obtained by the *mere* act of the *parties.* This is of two sorts: first, that which arises from the act of the injured party only; and, secondly, that which arises from the joint act of all the parties together: both which I shall consider in their order.

Of the first sort, or that which arises from the sole act of the injured party, is

I. The *defence* of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or *any* of these his relations,[2] be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace which happens is chargeable upon him only who began the affray.(*d*) For the law in this case respects the passions of the human mind, and (when external violence is offered to a man himself, or those to whom he bears a near connection) makes it lawful in him to do himself that immediate justice to which he *is prompted by nature, and *4] which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried unless it were permitted a man immediately to oppose one violence with another. Self-defence, therefore, as it is justly called the primary law of nature, so it is not, neither

(*d*) 2 Roll. Abr. 546. 1 Hawk. P. C. 131.

[2] It is said that, according to 1 Salk. 407, 1 Ld. Raym. 62, and Bul. N. P. 18, a master cannot justify an assault in defence of his servant, because he might have an action *per quod servitium amisit.* But, according to 2 Rol. Abr. 546, D. pl. 2, Owen, 151, Bac. Abr. Master and Servant. P., such an interference by the master is lawful; and lord Hale (1 vol. 484) says, "That the law had been for a master killing in the necessary defence of his servant, the husband in defence of his wife, the wife of the husband, the child of the parent, or the parent of the child, for the act of the assistant shall have the same construction in such cases as the act of the party assisted should have had if it had been done by himself; for they are in a mutual relation to one another." But though, as observed by the learned commentator, the law respects the passions of the human mind, yet it does not allow this interference as an indulgence of revenge, but merely to *prevent* the injury, or a repetition of it: and therefore, in a plea by a father, master, &c., founded on this ground, it is necessary to state that the plaintiff *would* have *beat* the son, servant, &c., if the defendant had not interfered; and if it be merely alleged that the plaintiff *had* assaulted or beat, &c., it will be demurrable, for if the assault on the master, &c. be over, the servant cannot strike by way of revenge, but merely in order to prevent an injury. 2 Stra. 953. When a person does not stand in either of these relations, he cannot justify an interference *on behalf* of the party injured, but merely as an indifferent person, to preserve the peace. 2 Stra. 954.—Chitty.

can it be in fact, taken away by the law of society. In the English law particularly it is held an excuse for breaches of the peace, nay, even for homicide itself: but care must be taken that the resistance does not exceed the bounds of mere defence and prevention: for then the defender would himself become an aggressor.

II. Reception or *reprisal* is another species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant: in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace.(*e*) The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed; and his wife, children, or servants concealed or carried out of his reach; if he had no speedier remedy than the ordinary process of law. If therefore he can so contrive it as to gain possession of his property again without force or terror, the law favours and will justify his proceeding. But as the public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right of reception *shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen;(*f*) but must have recourse to an action at law.[3] [*5

III. As reception is a remedy given to the party himself for an injury to his *personal* property, so, thirdly, a remedy of the same kind for injuries to *real* property is by *entry* on lands and tenements when another person without any right has taken possession thereof.[4] This depends in some measure on like

(*e*) 3 Inst. 134. Hal. Anal. § 46. (*f*) 2 Roll. Rep. 55, 56, 208. 2 Roll. Abr. 565, 566.

[3] In the case of personal property improperly detained or taken away, it may be retaken from the house and custody of the wrong-doer, even without a previous request; but, unless it was seized or attempted to be seized forcibly, the owner cannot justify doing any thing more than gently laying his hands on the wrong-doer in order to recover it, (8 T. R. 78. 2 Roll. Abr. 56, 208. 2 Roll. Abr. 565, pl. 50. 2 Leonard 302. Selw. N. P. tit. Assault and Battery;) nor can he without leave enter the door of a *third* person, not privy to the wrongful detainer, to take his goods therefrom. 2 Roll. Abr. 55, 56, 308. 2 Roll. Abr. 565, I. pl. 2. Bac. Abr. Trespass, F.—CHITTY.

If the possession of one's property be held by another, the owner may take possession if he can do so without tumult and riot or breach of the peace; but he has no right to use unreasonable violence. Davis *vs.* Whitridge, 2 Strobh. 232.

The owner of personal property left in the possession of a third person may by his own act repossess himself of such property, though it be taken from the possession of such third person by virtue of a writ of replevin; and the plaintiff in the replevin cannot maintain trespass against him. Spencer *vs.* McGowen, 13 Wend. 256. One whose chattel has been wrongfully taken from him may enter upon the land of the taker for the purpose of retaking it, without subjecting himself even to nominal damages. Chambers *vs.* Bedell, 2 Watts & Serg. 225.—SHARSWOOD.

[4] With respect to *land* and houses also, resumption of possession by the mere act of the party is frequently allowed. Thus, if a tenant omit at the expiration of his tenancy to deliver up possession, the landlord may legally, in his absence, break open the outer door and resume possession, though some articles of furniture remain therein; and, if the landlord put his cattle on the land, and the tenant distrain them as damage-feasant, he may be sued. 1 Bing. R. 158., 7 T. R. 431, 432. 1 Price R. 53. And. 109. 6 Taunt. 202. If the landlord, in resuming possession, be guilty of a forcible entry with strong hand, or other illegal breach of the peace, he will be liable to an indictment. 7 T. R. 432. 3 T. R. 295. 6 Taunt. 202. 8 T. R. 364, 403. But the circumstance of the owner of property using too much force in regaining possession, but taking care to avoid personal injury to the party resisting, will not enable the latter to sue him. See cases in

reasons with the former; and like that, too, must be peaceable and without force There is some nicety required to define and distinguish the cases in which such entry is lawful or otherwise; it will therefore be more fully considered in a subsequent chapter; being only mentioned in this place for the sake of regularity and order.

IV. A fourth species of remedy by the mere act of the party injured is the *abatement* or removal of *nuisances*.[5] What nuisances are, and their several species, we shall find a more proper place to inquire under some of the subsequent divisions. At present I shall only observe, that whatsoever unlawfully annoys or doth damage to another is a nuisance; and such nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it.(*g*) If a house or wall is erected so near to mine that it stops my antient lights, which is a *private* nuisance, I may enter my neighbour's land and peaceably pull it down.(*h*) Or if a new gate be erected across the public highway, which is a *common* nuisance, any of the king's subjects passing that way may cut it down and destroy it.(*i*) *And the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind, which obstruct or annoy such things as

*6]

(*g*) Rep. 101. 9 Rep. 55. (*h*) Salk. 459. (*i*) Cro. Car. 184.

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last two notes. But if any unnecessary violence to the person be used in rescuing or defending possession of real or personal property, the party guilty of it is liable to be sued. 8 T. R. 299. Id. 78. 1 Saund. 296, n. 1. So, as the law allows retaking of the possession of land, it also sanctions the due defence of the possession thereof; and therefore, though if one enter into my ground I must request him to depart before I can lay hands on him to turn him out, yet if he refuse I may then push him out, and if he enter with actual force I need not first request him to be gone, but may lay hands on him immediately. 8 T. R. 78. 1 Salk. 641. See 1 Bing. 158.—Chitty.

[5] Thus, in case of a *public* nuisance, if a house be built across a highway, any person may pull it down; and it is said he need not observe particular care in abating it, so as to prevent injury to the materials. And though a gate, illegally fastened, might have been opened without cutting it down, yet the cutting would be lawful. However, it is a general rule that the abatement must be limited by its necessity, and no wanton or unnecessary injury must be committed. 2 Salk. 458. As to private nuisances, they also may be abated; and therefore it was recently held, that if a man in his own soil erect a thing which is a nuisance to another, as by stopping a rivulet and so diminishing the water used by the latter for his cattle, the party injured may enter on the soil of the other and abate the nuisance, and justify the trespass; and this right of abatement is not confined merely to a house, mill, or land. 2 Smith's Rep. 9. 2 Rol. Abr. 565. 2 Leon. 202. Com. Dig. Pleader, 3 M. 42. 3 Lev. 92. So it seems that a libellous print or paper, affecting a private individual, may be destroyed, or (which is the safer course) taken and delivered to a magistrate. 5 Coke, 125, b. 2 Camp. 511. Per Best, J., in the Earl Lonsdale *vs.* Nelson, 2 Bar. & Cres. 311, "nuisances, by an act of *commission*, are committed in defiance of those whom such nuisances injure, and the injured party may abate them without notice to the person who committed them; but there is no decided case which sanctions the abatement by an individual of nuisances from *omission*, except that of cutting the branches of trees which overhang a public road or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees is an unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it: in such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of lord Hale, and appeal to a court of justice;" and see, further, 3 Dowl. & R. 556. And it was held in the same case, that where a person is bound to repair works connected with a port, and neglects to do so, another person cannot justify an entry to repair without averring and proving that immediate repairs were necessary, and the party's right to use the port. As to cutting trees, "if the boughs of your trees grow out into my land, I may cut them." Per Croke, J., Rol. Rep. 394. 3 Buls. 198. Vin. Abr. Trees, E. & tit. Nuisance, W. 2, pl. 3.

The abater of a private nuisance cannot remove the materials further than necessary, or convert them to his own use. Dalt. c. 50. And so much only of the thing as causes the nuisance should be removed; as, if a house be built too high, only so much of it as is too high should be pulled down. 9 Rep. 53. God. 221. 2 Stra. 686.—Chitty.

are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice.

V. A fifth case in which the law allows a man to be his own avenger, or to minister redress to himself, is that of *distraining* cattle or goods for the non-payment of rent, or other duties;[6] or distraining another's cattle *damage-feasant*,

[6] As to distresses in general, see Gilbert on Distresses, by Hunt; Bradley on Dist.; Com. Dig. Distress; Bac. Abr. Distress; Vin. Abr. Distress; 2 Saunders, index, Distress; Wilkinson on Replevin. As the law allows a creditor to arrest the person of his debtor as a security for his being forthcoming at the determination of the suit, so in certain cases it permits a landlord to distrain for arrears of rent, in order to compel the payment of it. It is laid down that the remedy for recovery of rent by way of distress was derived from the civil law; for anciently, in the feudal law, the neglect to attend at the lord's courts, or not doing feudal service, was a forfeiture of the estate; but these feudal forfeitures were afterwards turned into distresses according to the pignotary method of the civil law; that is, the land let out to the tenant is hypothecated, or as a pledge in his hands, to answer the rent agreed to be paid to the landlord; and the whole profits arising from the land are liable to the lord's seizure for the payment and satisfaction of it. Gilb. Dist. 2. Gilb. Rents, 3. Bacon on Govt. 77. Vigillius, 257, 271, 326. Cromp. Int. 9. 2 New R. 224. The distress could not at common law, before the stat. 2 W. and M. c. 5, be sold, but could only be impounded and detained, in order to induce the tenant to perform the feudal service. Distresses, therefore, were at common law only allowed when the relation of landlord and tenant subsisted, and when, consequently, there remained feudal service to be performed; and hence the necessity at the present day that the landlord distraining should, at the time of the distress, be entitled to the legal reversion; and hence the consequence that if a landlord, after rent has become due, and before payment, conveys his legal estate to another, he cannot distrain, (Gilb. Action Debt, 411. Bro. Debt, pl. 93. Vaughan, 40. Bac. Abr. Distress, A.;) and, for the same reason, it is necessary to aver in an avowry and cognizance that at the time of the distress the tenancy subsisted. The common law was altered, as far as regards tenants holding over, by the 8 Anne, c. 14, which provided that if a person retain possession of the estate after the expiration of his tenancy, the landlord, if his interest continue, may distrain within six months. Before this statute it was usual, and still may be expedient, to provide that the last half-year's rent shall be paid at a day prior to the determination of the lease, so as to enable the landlord to distrain before the removal of the tenant. Co. Litt. 47, b. If by agreement or custom the tenant has an away-going crop, and right to hold over to clear the same, the landlord may, during such excrescence of the term, distrain at common law. 1 Hen. Bla. 8. So the 11 Geo. II. c. 19, s. 8 enables a landlord to distrain for double rent if a tenant do not deliver up possession after the expiration of his own notice to quit, by which he incurs double rent so long as he holds over. When a lessor has not the legal estate or reversion, he should reserve a power to distrain, which will entitle him to do so. Co. Litt. 47, a. 5 Co. 3. But though the principal object of a distress was to compel the performance of feudal services, and, consequently, if rent be reserved on a letting merely of personal property, no distress can be taken, (5 Co. 17. 3 Wils. 27,) yet a distress may be made for rent of a ready-furnished house or lodging, because it is then considered that the rent issues out of the principal, —the real property demised. 2 New Rep. 224.

Accepting a note of hand and giving a receipt for the rent does not, till payment, preclude the landlord from distraining; and so if the landlord accept a bond; but a judgment obtained on either of such instruments would preclude the right of distress. See Bull. N. P. 182. An agreement to take interest on rent in arrear does not take away the right of distress. 2 Chit. R. 245. Where there are rents for which the party cannot distrain, although he may have an assize, yet remedy may be had in equity. Per Comyns, B., Exch. Trin. 5 & 6 Geo. II. 1 Selw. N. P. 6 ed. 673.

To entitle a person to distrain for non-payment of money, it must be due under a *demise*, and for rent *fixed* and certain in its nature; and therefore, if a person be let into possession under an agreement for a lease which does not contain words of immediate demise, no distress can be made, unless from a previous payment of rent or other circumstance a tenancy from year to year can be inferred; and the only remedy is by action for use and occupation. 2 Taunt. 148. 5 B. & A. 322. 13 East, 19. So, as lord Coke quaintly says, (Co. Litt. 96, a.,) it is a maxim in law that no distress can be taken for any services that are not put into certainty nor can be reduced to any certainty, for *id certum est quod certum reddi potest*, but yet in some cases there may be a certainty in uncertainty. Therefore, if a man hold land, paying so much per acre, although in the terms of the demise the number of acres be not fixed, the lord may distrain, (Vin. Abr. Distress, E. See form of avowry, 3 Chitty on Pl. 4th edit. 1051;) but where an estate has been let without in any way fixing the amount of rent, the only remedy is by action.—CHITTY.

that is, doing damage or trespassing upon his land. The former intended for the benefit of landlords, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter arising from the necessity of the thing itself, as it might otherwise be impossible at a future time to ascertain whose cattle they were that committed the trespass or damage.

As the law of distresses is a point of great use and consequence, I shall consider it with some minuteness: by inquiring, first, for what injuries a distress may be taken; secondly, what thing may be distrained; and thirdly, the manner of taking, disposing of, and avoiding distresses.

1. And first it is necessary to premise that a distress,(*j*) *districtio*, is the taking a personal chattel out of the possession of the wrong-doer into the custody of the party injured, to procure a satisfaction for the wrong committed. 1. The most usual injury for which a distress may be taken is that of non-payment of rent. It was observed in the former book,(*k*) that distresses were incident by the common law to every *rent-service*, and by particular reservation to *rent-charges* also; but not to *rent-seek* till the statute 4 Geo. II. c. 28 extended the same remedy to all rents alike, and thereby in effect abolished all material distinction between them. So that now we may lay it down as a universal principle, *that a distress may be taken for any kind of rent in arrear; the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it.[7] 2. For neglecting to do suit at the lord's court,(*l*) or other certain personal service,(*m*) the lord may distrain of common right. 3. For amercements in a court-leet a distress may be had of common right; but not for amercements in a court-baron, without a special prescription to warrant it.(*n*) 4. Another injury for which distresses may be taken is where a man finds beasts of a stranger wandering in his grounds *damage-feasant;* that is, doing him hurt or damage by treading down his grass or the like; in which case the owner of the soil may distrain them till satisfaction be made him for the injury he has thereby sustained. 5. Lastly, for several duties and penalties inflicted by special acts of parliament, (as for assessments made by commissioners of sewers,(*o*) or for the relief of the poor,)(*p*) remedy by distress and sale is given; for the particulars of which we must have recourse to the statutes themselves: remarking only that such distresses(*q*) are partly analogous to the antient distress at common law, as being repleviable and the like; but more resembling the common law process of execution, by seizing and selling the goods of the debtor under a writ of *fieri facias*, of which hereafter.

*7]

2. Secondly, as to the things which may be distrained, or taken in distress,[8]

(*j*) The thing itself taken by this process, as well as the process itself, is in our law-books very frequently called a distress.
(*k*) Book ii. ch. 3.
(*l*) Bro. Abr. tit. *distress*, 15.
(*m*) Co. Litt. 47.
(*n*) Brownl. 36.
(*o*) Stat. 7 Anne, c. 10.
(*p*) Stat. 43 Eliz. c. 2.
(*q*) 1 Burr. 539.

[7] But, to entitle a party to distrain, there must be rent due in the legal sense of that word. One man may be in possession of another's house or land with his consent, and may be bound to render him such a sum for the use and occupation of it as a jury shall deem a proper equivalent for the rent; but if there be no actual demise, nor any contract for a demise amounting to as much, and no fixed rent has been agreed on or paid, the owner cannot distrain; for in his avowry to an action of replevin for such distress he would be bound to state an actual tenancy and the definite terms of it, which it would be impossible to do under such a relation as above supposed. Kegan *vs.* Johnson, 2 Taunt. 148. Dunk *vs.* Hunter, 5 B. & A. 322.—Coleridge.

[8] Besides the rules in the text, it is a maxim of law that *goods in the custody of the law* cannot be distrained: thus, goods distrained, damage-feasant, cannot be distrained, (Co. Litt. 47, a.;) so goods taken in execution, (Willes, 131;) but the goods so taken must be removed from the premises within a reasonable time, or they will not be protected. 1 Price, 277. 1 M. & S. 711. However, growing corn sold under a writ of fi. fa. cannot be distrained unless the purchaser allow it to remain uncut an unreasonable time after it is ripe, (2 B. & B. 362. 5 Moore, 97, S. C.;) but goods taken under a void outlawry are liable to distress. 7 T. R. 259. For the protection of landlords, by the 8 Anne, c. 14, s. 1, no goods taken in execution upon any premises demised can be removed until rent, not exceeding one year's arrear, be paid. Under this act the sheriff is bound to satisfy the rent in the first instance. 4 Moore, 473. In cases to which the statute applies, the land-

we may lay it down as a general rule, that all chattels personal are liable to be distrained, unless particularly protected or exempted. Instead therefore of mentioning what things are distrainable, it will be easier to recount those which are not so, with the reason of their particular exemptions.(*r*) And, 1. As every thing which is distrained is presumed to be the property of the wrong-doer, it will follow that such things wherein no man can have an absolute and valuable property (as dogs, cats, rabbits, and *all animals *feræ naturæ*,) cannot be distrained. Yet if deer (which are *feræ naturæ*) are kept in a private [*8 enclosure for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandise, that they may be distrained for rent.(*s*) 2. Whatever is in the personal use or occupation of any man is for the time privileged and protected from any distress; as an axe with which a man is cutting wood, or a horse while a man is riding him. But horses drawing a cart may (cart and all) be distrained for rent-arrere; and also if a horse, though a man be riding him, be taken *damage-feasant*, or trespassing in another's grounds, the horse (notwithstanding his rider) may be distrained and led away to the pound.[9](*t*) Valuable things in the way of trade shall not be liable to distress; as a horse standing in a smith-shop to be shoed, or in a common inn; or cloth at a tailor's house; or corn sent to a mill or a market. For all these are protected and privileged for the benefit of trade, and are supposed in common presumption not to belong to the owner of the house, but to his customer.[10] But,

(*r*) Co. Litt. 47. (*s*) Davis *vs.* Powl, C. B. Hil. 11 Geo. II. (*t*) 1 Sid. 440.

lord is entitled to be paid his whole rent without deducting poundage. 1 Stra. 643. Rent only due at the time of the levy can be obtained under the act, (1 M. & S. 245. 1 Price, 274;) but forehand-rent, or rent stipulated to be paid in advance, may be obtained, (7 Price, 690;) so rent that falls due on the day of the levy. Tidd, Prac. 8th edit. 1054 After the landlord has had one year's rent paid him, he is not entitled to another upon a second execution, (2 Stra. 1024. 2 B. & B. 362. 5 Moore, 97, S. C.,) unless, as we have just seen, the goods be not removed within a reasonable time. The ground landlord is not within the act where there is an execution against the under-lessee. 2 Stra. 787. If the sheriff remove the goods without payment of the rent, and after notice and a formal demand of the rent, an action on the case lies against him. Vin. Abr. Dist. c. 3. Stra. 97. 3 B. & A 440. But no specific and formal notice is necessary. 3 B. & A. 645. 4 Moore, 473. 2 B. & B. 67, S. C. The action lies though part only of the goods be removed, (4 Moore, 473. 2 B. & B. 67, S. C.;) but the landlord's consenting to the removal waives the remedy. 3 Camp. 24. An executor or administrator, (1 Stra. 212,) or a trustee of an outstanding satisfied term to attend the inheritance, may sue. 4 Moore, 473. 2 B. & B. 67, S. C. Instead of an action, the landlord may move the court out of which the execution issued that he may be paid what is due to him out of the money levied and in the sheriff's hands, (Ca. *temp.* Hardw. 255. 2 Wils. 140,) and the court will grant the motion, though the sheriff had no notice of the rent due till after the removal. 3 B. & A. 440; and see further, on this point, Tidd's Prac. 8th edit. 1053–1055.

The recent bankrupt act provides that, in case of bankruptcy, no distress made after act of bankruptcy shall be available for more than a year's rent, but the landlord may prove for the excess. 1 Geo. IV. c. 16, § 74; and see *ante*, 2 book, 473.

For the protection of landlords, by the 56 Geo. III. c. 50, no sheriff or other officer shall carry off, or sell, or dispose of, for the purpose of being carried off from any lands, any straw, chaff, turnips, in any case, nor any hay or other produce which, according to any covenant or written agreement, ought not to be so carried off, provided notice be given to the sheriff of the existence of such covenant; but, by third section, the sheriff may sell on condition of such crops being consumed on the land. The sixth section provides that landlords shall not distrain for rent on the purchasor of any such crops sold according to third section, nor on articles or cattle, &c. employed for the purpose of consuming such crops.—CHITTY.

[9] But this doctrine is contrary to Sayer Rep. 139. 2 Keb. 596. Cro. Eliz. 596. Co. Litt. 47, a. Roll. Abr. Distress, A. pl. 4; and was expressly overruled in 6 Term R. 138, on the ground that the distraining a horse as damage-feasant whilst any person is riding him would perpetually lead to a breach of the peace. And it has been held that nets or ferrets cannot be taken damage-feasant in a warren if they are in the hands of the person using them. Harg. Co. Litt. note 13. Cro. Eliz. 550. So a loom cannot be distrained while in the hands of the weaver, (Willes, 517,) nor wearing-apparel if in actual use; but if put off, though only for the purpose of repose, it is liable to be distrained. 1 Esp. Rep. 206. Peake's Rep. 36, S. C.—CHITTY.

[10] As to this exception in favour of trade, see Gilb. Dist. by Hunt, 39: so cattle and

generally speaking, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to the tenant or a stranger, are distrainable by him for rent: for otherwise a door would be open to infinite frauds upon the landlord; and the stranger has *his* remedy over by action on the case against the tenant, if by the tenant's default the chattels are distrained so that he cannot render them when called upon.[11] With regard to a stranger's beasts which are found on the tenant's land, the following distinctions are, however, taken. If they are put in by consent of the owner of the beasts, they are distrainable immediately afterwards for rent-arrere by the landlord.(*u*) So also if

(*u*) Cro. Eliz. 549.

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goods of a guest at an inn are not distrainable for rent, but a chariot or horses standing at livery are not exempt. 2 Burr. 1498. Mr. Sergt. Williams, in 2 Saund. 290, n. 7, suggests that it should seem that at this day a court of law would be of opinion that cattle belonging to a drover being put into ground, with the consent of the occupier, to graze only one night on their way to a fair or market, are not liable to the distress of the landlord for rent; and lord Nottingham intimated the same opinion in 2 Vern. 130; and Mr. Christian, in his edition, has the following note of a decision to the same effect:—"Cattle driven to a distant market, and put into land to rest for one night, cannot be distrained for rent by the owner of the land, such protection being absolutely for the public interest." Tate *vs.* Gleed, C. P. Hil. 24 Geo. III. Gilb. Dist. by Hunt, 47. It was before held that cattle going to London, and put into a close, with the consent of the landlord and leave of the tenant, to graze for a night, might be distrained by the landlord for rent, (3 Lev. 260. 2 Vent. 50. 2 Lutw. 1161;) but the owner of the cattle was afterwards relieved *in equity* on the ground of fraudulent connivance and concealment of the demand for rent by the landlord, and he was decreed to pay all costs both of law and equity. 2 Vern. 129. Prec. Ch. 7. Gilb. Dist. by Hunt, 47. As courts of law now take notice of fraud, as well as courts of equity, when it can be fully proved, there would now be the same result at law.

Goods of a principal in the hands of a factor are privileged from distress for rent due from such factor to his landlord, on the ground that the rule of public convenience, out of which the privilege arises, is within the exception of a landlord's general right to distrain, and therefore that such goods are protected for the benefit of trade. 6 Moore Rep. 243. 3 B. & B. 75, S. C. So goods landed at a wharf and consigned to a broker, as agent of the consignor, for sale, and placed by the broker in the wharfinger's warehouse for safe custody until an opportunity for selling them should occur, are not distrainable for rent due in respect of the wharf and warehouse, as they were brought to the wharf in the course of trade. 1 Bing. 283. So goods carried to be weighed, even at a private beam, if in the way of trade, are exempt; so is a horse that has carried corn to a mill to be ground, and during the grinding of the corn is tied to the mill-door. Cro. Eliz. 549, 596. Goods in a public fair are exempt from distress, unless for toll due from the owner. 2 Lutw. 1380. Goods in possession of a carrier are also exempt, and this though the carrier be not a public one. 1 Salk. 249.—Chitty.

The American courts have adopted the principle stated in the text, and carried it out in application with great liberality. Thus, goods in an auctioneer's rooms, or in the store of one who takes merchandise on storage or on commission to sell, have been held to be exempt. Hinely *vs.* Wyatt, 1 Bay, 102. Brown *vs.* Simms, 17 Serg. & Rawle, 138. Walker *vs.* Johnson, 4 McCord, 552. Bevan *vs.* Crooks, 7 Watts & Serg. 452. So it has been held that the goods of a boarder are not liable to be distrained for rent due by the keeper of the boarding-house. Riddle *vs.* Welden, 5 Wharton, 9. Stone *vs.* Matthews, 7 Hill, 428.—Sharswood.

[11] As if horses or cattle are sent to agist, they may be immediately distrained by the landlord for rent in arrear, and the owner must seek his remedy by action against the farmer. The principle of this rule extends to public livery-stables, to which if horses and carriages are sent to stand, it is determined that they are distrainable by the landlord, as if they were in any public place, (3 Burr. 1498;) so upon the same principle the goods of lodgers or any other person on the premises are liable to be distrained; and to exempt goods from distress on the ground of their being in an inn, they must be within the very precincts of the inn, and not on other premises at a distance belonging to it, (Barnes, 472;) and even within the inn itself the exemption does not extend to a person dwelling therein as a tenant rather than a guest. 1 Bla. Rep. 484.

As to the remedy over by an under tenant or lodger, see the cases cited in 3 Bar. & Cres. 789, in which it was held that where the tenant of premises had underlet a part by deed, and the original landlord distrained for rent upon the under-tenant, the latter could not support assumpsit against his immediate lessor upon an implied promise to indemnify him against the rent payable to the superior landlord.—Chitty.

the stranger's cattle break the fences and commit a trespass by coming on the land, they are distrainable immediately by the lessor for the tenant's rent, as a punishment to the owner of the beasts for the wrong committed through his negligence.(*v*) But if the lands were not *sufficiently fenced so as to keep out cattle, the landlord cannot distrain them till they have been *levant* and [*9 *couchant* (*levantes et cubantes*) on the land; that is, have been long enough there to have lain down and rose up to feed; which in general is held to be one night at least:[12] and then the law presumes that the owner may have notice whether his cattle have strayed, and it is his own negligence not to have taken them away. Yet, if the lessor of his tenant were bound to repair the fences and did not, and thereby the cattle escaped into their grounds without the negligence or default of the owner; in this case, though the cattle may have been *levant* and *couchant*, yet they are not distrainable for rent till actual notice is given to the owner that they are there, and he neglects to remove them:(*w*) for the law will not suffer the landlord to take advantage of his own or his tenant's wrong.[13] 3. There are also other things privileged by the antient common law; as a man's tools and utensils of his trade, the axe of a carpenter, the books of a scholar, and the like: which are said to be privileged for the sake of the public, because the taking them away would disable the owner from serving the common wealth in his station.[14] So, beasts of the plough,[15] *averia carucæ*, and sheep, are privileged from distresses at common law;(*x*) while dead goods, or other sort of beasts, which Bracton calls *catalla otiosa*, may be distrained. But as beasts of the plough may be taken in execution for debt, so they may be for distress by statute, which partake of the nature of executions.(*y*) And perhaps the true reason why these and the tools of a man's trade were privileged at the common law, was because the distress was then merely intended to compel the payment of the rent, and not as a satisfaction for its non-payment: and therefore to deprive the party of the instruments and means of paying it would counteract the very end of the distress.(*z*) 5. Nothing shall be distrained for rent which may not be rendered again in as good plight as when it was distrained: for which reason milk, fruit, and the like cannot be distrained, a distress at

(*v*) Co. Litt. 47.
(*w*) Lutw. 1580.
(*x*) Stat. 51 Hen. III. st. 4, *de districtiones caccania.*
(*y*) 1 Burr. 589.
(*z*) Ibid. 588.

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[12] Levant and couchant in this sense means that the cattle must be lying down and rising up on the premises *for a night and a day*, without pursuit made by the owner of them. Gilb. Dist. by Hunt, 3 edit. 47.—CHITTY.

[13] In the case of Poole *vs.* Longuevill, 2 Saund. 289, the contrary was determined; but that case was overruled in 2 Lutw. 1580; and the result of the cases seems to be, that if a stranger's beasts escape into another's land, by default of the owner of the beasts, as by breaking the fences, otherwise sufficient, they may be distrained for rent immediately, without being *levant* and *couchant;* but that if they escape there by default of the tenant of the land, or for want of his keeping a sufficient fence, then they cannot be distrained for rent or service of any kind till they have been *levant* and *couchant*, nor afterwards by a landlord for rent on a lease, unless the owner of the beasts neglect or refuse, after *actual notice*, to remove them within a reasonable time; but it is said that such notice is not necessary where the distress is by the lord of the fee or by the grantee of a rent-charge. 2 Lutw. 1573. Co. Litt. 47, b., n. 3. Gilb. Dist. by Hunt, 3d edit. 45. 2 Saund. 290, n. 7, 285, n. 4. See further, Vin. Abr. Fences.—CHITTY.

[14] A stocking-frame (Willes, 512) or a loom, (4 T. R. 565,) being implements of trade, cannot be distrained; but it must be observed that utensils and implements of trade may be distrained where they are not in actual use and no other sufficient distress can be found on the premises. Co. Litt. 47, a. 4 T. R. 565. And it should seem that if there be reasonable ground for presuming there are not sufficient other goods, the party may distrain implements of trade, and is not bound to sell the other goods first, (6 Price's Rep. 3. 2 Chitty's R. 167;) and this rule of exemption does not extend to cases where a distress is given in the nature of an execution by any particular statute, as for poor-rates and the like, (3 Salk. 136. 1 Burr. 579. Lord Raym. 384. 1 Salk. 249, S. C.,) nor where the distress is for damage-feasant. Com. Dig. Distress, B. 4.—CHITTY.

[15] In actual use, but not otherwise. 4 T. R. 566. Also see 2 Inst. 132, where other authorities are collected. The modern case just cited contains much learning upon what is, and what is not, with reference to the freehold, distrainable.—CHITTY.

*10] *common law being only in the nature of pledge or security, to be restored in the same plight when the debt is paid. So, antiently, sheaves or shocks of corn could not be distrained, because some damage must needs accrue in their removal; but a cart loaded with corn might, as that could be safely restored. But now, by statute 2 W. and M. c. 5, corn in sheaves or cocks, or loose in the straw, or hay in barns or ricks, or otherwise, may be distrained, as well as other chattels.[16] 6. Lastly, things fixed to the freehold may not be distrained; and caldrons, windows, doors, and chimney-pieces; for they savour of the realty.[17] For this reason also corn growing could not be distrained, till the statute 11 Geo. II. c. 19 empowered landlords to distrain corn, grass, or other products of the earth, and to cut and gather them when ripe.[18]

Let us next consider, thirdly, how distresses may be taken, disposed of, or avoided. And first I must premise that the law of distresses is greatly altered within a few years last past. Formerly they were looked upon in no other light than as a mere pledge or security for payment of rent or other duties, or satisfaction for damage done. And so the law still continues with regard to distresses of beasts taken *damage-feasant*, and for other causes, not altered by act of parliament; over which the distrainor has no other power than to retain them till satisfaction is made. But, distresses for rent-arrere being found by the legislature to be the shortest and most effectual method of compelling the payment of such rent, many beneficial laws for this purpose have been made in the present century, which have much altered the common law as laid down in our antient writers.

In pointing out therefore the methods of distraining, I shall in general suppose the distress to be made for rent, and remark, where necessary, the differences between such distress and one taken for other causes.

*11] *In the first place then, all distresses must be made *by day*,[19] unless in the case of *damage-feasant;* an exception being there allowed, lest the

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[16] This provision extends to corn in whatever state it may be, whether threshed or unthreshed, (1 Lutw. 214;) and, as observed by Mr. Bradby, inasmuch as this statute directs the distress to be sold unless replevied within five days, perhaps the rule of the ancient common law with respect to the perishable nature of the distress no longer extends in the case of a distress for rent to any thing which is not liable to deterioration within the five days. Bradby on Dist. 213. A sale by a landlord of standing corn, taken as a distress before it is ripe, is void, and the tenant need not replevy, neither can he sue the seller, in an action on the case, for selling such corn before the expiration of five days. 3 B. & A. 470.—Chitty.

[17] Co. Litt. 47, b. This rule extends to such things as are essentially part of the household, although for a time removed therefrom,—as a millstone, removed to be picked. Bro. Abr. Distress, pl. 23. 4 T. R. 567. As to what are fixtures, see 2 Chit. Com. Law, 268. Com. Dig. Biens. H. Chitty's Law of Descents, 256, 257. 4 Moore, 281, 440. 2 D. & R. 1. 5 B. & A. 826. 2 Stark. 403. 2 B. & C. 608. 4 D. & R. 62, S. C. 1 M'Clelan Rep. Ex. 217.—Chitty.

[18] The act applies only to corn and other produce of the land which may become ripe, and are capable of being cut and laid up: therefore trees, shrubs, and plants growing on land which the defendant had demised to the plaintiffs for a term, and which they had converted into a nursery-ground, and planted subsequently to the demise, were held not distrainable by the former for rent. 2 Moore, 491. 8 Taunt. 431. S. C. 3 Moore, 114, S. P. 3 B. & A. 470.—Chitty.

To these heads of things not distrainable may be added all goods in the custody of the law, whether as being already distrained damage-feasant, or taken in execution. In this last case, however, so long as they remain on the premises, the statute 8 Anne, c. 14 gives the landlord a beneficial lien on them, for which see *post*, p. 417.

The words of the statute 11 Geo. II. c. 19 are, "corn, grass, hops, roots, fruits, or other product growing on the estate demised." The court of Common Pleas has determined that the general word "product" does not extend beyond things of a similar nature with those before specified, to all of which the process of becoming ripe, and of being cut, gathered, made and laid up when ripe, was incidental. It was held therefore that nursery trees and shrubs could not be distrained. Clark *vs.* Gaskarth, 8 Taunt. 431.—Coleridge.

[19] Mirrour, c. 2, s. 26. See also 7 Rep. 7, a. The distress cannot be made until the day after the rent falls due, unless, indeed, there be any agreement or local custom to the

beasts should escape before they are taken.(*a*) And, when a person intends to make a distress, he must, by himself or his bailiff, enter on the demised premises; formerly during the continuance of the lease, but now,(*b*) if the tenant holds over, the landlord may distrain within six months after the determination of the lease; provided his own title or interest, as well as the tenant's possession, continue at the time of the distress.[20] If the lessor does not find sufficient distress on the premises, formerly he could resort nowhere else; and therefore tenants who were knavish made a practice to convey away their goods and stocks fraudulently from the house or lands demised, in order to cheat their landlords. But now(*c*) the landlord may distrain any goods of his tenant carried off the premises clandestinely, wherever he finds them within thirty days after, unless they have been *bonâ fide* sold for valuable consideration; and all persons privy to or assisting in such fraudulent conveyance forfeit double the value to the landlord.[21] The landlord may also distrain the beasts of his tenant feeding upon any commons or wastes appendant or appurtenant to the demised premises.[22] The landlord might not formerly break open a house to make a distress; for that is a breach of the peace. But when he was in the house, it was held that he might break open an inner door;(*d*) and now(*e*) he may, by the assistance of the peace-officer of the parish, break open in the daytime any place whither the goods have been fraudulently removed and locked up to prevent a distress; oath being first made, in case it be a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein.

Where a man is entitled to distrain for an entire duty, he ought to distrain for the whole at once, and not for part at one time and part at another.(*f*)[23] But if he distrains for the whole, and there is not sufficient on the premises, or he happens *to mistake in the value of the thing distrained, and so takes an insufficient distress, he may take a second distress to complete his remedy.(*g*) [*12

(*a*) Co. Litt. 142.
(*b*) Stat. 8 Anne, c. 14.
(*c*) Stat. 8 Anne, c. 14. 11 Geo. II. c. 19.
(*d*) Co. Litt. 161. Comberb. 17.
(*e*) Stat. 11 Geo. II. c. 19.
(*f*) 2 Lutw. 1532.
(*g*) Cro. Eliz. 13. Stat. 17 Car. II. c. 7. 1 Burr. 590.

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contrary. Gilb. Dist. 56, &c. Hargrave's Co. Litt. 47, b. n. 6. The distress must not be made after *tender* of payment of the entire rent due. According to 8 Co. 147, a., Gilb. Dist. by Hunt, 76, &c., 3 Stark. 171, 1 Taunt. 261, tender upon the land before the distress makes the distress tortious; tender after the distress, and before the impounding, makes the detainer, and not the taking, wrongful; tender after impounding makes neither the one nor the other wrongful; but in the case of a distress for rent, upon the equity of the 2 W. and M. c. 5, a sale of the distress after tender of the rent and costs would be illegal.—CHITTY.

[20] Although this proviso is in terms confined to the possession of the tenant, yet it has been holden that where the tenant dies before the term expires, and his personal representative continues in possession during the remainder and after the expiration of the term, the landlord may distrain within six calendar months after the end of the term for rent due for the whole term. 1 H. Bla. 465. And in 1 H. Bla. 7, n. a. it was holden that the term was continued by the custom of the country for the purpose of giving a right to the landlord to distrain on the premises in which the way-going crop remained. See 1 Selw. N. P. 6 ed. 681.—CHITTY.

[21] See 11 Geo. II. c. 19, sects. 1, 2, 3. The act is remedial, not penal. 9 Price, 30. It applies to the goods of the *tenant* only which are fraudulently removed, and not those of a stranger. 5 M. & S. 38. And the rent must be in arrear at the time of the removal. 1 Saund. 284, a. 3 Esp. 15. 2 Saund. 2. n. b; *sed vid.* 4 Camp. 136.—CHITTY.

[22] If the lord come to distrain cattle which he sees within his fee, and the tenant, or any person, to prevent the lord from distraining, drive the cattle out of the lord's fee into some other place, yet he may pursue and take the cattle. Co. Litt. 161, a. But this rule does not hold to distresses damage-feasant, which must be made on the land. Id.—CHITTY.

[23] It may be as well here to observe that if a landlord come into a house and seize upon some goods as a distress, in the name of all the goods of the house, that will be a good seizure of all. 6 Mod. 215. 9 Vin. Abr. 127. But a fresh distress may be made on the same goods which have been replevied, for subsequent arrears of rent. 1 Taunt. 218. So, if the cattle distrained die in the pound, the loss will fall on the party distrained on, and not upon the distrainor. Burr. 1738. 1 Salk. 248. 11 East, 54.—CHITTY.

Distresses must be proportioned to the thing distrained for. By the statute of Marlbridge, 52 Hen. III. c. 4, if any man takes a great or unreasonable distress for rent arrere, he shall be heavily amerced for the same. As if(*h*) the landlord distrains two oxen for twelve pence rent; the taking of *both* is an unreasonable distress; but if there were no other distress nearer the value to be found, he might reasonably have distrained *one* of them; but for homage, fealty, or suit and service, as also for parliamentary wages, it is said that no distress can be excessive.(*i*) For, as these distresses cannot be sold, the owner, upon making satisfaction, may have his chattels again. The remedy for excessive distresses is by a special action on the statute of Marlbridge; for an action of trespass is not maintainable upon this account, it being no injury at the common law.(*j*)[24]

When the distress is thus taken, the next consideration is the disposal of it. For which purpose the things distrained must in the first place be carried to some pound, and there impounded by the taker. But in their way thither they may be *rescued* by the owner, in case the distress was taken without cause or contrary to law: as if no rent be due, if they were taken upon the highway, or the like; in these cases the tenant may lawfully make rescue.(*k*) But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out; for they are then in the custody of the law.(*l*)

A pound (*parcus*, which signifies any enclosure) is either pound-*overt*, that is, open overhead; or pound-*covert*, that is, close. By the statute 1 & 2 P. and M. c. 12, no distress of cattle can be driven out of the hundred where it is taken, *13] *unless to a pound-overt within the same shire, and within three miles of the place where it was taken. This is for the benefit of the tenants, that they may know where to find and replevy the distress. And by statute 11 Geo. II. c. 19, which was made for the benefit of landlords, any person distraining for rent may turn any part of the premises upon which a distress is taken into a pound, *pro hac vice*, for securing of such distress. If a live distress of animals be impounded in a *common* pound-overt, the owner must take notice of it at his peril; but if in any *special* pound-overt, so constituted for this particular purpose, the distrainor must give notice to the owner: and in both these cases the owner, and not the distrainor, is bound to provide the beasts with food and necessaries. But if they are put in a pound-covert, in a stable, or the like, the landlord or distrainor must feed and sustain them.(*m*)[25] A distress of household goods, or other dead chattels, which are liable to be stolen or damaged by weather, ought to be impounded in a pound-covert; else the distrainor must answer for the consequences.

When impounded, the goods were formerly, as was before observed, only in the nature of a pledge or security to compel the performance of satisfaction; and upon this account it hath been held(*n*) that the distrainor is not at liberty to work or use a distrained beast. And thus the law still continues with regard to beasts taken damage-feasant, and distresses for suit or services; which must remain impounded till the owner makes satisfaction, or contests the right of

(*h*) 2 Inst. 107.
(*i*) Bro. Abr. tit. *assize*, 291; *prerogative*, 98.
(*j*) 1 Ventr. 104. Fitzgibb. 85. 4 Burr. 590.
(*k*) Co. Litt. 160, 161.
(*l*) Co. Litt. 47.
(*m*) Co. Litt. 47.
(*n*) Cro. Jac. 148.

[24] And see 2 Stra. 851. 3 Leon. 48. See exceptions, 1 Burr. 582. 1 H. Bla. 13. 9 East, 298. It is no bar to this action that, between the distress and sale of the goods distrained, the parties came to an arrangement respecting the sale, (1 Bing. 401. 4 D. & R. 539. 2 B. & C. 821, S. C.;) and the action is sustainable though there was a tender of the rent before the distress was made. 2 D. & R. 250. Where more rent is distrained for than is due, the remedy is at common law, and is not founded on the 52 Hen. III. c. 4, nor on the 2 W. and M. c. 5, s. 5. Stra. 151. Where no rent is due, the owner of the goods distrained may, in an action of trespass on the case, recover double the value of the goods and full costs. 2 W. and M. sess. 1, c. 5, s. 5.—Chitty.

[25] The distrainor cannot tie up cattle impounded; and if he tie a beast and it is strangled, he will be liable in damages. 1 Salk. 248. If the distress be lost by act of God, as by death, the distrainor may distrain again. 11 East, 51. Burr. 1738.—Chitty.

distraining by replevying the chattels. To *replevy* (*replegiare*, that is, to take back the pledge) is when a person distrained upon applies to the sheriff or his officers, and has the distress returned into his own possession, upon giving good security to try the right of taking it in a suit of law, and, if that be determined against him, to return the cattle or goods once more into the hands of the distrainor. This is called a replevin, of which more will be said hereafter. At present I shall only observe that, as a distress is at common *law only in nature of a security for the rent or damages done, a replevin answers [*14 the same end to the distrainor as the distress itself, since the party replevying gives security to return the distress if the right be determined against him.

This kind of distress, though it puts the owner to inconvenience, and is therefore a punishment to *him*, yet if he continues obstinate and will make no satisfaction or payment, it is no remedy at all to the distrainor. But for a debt due to the crown, unless paid within forty days, the distress was always salable at common law.(*o*) And for an amercement imposed at a court-leet, the lord may also sell the distress:(*p*) partly because, being the king's court of record, its process partakes of the royal prerogative;(*q*) but principally because it is in the nature of an execution to levy a legal debt. And so, in the several statute-distresses before mentioned, which are also in the nature of executions, the power of sale is likewise usually given, to effectuate and complete the remedy. And in like manner, by several acts of parliament,(*r*) in all cases of distress for rent, if the tenant or owner do not, within five days after the distress is taken,[26] and notice of the cause thereof given him, replevy the same with sufficient security, the distrainor, with the sheriff or constable, shall cause the same to be appraised by two sworn appraisers, and sell the same towards satisfaction of the rent and charges; rendering the overplus, if any, to the owner himself. And by this means a full and entire satisfaction may now be had for rent in arrere by the mere act of the party himself, viz., by distress, the remedy given at common law; and sale consequent thereon, which is added by act of parliament.

Before I quit this article, I must observe, that the many particulars which attend the taking of a distress used formerly to make it a hazardous kind of proceeding: for if any *one irregularity was committed it vitiated the whole and made the distrainors trespassers *ab initio*.(*s*) But now, by the [*15 statute 11 Geo. II. c. 19, it is provided, that for any unlawful act done the whole shall not be unlawful, or the parties trespassers *ab initio:* but that the party grieved shall only have an action for the real damage sustained, and not even that if tender of amends is made before any action is brought.

VI. The seizing of heriots, when due on the death of a tenant, is also another species of self-remedy, not much unlike that of taking cattle or goods in distress. As for that division of heriots which is called heriot-service, and is only a species of rent, the lord may distrain for this as well as seize; but for heriot-custom (which Sir Edward Coke says(*t*) lies only in *prender*, and not in

(*o*) Bro. Abr. tit. *distress*, 71.
(*p*) 8 Rep. 41.
(*q*) Bro. ibid. 12 Mod. 330.
(*r*) 2 W. and M. c. 5. 8 Anne, c. 14. 4 Geo. II. c. 28. 11 Geo. II. c. 19.
(*s*) 1 Ventr. 37.
(*t*) Cop. § 25.

[26] A reasonable time after the expiration of the five days is allowed to the landlord for appraising and selling the goods. 4 B. & A. 208; *sed vid.* 1 H. Bla. 15. The five days are reckoned inclusive of the day of sale; as if the goods are distrained on the first, they must not be sold before the sixth. 1 H. Bla. 13. An action lies on the equity of this act for selling within the five days. Semb. id. If the distrainor continue in possession more than a reasonable time beyond the five days, an action of case or trespass lies on the equity of the statute. 11 East, 395. Stra. 717. 4 B. & A. 208. 1 B. & C. 145. Though the act authorizes a sale after the five days, it does not take away the right to replevy after the five days in case the distress is not sold; but it would be otherwise after a sale. 5 Taunt. 451. 1 Marsh. 135. By the consent of the tenant, the landlord may continue in possession longer than the five days without incurring any liability; and his so continuing in possession will not of itself create any presumption of collusion between him and the tenant to defeat an execution. 7 Price, 690.—CHITTY.

render) the lord may seize the identical thing itself, but cannot distrain any other chattel for it.(*u*) The like speedy and effectual remedy of seizing is given with regard to many things that are said to lie in franchise; as waifs, wrecks, estrays, deodands, and the like; all which the person entitled thereto may seize without the formal process of a suit or action. Not that they are debarred of this remedy by action; but have also the other and more speedy one, for the better asserting their property; the thing to be claimed being frequently of such a nature as might be out of the reach of the law before any action could be brought.

These are the several species of remedies which may be had by the *mere act* of the *party injured*. I shall next briefly mention such as arise from the *joint act of all the parties* together. And these are only two, *accord* and *arbitration*.

I. Accord is a satisfaction agreed upon between the party injuring and the party injured; which, when performed, is a bar of all actions upon this account. *16] As if a man contract *to build a house or deliver a horse, and fail in it; this is an injury for which the sufferer may have his remedy by action; but if the party injured accepts a sum of money or other thing as a satisfaction, this is a redress of that injury, and entirely takes away the action.(*w*)[27] By

(*u*) Cro. Eliz. 590. Cro. Car. 260. (*w*) 9 Rep. 79.

[27] See, in general, Com. Dig. Accord, Bac. Abr. Accord.

The mere consent of a party to accept a satisfaction, without an actual satisfaction, is not sufficient to discharge the other. The accord and satisfaction must be perfect, complete, and executed; for, were it otherwise, it would be only substituting one cause of action for another, which might go on to any extent. 9 Rep. 79, b. 5 T. R. 141. Satisfaction must be made to the whole of the original demand; and a party will not be discharged upon performance of a satisfaction to part of such demand, the residue remaining unperformed. 1 Taunt. 526. 5 East, 230. The performance of one of two things stipulated for by an accord is nugatory, (lord Raym. 203;) and where it was agreed that the plaintiff and defendant should each deliver up his part of an indenture to be cancelled, and the defendant had delivered up his part, this was held no accord and satisfaction. 3 Lev. 189. The accord and satisfaction must be certain: an accord to pay a less sum on the same or at a subsequent day is not sufficient. 5 East, 230. So an accord that the defendant shall employ workmen in two or three days is bad, (4 Mod. 88;) and performance of an uncertain accord will not aid the defect. 3 Lev. 189. Yelv 124.

We have already seen (*ante*, 2 book) how far a contract may be varied, released, or discharged by another contract. A deed *before* breach cannot be discharged by accord and satisfaction without a deed,(1 Taunt. 428. Com. Dig. Pleader, 2, v. 8;) but *after* breach accord and satisfaction without deed is a good plea, for there the satisfaction is of the breach, and not of the deed. Com. Dig. Accord, A. 1 & C. 7 East, 150. 1 J. B. Moore, 358, 460. Cro. Eliz. 46. 2 Wils. 86. 6 Rep. 43, b.

The satisfaction must be a reasonable one. Generally speaking, the mere acceptance of a less sum is not in law a satisfaction of a greater sum, (5 East, 230;) and this though an additional security be given. 1 Stra. 426. An agreement between a debtor and creditor that part of a larger sum due should be paid by the debtor, and accepted by the creditor as a satisfaction for the whole, might, under special circumstances, operate as a discharge of the whole; but then the legal effect of such an agreement might be considered to be the same as if the whole debt had been paid, and part had been returned as a gift to the party paying. Per Holroyd, J., 2 B. & C. 481. A debtor's assignment of all his effects to a trustee, to raise a fund for the payment of a composition to his creditors, is a sufficient satisfaction, (2 T. R. 24;) so if a third person guarantees the payment of the less sum. 11 East, 390. So if a creditor, by his undertaking to accept a composition, induce the debtor to part with his property to his creditors, or induce other creditors to discharge the debtor, to enter into a composition-deed, or deliver up securities to him, such creditor would be bound by such undertaking. 2 Stark. Rep. 407. 2 M. & S. 120. 1 Esp. 236. And where several creditors, with the knowledge of each other, agree on the faith of each others' undertaking to give time to, or accept a composition from, a debtor, the agreement will be binding on every creditor who is party to it. 3 Camp. 175. 2 M. & S. 122. 16 Ves. 374; and see further, as to composition with creditors, 3 Chitty's Com. L. 687 to 698. It should be here also observed that when a bond or other security under seal has been given and accepted in satisfaction of a simple contract-debt, the latter is merged in such higher security, and no action can be supported for the non-performance of the simple contract, (Cro. Car. 415. Bac. Abr. Debt, G.,) unless indeed such new security be void; but the mere taking of an instrument of a

several late statutes, (particularly 11 Geo. II. c. 19, in case of irregularity in the method of distraining, and 24 Geo. II. c. 24, in case of mistakes committed by justices of the peace,) even *tender* of sufficient amends to the party injured is a bar of all actions, whether he thinks proper to accept such amends or no.[28]

II. Arbitration is where the parties injuring and injured submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of two or more *arbitrators*, who are to decide the controversy; and if they do not agree, it is usual to add, that another person be called in as *umpire*, (*imperator* or *impar*,)(*x*) to whose sole judgment it is then referred: or frequently there is only one arbitrator originally appointed. This decision, in any of these cases, is called an *award*. And thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties or the judgment of a court of justice.(*y*) But the right of real property cannot thus pass by a mere award:(*z*) which subtilty in point of form (for it is now reduced to nothing else) had its rise from feodal principles; for if this had been permitted the land might have been aliened collusively without the consent of the superior. Yet doubtless an arbitrator may now award a conveyance or a release

(*x*) Whart. *Angl. Sacr.* i. 772. Nicols. Scot. Hist. Libr. ch. 1, *prope finem.*

(*y*) Brownl. 55. 1 Freem. 410.

(*z*) 1 Roll. Abr. 242. 1 Lord Raym. 115.

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higher order as a *collateral* or *additional* security does not preclude the debtor from suing on the original contract, and this though judgment be obtained on such security. 2 Leon. 110. 6 T. R. 176, 177. Payment and acceptance of a part of a debt before the day it falls due, or at a place where the whole debt was not payable, in satisfaction of the whole, is a good satisfaction, (Co. Litt. 212, b.;) and so if the debtor give a chose in possession for a chose in action, (2 T. R. 24,) as the gift of a horse, or other property in specie. Co. Litt. 212, b. The mere fulfilment of an act which a party is bound in law to do is no satisfaction. Per Grose, J., 5 East, 302. A release of an equity of redemption is no satisfaction. 2 Wils. 86. Conferring a benefit to a third person at the debtor's request is sufficient. See Skin. Rep. 391.

The satisfaction should proceed from the party who wishes to avail himself of it; for when it proceeds entirely from a stranger it will be a nullity. See 5 East, 294. 1 Smith, 515. Cro. Eliz. 541.

Accord and satisfaction by copartner is a bar to any action against the other partners. 9 Rep. 79, b. So the acceptance of satisfaction from a joint tort-feasor discharges the other wrong-doers. (Sembl. 3 Taunt. 117;) and accord and satisfaction to one of several co-plaintiffs will operate as a discharge from all. See 13 Edw. IV. 6. 5 Co. 117, b.—CHITTY.

[28] By several statutes, (particularly 11 Geo. II. c. 19, in case of irregularity in the method of distraining, and 11 & 12 Vict. c. 44, in case of mistakes committed by justices of the peace,) a *tender* of amends to the party injured is a bar to the action, if the party thinks proper to accept such tender. If the party injured does not accept the amends tendered, and the jury, on the trial of the action, think the sum offered sufficient, their verdict must be for the defendant. By the Common Law Procedure Act, 1852, s. 70, the defendant in all actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauchery of the plaintiff's daughter or servant) may pay into court a sum of money by way of compensation or amends. And, by statute 6 & 7 Vict. c. 96, s. 2, in action for a libel contained in any newspaper or periodical publication, the defendant may plead that it was inserted without malice or gross negligence, and that an apology had been offered to be published. The defendant may with the plea pay money into court as amends. By s. 4, the offer of apology is admissible in evidence in mitigation of damages.—STEWART.

Where, by act of assembly, a penalty of fifty pounds was imposed upon any magistrate or minister marrying a minor without the consent of parents or guardians, and an act of assembly provided also for notice of any suit against a magistrate in order that he might have the opportunity to tender amends, it was held that no sum of money short of the penalty could be a sufficient amends. In demands founded on torts and sounding in damages, any sum of money may be treated as amends, because the standard of damage is uncertain, depending on a variety of circumstances, and a party is as likely to recover on trial less than the sum tendered as to recover more. But for a pecuniary debt, fixed and certain, a less sum of money cannot be an equivalent. Thus, payment of a less sum of money can never be admitted as an accord and satisfaction of a greater sum due. But payment of any sum accepted as satisfaction of damages for a personal injury is sufficient. Lowrie *vs.* Verner, 3 Watts, 317.—SHARSWOOD.

of land; and it will be a breach of the arbitration-bond to refuse compliance.[29] For though originally the submission to arbitration used to be by word, or by deed, yet, both of these being revocable in their nature, it is now become the practice to enter into mutual bonds with condition to stand to the award or arbitration
*17] of the arbitrators *or umpire therein named.(a)[30] And experience having shown the great use of these peaceable and domestic tribunals, especially in settling matters of account, and other mercantile transactions, which are difficult and almost impossible to be adjusted on a trial at law, the legisla-

(a) Append. No. III. § 6.

[29] And where a party's title to land is referred with his consent, the award is conclusive evidence, and binding on him and his heirs and assigns as to such title. 3 East, 15.—Chitty.

[30] If the parties intend to refer all disputes, the terms of the reference should be, "of all matters in difference between the parties." When the reference is only intended to be of the matter in a particular cause, it should be, "of all matters in difference in the cause." 3 T. R. 628. A time should in all cases be mentioned within which the award is to be made; but, if no time be mentioned, the award should be made in a reasonable time. 2 Keb. 10, 20. 3 M. & S. 145. It is usual to vest in the arbitrators a power of enlarging the time for making their award; but it should be stipulated that this enlargement be made a rule of court. It is best to provide that the arbitration is not to be defeated by the death of either party. 7 Taunt. 571. 2 B. & A. 394. 3 D. & R. 184, 608. In some cases the court will amend an order of reference. 5 Moore, 167.

A court of chancery will not decree a specific performance, (1 Ves. 431. 6 Ves. 815,) and no action lies for not appointing an arbitrator, (2 B. & P. 13;) but if a party has agreed not to revoke, or has covenanted to perform an award, and the award be made, he will be liable to an action for a breach of the agreement or covenant if he revoke or refuse to perform the award, (see 5 B. & A. 507. 1 D. & R. 106. 2 Chit. R. 316. 5 East, 266; and see 4 B. & C. 103;) and an attachment for a contempt of court sometimes lies, where the submission is a rule of court. Crompt. Prac. 262. 1 Stra. 593. 7 East, 607.

With respect to the *revocation* of the arbitrator's authority, it is a rule of law that every species of authority, being a delegated power, although by express words made irrevocable, is nevertheless in general revocable. See 8 Co. 82. A submission to arbitration may be revoked by the act of God, by operation of law, or by the act of the parties.

The *death* of either or any of the parties before the award is delivered in general vacates the submission, unless it contain a stipulation to the contrary, (see 1 Marsh. 366. 7 Taunt. 571. 1 Moore, 287, S. C. 2 B. & A. 394;) but where all matters in difference in a cause are referred by order of nisi prius to arbitration, the death of one of the parties at any time before award made is a revocation of the arbitrator's authority and the court will set aside an award made after his death: or, in other words, it should seem, if the cause of action is referred, the death abates the action, but not so if other matters besides the cause of action are referred. 3 D. & R. 608. 2 B. & A. 394.

If a feme-sole submit to arbitration, and marry before the award is delivered, such *marriage* is in effect a revocation, without notice to the arbitrators, (2 Keb. 865. Jones, 388. Roll. Abr. 331;) but the husband and wife may be sued on their bond for such revoking. 5 East, 266.

Bankruptcy of one of the parties is no revocation. 2 Chit. Rep. 43. 4 B. & A. 250.

The *death of the arbitrators*, or one of them, will defeat the reference, unless there be a clause in the submission to the contrary, (see 4 Moore, 3;) so if the arbitrators do not make the award within the limited time, or they disagree, or refuse to act or intermeddle any further. 1 Roll. Abr. 261. 2 Saund. 129. Tidd, 8 ed. 877.

The parties themselves, as we have just seen, may revoke the arbitrators' authority before the award is made: the revocation must follow the nature of the submission: if the latter be by parol, so may the revocation. 2 Keb. 64. If the submission be by deed, so must the revocation. 8 Co. 72; and see T. Jones, 134. Notice of the revocation by the act of the parties must be given to the arbitrators in order to render it effectual. Roll. Abr. 331. Vin. Abr. Authority, 13; and see 5 B. & A. 507.

The law relating to the proceedings during the conduct of the arbitration, and the duties of arbitrators and umpires, will be found in 3 Chit. Com. Law, 650 to 656, and Caldw. on Arb. 42, 45, &c. As to the power, &c. of awarding costs, see Tidd, 8 ed. 883 to 887. As to when a court of equity will compel an arbitrator to proceed, see 1 Swanst. 40. As to the general requisites of an award and how it will be construed, see 3 Chit. Com. Law, 656 to 660. Tidd, 8 ed. 882. For the remedy to compel the performance of an award, see Tidd, Prac. 8 ed. 887 to 894. 3 Chit. Com. Law, 600 to 665; and for the relief against an improper award, see 3 Chit. Com. Law, 665 to 668. Tidd, Prac. 8 ed. 894 to 898.—Chitty.

ture has now established the use of them as well in controversies where causes are depending as in those where no action is brought: enacting, by statute 9 & 10 W. III. c. 15, that all merchants and others who desire to end any controversy, suit, or quarrel, (for which there is no other remedy but by personal action or suit in equity,) may agree that their submission of the suit to arbitration or umpirage shall be made a rule of any of the king's courts of record, and may insert such agreement in their submission or promise, or condition of the arbitration-bond: which agreement being proved upon oath by one of the witnesses thereto, the court shall make a rule that such submission and award shall be conclusive: and, after such rule made, the parties disobeying the award shall be liable to be punished as for a contempt of the court; unless such award shall be set aside for corruption or other misbehaviour in the arbitrators or umpire, proved on oath to the court within one term after the award is made. And, in consequence of this statute, it is now become a considerable part of the business of the superior courts to set aside such awards when partially or illegally made; or to enforce their execution, when legal, by the same process of contempt as is awarded for disobedience to those rules and orders which are issued by the courts themselves.[31]

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[31] The Common Law Procedure Act, 1854, it may be observed, contains several very important provisions with reference to arbitrations by consent of parties. Some more particular mention of these enactments may not be considered inopportune.

To prevent an arbitration coming to an end without an award being made, it is provided that if in any arbitration the document authorizing the reference provides that the reference shall be to a single arbitrator, and the parties do not concur in the appointment of an arbitrator; or if any arbitrator refuses to act, or becomes incapable of acting, or dies, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire, such parties or arbitrators do not appoint an umpire; or if any umpire refuses to act, or becomes incapable of acting, or dies, and the parties or arbitrators do not appoint a new umpire,—in every such instance any party may serve the other party or the arbitrators, as the case may be, with notice to appoint an arbitrator or umpire: and if within seven days no arbitrator or umpire is appointed, any judge of any of the superior courts may appoint the arbitrator or umpire.

Nor can a reference be rendered nugatory by the failure of one party to appoint an arbitrator; for when a reference is to two arbitrators, one to be appointed by each party, and one party fails to appoint an arbitrator for seven days after the other party has done so and has served the party thus failing to appoint with a notice to appoint his arbitrator, the party who has appointed may appoint his own arbitrator to act as *sole arbitrator*, and an award made by such sole arbitrator will then be binding on both parties. The court or a judge may, nevertheless, revoke the appointment on such terms as may seem just.

Formerly it was required that express authority to appoint an umpire should be given to arbitrators; otherwise such an appointment could not be made by them. Now, however, when a reference is to two arbitrators, and the document authorizing it does not show that it was intended that there should not be an umpire or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire. They may be called upon to make the appointment by notice from any of the parties to the reference; and the appointment must be made within seven days; otherwise an umpire may be appointed by a judge.

An arbitrator is also required to make his award within three months after he has been appointed and has entered on the reference, or been called upon by a notice in writing from a party to the reference to do so; but the parties, by consent in writing or the court, may enlarge the time for the arbitrator making his award.

That delay may be avoided, however, when arbitrators cannot agree, it is provided that any umpire, when appointed, may enter on the reference in lieu of the arbitrators, if the latter have allowed their time to expire without making an award, or have delivered to any party, or to the umpire himself, a notice stating that they cannot agree. Instead of deciding the dispute, an arbitrator may state his award in the form of a special case for the opinion of the court, the nature and object of which proceeding shall be explained afterwards.

Soon after the statute 9 & 10 W. III. c. 15, it was decided that the right to real property could not pass by a mere award. 1 Roll. Abr. 242. 1 Ld. Raym. 115. This subtlety in point of form (for it was soon reduced to nothing else) had its rise from feudal principles; for, if this had been permitted, the land, it was said, might be aliened collusively

CHAPTER II.

OF REDRESS BY THE MERE OPERATION OF LAW.

The remedies for private wrongs which are effected by the mere operation of the law will fall within a very narrow compass; there being only two instances of this sort that at present occur to my recollection: the one that of *retainer*, where a creditor is made executor or administrator to his debtor; the other in the case of what the law calls a *remitter*.

I. If a person indebted to another makes his creditor or debtee his executor, or if such a creditor obtains letters of administration to his debtor; in these cases the law gives him a remedy for his debt by allowing him to *retain* so much as will pay himself, before any other creditors whose debts are of equal degree.(*a*)[1] This is a remedy by the mere act of law, and grounded upon this reason: that the executor cannot, without an apparent absurdity, commence a suit against himself, as a representative of the deceased, to recover that which is due to him in his own private capacity: but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else, by being made executor *he would be put in a worse condition than all the rest of the world besides. For though a ratable payment of all the debts of the deceased, in equal degree, is clearly the most equitable method, yet, as every scheme for a proportionable distribution of the assets among all the creditors hath been hitherto found to be impracticable, and productive of more mischiefs than it would remedy, so that the creditor who first commences his suit is entitled to a preference in payment; it follows that, as the executor can commence no suit, he must be paid the last of any, and of course must lose his debt, in case the estate of his testator should prove insolvent, unless he be allowed to retain it.[2] The doctrine of *retainer* is

*19]

(*a*) 1 Roll. Abr. 922. Plowd. 543. See book ii. page 511.

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without the consent of the superior. If, therefore, an arbitrator awarded a conveyance or a release of land, and the party ordered to convey refused to do so, the court of chancery must have been resorted to in order to enforce a specific performance of the award. This proceeding is no longer necessary, however; for an award directing the possession of land to be delivered may now be enforced summarily, like a judgment in ejectment. Com. Law Proc. Act, 1854.

An award, as we have seen, is only a final judgment on the matters submitted, when the decision of the arbitrator is properly made. An award may and will be set aside by the court, in the exercise of the summary jurisdiction conferred upon it by the statute before referred to, when the arbitrator has not pursued the submission, or has in any respect exceeded his authority; when the award itself is uncertain or ambiguous; when the proceedings in the arbitration have been irregular; when the arbitrator has misconducted himself; or when the award has been procured by undue means. But these constitute but a few of the instances in which an award will be set aside; for it would be quite out of place here to enter into any detail of the circumstances which will avoid an award.—Kerr.

[1] Toller, 4 ed. 295, 298. So if a creditor be made a co-executor. 1 B. & P. 630. The same law as to an administrator (8 T. R. 407) or heir. 2 Vern. 62. So if a debtor be made executor of creditor, it is a release at law. *Ante*, 2 book, 512. Plowd. 184. Salk. 299.—Chitty.

[2] The principle of an equal and *pro rata* distribution of the property of an insolvent decedent among his creditors has been adopted and successfully carried out in the United States. So far from being impracticable, or accompanied with inconveniences more than counterbalancing its justice,—as the learned commentator plainly intimates,—no voice would be raised anywhere in favour of a return to a system which was a mere scramble as to who should get priority, and with a very unjust power in the executor or administrator not only to prefer himself but others. It follows that in this country there is no such thing as retainer as against other creditors in equal degree. The executor or administrator must come in *pari passu* with all others, according to the general principles of order settled by the various statutes,—in which there is some diversity, but a manifest tendency in the later legislation to place all debts, without regard to quality, upon one and the same level.—Sharswood.

therefore the necessary consequence of that other doctrine of the law, the priority of such creditor who first commences his action. But the executor shall not retain his own debt, in prejudice to those of a higher degree; for the law only puts him in the same situation as if he had sued himself as executor and recovered his debt; which he never could be supposed to have done while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt in prejudice to that of his co-executor in equal degree; but both shall be discharged in proportion.(*b*) Nor shall an executor of his own wrong be in any case permitted to retain.(*c*)

II. Remitter is where he who hath the true property or *jus proprietatis* in lands, but is out of possession thereof, and hath no right to enter without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent, and of course defective, title; in this case he is remitted, or sent back by operation of law, to his antient and more certain title.(*d*) The right of entry, which he hath gained by a bad title, shall be *ipso facto* annexed to his own inherent good one: and his defeasible estate shall be utterly defeated and annulled, by the instantaneous act of law, without his participation or consent.(*e*) As if A. disseizes B., that *is, turns him out of possession, and dies, leaving a son C.; hereby the estate descends to C. the son of A., and [*20 B. is barred from entering thereon till he proves his right in an action; now, if afterwards C., the heir of the disseizor, makes a lease for life to D., with remainder to B. the disseizee for life, and D. dies; hereby the remainder accrues to B., the disseizee: who, thus gaining a new freehold by virtue of the remainder, which is a bad title, is by act of law *remitted*, or in of his former and surer estate.(*f*) For he hath hereby gained a new right of possession, to which the law immediately annexes his antient right of property.

If the subsequent estate, or right of possession, be gained by a man's own act or consent, as by immediate purchase being of full age, he shall not be remitted. For the taking such subsequent estate was his own folly, and shall be looked upon as a waiver of his prior right.(*g*) Therefore it is to be observed, that to every remitter there are regularly these incidents: an antient right, and a new defeasible estate of freehold, uniting in one and the same person; which defeasible estate must be *cast upon* the tenant, not gained by his own act or folly. The reason given by Littleton,(*h*) why this remedy, which operates silently, and by the mere act of law, was allowed, is somewhat similar to that given in the preceding article; because otherwise he who hath right would be deprived of all remedy. For, as he himself is the person in possession of the freehold, there is no other person against whom he can bring an action, to establish his prior right. And for this cause the law doth adjudge him in by remitter; that is, in such plight as if he had lawfully recovered the same land by suit. For, as lord Bacon observes,(*i*) the benignity of the law is such, as when, to preserve the principles and grounds of law, it depriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse. *Nam quod remedio destituitur, ipsa re valet, si culpa absit.* But there shall be no *remitter to a right for which the party has no remedy by action:(*k*) [*21 as if the issue in tail be barred by the fine or warranty of his ancestors,[3] and the freehold is afterwards cast upon him, he shall not be remitted to his estate-tail:(*l*) for the operation of the remitter is exactly the same, after the union of the two rights, as that of a real action would have been before it. As therefore the issue in tail could not by any action have recovered his antient estate, he shall not recover it by remitter.

And thus much for these extrajudicial remedies, as well for real as personal injuries, which are furnished or permitted by the law, where the parties are so

(*b*) Vin. Abr. tit. *executors*, D. 2.
(*c*) 5 Rep. 36.
(*d*) Litt. § 659.
(*e*) Co. Litt. 358. Cro. Jac. 489.
(*f*) Finch, L. 194. Litt. § 683.
(*g*) Co. Litt. 348, 350.
(*h*) § 661.
(*i*) Elem. c. 9.
(*k*) Co. Litt. 340.
(*l*) Moor. 115. 1 Ann. 186.

[3] The issue is no longer liable to be barred by these means. Stat. 3 & 4 W. IV. c. 74.

peculiarly circumstanced as not to make it eligible, or in some cases even possible, to apply for redress in the usual and ordinary methods to the courts of public justice.

CHAPTER III.

OF COURTS IN GENERAL.

The next, and principal, object of our inquiries is the redress of injuries by *suit in courts:* wherein the act of the parties and the act of law co-operate; the act of the parties being necessary to set the law in motion, and the process of the law being in general the only instrument by which the parties are enabled to procure a certain and adequate redress.

And here it will not be improper to observe, that although, in the several cases of redress by the act of the parties mentioned in a former chapter,(*a*) the law allows an extrajudicial remedy, yet that does not exclude the ordinary course of justice: but it is only an additional weapon put into the hands of certain persons in particular instances, where natural equity or the peculiar circumstances of their situation required a more expeditious remedy than the formal process of any court of judicature can furnish. Therefore, though I may defend myself, or relations, from external violence, I yet am afterwards entitled to an action of assault and battery: though I may retake my goods if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action of trover or detinue: I may either enter on the lands on which I have a right of entry, or may demand possession by a real action: I may either abate a nuisance by my own authority, or call upon the law to do it for me: I may *23] distrain for rent, or have an action of debt, at my own *option: if I do not distrain my neighbour's cattle *damage-feasant*, I may compel him by action of trespass to make me a fair satisfaction; if a heriot, or a deodand, be withheld from me by fraud or force, I may recover it though I never seized it. And with regard to accords and arbitrations, these, in their nature being merely an agreement or compromise, most indisputably suppose a previous right of obtaining redress some other way; which is given up by such agreement. But as to remedies by the mere operation of law, those are indeed given, because no remedy *can* be ministered by suit or action, without running into the palpable absurdity of a man's bringing an action against himself; the two cases wherein they happen being such wherein the only possible legal remedy would be directed against the very person himself who seeks relief.

In all other cases it is a general and indisputable rule, that where there is a legal right there is also a legal remedy, by suit or action at law, whenever that right is invaded. And in treating of these remedies by suit in courts, I shall pursue the following method: *first*, I shall consider the nature and several species of courts of justice; and, *secondly*, I shall point out in which of these courts, and in what manner, the proper remedy may be had for any private injury; or, in other words, what injuries are cognizable, and how redressed, in each respective species of courts.

First, then, of courts of justice. And herein we will consider, *first*, their nature and incidents in general; and then, the several species of them, erected and acknowledged by the laws of England.

A court is defined to be a place wherein justice is judicially administered.(*b*) And, as by our excellent constitution the sole executive power of the laws is *24] vested in the person of the king, it will follow that all courts of justice, which are *the medium by which he administers the laws, are derived from the power of the crown.(*c*) For, whether created by act of parliament, or letters-patent, or subsisting by prescription, (the only methods by which any

(*a*) Ch. 1. (*b*) Co. Litt. 58. (*c*) See book i. ch. 27

court of judicature(*d*) can exist,) the king's consent in the two former is expressly, and in the latter impliedly, given. In all these courts the king is supposed in contemplation of law to be always present; but, as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative.

For the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a prodigious variety of courts, some with a more limited, others with a more extensive, jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal and by way of review. All these in their turns will be taken notice of in their respective places: and I shall therefore here only mention one distinction, that runs throughout them all; viz., that some of them are courts *of record*, others *not of record*. A court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and supereminent authority that their truth is not to be called in question. For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary.(*e*)[1] And if the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes. But, if there appear any mistake of the clerk in making up such record, the court will direct him to amend it. All courts of record are the king's courts, in right of his crown and royal dignity,(*f*) and therefore no other court hath authority to fine or imprison; so that the very erection *of a new jurisdiction with the power of fine or imprisonment makes it [*25 instantly a court of record.(*g*)[2] A court not of record is the court of a private man; whom the law will not intrust with any discretionary power over the fortune or liberty of his fellow-subjects. Such are the courts-baron incident to every manor, and other inferior jurisdictions: where the proceedings are not enrolled or recorded; but as well their existence as the truth of the matters therein contained shall, if disputed, be tried and determined by a jury. These courts can hold no plea of matters cognizable by the common law, unless under the value of 40*s*., nor of any forcible injury whatsoever, not having any process to arrest the person of the defendant.(*h*)

In every court there must be at least three constituent parts, the *actor, reus,* and *judex:* the *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judical power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy. It is also usual in the superior courts to have attorneys, and advocates or counsel, as assistants.

An attorney at law answers to the *procurator*, or proctor, of the civilians and canonists.(*i*) And he is one who is put in the place, stead, or *turn* of another, to manage his matters of law. Formerly every suitor was obliged to appear in person, to prosecute or defend his suit, (according to the old Gothic constitu-

(*d*) Co. Litt. 260.
(*e*) Ibid.
(*f*) Finch, L. 231.
(*g*) Salk. 200. 12 Mod. 388.
(*h*) 2 Inst. 311.
(*i*) Pope Boniface VIII. in 6 *Decretal. l.* 3, *t.* 16, § 3, speaks of "*procuratoribus, qui in aliquibus partibus* attornati *nuncupantur*."

[1] This rule is subject to some exceptions; for in the case of a judgment signed on a warrant of attorney given upon an unlawful consideration or obtained by fraud, upon an affidavit thereof, the court will afford relief upon a summary application. Doug. 196. Cowp. 727. 1 Hen. Bla. 75. And equity will relieve against a judgment obtained by fraud or collusion. 1 Anst. 8. 3 Ves. & B. 42. And third persons who have been defrauded by a collusive judgment may show such fraud, so as to prevent themselves from being prejudiced by it. 2 Marsh. 392. 7 Taunt. 97. 13 Eliz. c. 5.—CHITTY.

[2] But every court of record has not necessarily a power to fine and imprison. 1 Sid. 145. There are several of the king's courts not of record, as the court of equity in chancery, the admiralty courts, &c. 4 Inst. 84. 37 H. 6, 14, b. Yelv. 227. Com. Dig. tit. Chancery, C. 2.—CHITTY.

tion,)(*k*) unless by special license under the king's letters-patent.(*l*) This is still the law in criminal cases.[3] And an idiot cannot to this day appear by attorney, but in person;(*m*) for he hath not discretion to enable him to appoint *a
*26] proper substitute: and upon his being brought before the court in so defenceless a condition, the judges are bound to take care of his interests, and they shall admit the best plea in his behalf that any one present can suggest.(*n*) But, as in the Roman law, "*cum olim in usu fuisset, alterius nomine agi non posse, sed, quia hoc non minimam incommoditatem habebat, cœperunt homines per procuratores litigare,*"(*o*) so with us, upon the same principle of convenience, it is now permitted in general, by divers antient statutes, whereof the first is statute Westm. 3, c. 10, that attorneys may be made to prosecute or defend any action in the absence of the parties to the suit. These attorneys are now formed into a regular corps; they are admitted to the execution of their office by the superior courts of Westminster hall, and are in all points officers of the respective courts of which they are admitted; and, as they have many privileges on account of their attendance there, so they are peculiarly subject to the censure and animadversion of the judges.[4] No man can practise as an attorney in any of those courts, but such as is admitted and sworn an attorney of that particular court: an attorney of the court of king's bench cannot practise in the court of common pleas; nor *vice versa*.[5] To practise in the court of chancery it is also necessary to be admitted a solicitor therein: and by the statute 22 Geo. II. c. 40, no person shall act as an attorney at the court of quarter-sessions but such as has been regularly admitted in some superior court of record. So early as the statute 4 Henry IV. c. 18, it was enacted, that attorneys should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty. And many subsequent statutes(*p*) have laid them under further regulations.[6]

(*k*) Stiernhook *de jure Goth. l.* 1, c. 6.
(*l*) F. N. B. 25.
(*m*) F. N. B. 27.
(*n*) Bro. Abr. tit. *Idiot*, 1.
(*o*) Inst. 4, tit. 10.
(*p*) 3 Jac. I. c. 7. 12 Geo. I. c. 29. 2 Geo. II. c. 23. 22 Geo. II. c. 46. 23 Geo. II. c. 26.

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[3] This is not universally so; for in prosecutions and informations for misdemeanours, especially in the court of King's Bench, a defendant may, and usually does, appear and plead by his attorney or clerk in court. 1 Chitty's Crim. Law. But an attorney has no right to be present during the investigation of a charge of felony before a magistrate against his client. 3 B. & A. 432; and see 1 B. & C. 37.—Chitty.

[4] An attorney is bound to use care, skill, and integrity; and if he be not deficient in any of these essential requisites he is not responsible for any error or mistake arising in the exercise of his profession. 4 Burr. 2061; and see 4 B. & A. 202. If he be deficient, and a loss thereby arises to his client, he is liable to an action in damages, (2 Wils. 325. 1 Bing. 347;) and in some cases, as we have above seen, the court of which he is an attorney will afford a summary remedy.—Chitty.

The judges will exercise their summary jurisdiction over the attorneys of the several courts, not merely in cases where they have been employed in the conduct of suits, or any matter purely professional, but "whenever the employment is so connected with their professional character as to afford a presumption that their character formed the ground of their employment." Thus, one attorney has been compelled to give up papers and deeds which had been placed in his hands as steward for the owner of the estates to which they refer, and another to pay over money which he had received when employed to collect the effects of an intestate by the administrator, although he had never been employed by him to prosecute or defend any suits in law or equity. Hughes *vs.* Mayer, 3 T. R. 275. *In re* Aitkin, 4 B. & A. 47. Luxmoore *vs.* Lethbridge, 5 B. & A. 898.—Coleridge.

[5] But now, by stat. 6 & 7 Vict. c. 73, s. 27, attorneys admitted of any one of the superior courts may practise in any other superior court, or in any inferior court of law in England and Wales, upon signing the roll of such other court. To practise in the court of chancery and the superior courts of equity, however, it is still necessary to be admitted a solicitor therein.—Stewart.

[6] The stat. 6 & 7 Vict. c. 73, consolidating and amending several of the laws relating to attorneys and solicitors, prescribes the conditions of admission as an attorney, the time and mode of their service under articles, and the oaths to be administered to them, and authorizes the judges of the courts of common law and the master of the rolls to appoint examiners to examine the fitness and capacity of all persons applying to be

Of advocates, or (as we generally call them) counsel, there are two species or degrees; barristers, and serjeants. The former are admitted after a considerable period of study, or at least standing, in the inns of court;(q) and are in our old books *styled apprentices, *apprenticii ad legem*, being looked upon as merely learners, and not qualified to execute the full office of an advocate till they were sixteen years standing; at which time, according to Fortescue,(r) they might be called to the state and degree of serjeants, or *servientes ad legem*. How antient and honourable this state and degree is, with the form, splendour, and profits attending it, hath been so fully displayed by many learned writers,(s) that it need not be here enlarged on. I shall only observe, that serjeants at law are bound by a solemn oath(t) to do their duty to their clients: and that by custom(u) the judges of the courts of Westminster are always admitted into this venerable order before they are advanced to the bench; the original of which was probably to qualify the *puisnè* barons of the exchequer to become justices of assize, according to the exigence of the statute of 14 Edw. III. c. 16.[7] From both these degrees some are usually selected to be his majesty's counsel learned in the law; the two principal of whom are called his attorney and solicitor-general. The first king's counsel under the degree of serjeant was Sir Francis Bacon, who was made so *honoris causa*, without either patent or fee;(w) so that the first of the modern order (who are now the sworn servants of the crown, with a standing salary) seems to have been Sir Francis North, afterwards lord-keeper of the great seal to king Charles II.(x) These king's counsel answer, in some measure, to the advocates of the revenue, *advocati fisci*, among the Romans. For they must not be employed in any cause against the crown without special license;[8] in which restriction they agree with the advocates of the fisc:(y) but in the imperial law the prohibition was carried still further, and perhaps was more for the dignity of the sovereign: for, excepting some peculiar causes, the fiscal advocates were not permitted to be at all concerned *in private suits between subject and subject.(z) A custom has of late years prevailed of granting letters-patent of precedence to such barris- [*27 [*28

(q) See book i. introd. § 1.
(r) *De LL.* c. 50.
(s) Fortesc. ibid. 10 Rep. pref. Dugd. *Orig. Jurid.* To which may be added a tract by the late serjeant Wynne, printed in 1765, entitled "Observations touching the Antiquity and Dignity of the Degree of Serjeant-at-Law."
(t) 2 Inst. 214.
(u) Fortesc. c. 50.
(w) See his letters, 256.
(x) See his life by Roger North, 37.
(y) Cod. 2, 9, 1.
(z) Ibid. 2, 7, 13.

admitted as attorneys or solicitors; and the certificate either of the common law or equity examiners will be sufficient to entitle a person so examined to admission in all the courts, examination by both not being necessary.—STEWART.

[7] The degree of serjeant was deprived of its most profitable, if not most important, advantage (exclusive audience in the court of Common Pleas) by the stat. 9 & 10 Vict. c. 54, which extends to all barristers the privileges of serjeants in the court of Common Pleas.—STEWART.

The most valuable privilege formerly enjoyed by the serjeants (who, besides the judges, were limited to fifteen in number) was the monopoly of the practice in the court of Common Pleas. A bill was introduced into parliament in the year 1755 for the purpose of destroying this monopoly; but it did not pass. In 1834, a warrant under the sign-manual of the crown was directed to the judges of the Common Pleas, commanding them to open that court to the bar at large, on the ground that it would tend to the general despatch of business. This order was received, and the court acted accordingly. But in 1839 the matter was brought before the court by the serjeants, when it was decided that the order was illegal, Tindal, C. J., declaring that "from time immemorial the serjeants have enjoyed the exclusive privilege of practising, pleading, and audience in the court of Common Pleas. Immemorial enjoyment is the most solid of all titles; and we think the warrant of the crown can no more deprive the serjeant, who holds an immemorial office, of the benefits and privileges which belong to it, than it could alter the administration of the law within the court itself." 10 Bingh. 571. 6 Bingh. N. C. 187, 232, 235. However, the statute 9 & 10 Vict. c. 54 has since extended to all barristers the privileges of serjeants in the court of Common Pleas.—SHARSWOOD.

[8] Hence none of the king's counsel can publicly plead in court for a prisoner, or a defendant in a criminal prosecution, without a license,—which is never refused, but an expense of about nine pounds must be incurred in obtaining it.—CHITTY.

ter as the crown thinks proper to honour with that mark of distinction: whereby they are entitled to such rank and pre-audience(*a*) as are assigned in their respective patents; sometimes next after the king's attorney-general, but usually next after his majesty's counsel then being. These (as well as the queen's attorney and solicitor-general)(*b*) rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts; but receive no salaries, and are not sworn, and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately (except in the court of common pleas, where only serjeants are admitted)[10] may take upon them the protection and defence of any suitors, whether plaintiff or defendant; who are therefore called their *clients*, like the dependants upon the antient Roman orators. Those indeed practised *gratis*, for honour merely, or at most for the sake of gaining influence: and so likewise it is established with us,(*c*) that a counsel can maintain no action for his fees; which are given, not as *locatio vel conductio*, but as *quiddam honorarium;* not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation:(*d*)[11] as is also laid down with regard to advocates in the civil law,(*e*) whose *honorarium* was directed by a decree of the senate not to exceed in any case ten thousand sesterces, *or about 80*l.* of English money.(*f*)[12] And, in order to encourage due freedom of

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(*a*) Pre-audience in the courts is reckoned of so much consequence that it may not be amiss to subjoin a short table of the precedence which usually obtains among the practisers.

1. The king's premier serjeant, (so constituted by special patent.)
2. The king's ancient serjeant, or the eldest among the king's serjeants.
3. The king's advocate-general.
4. The king's attorney-general.[9]
5. The king's solicitor-general.[9]
6. The king's serjeants.
7. The king's counsel, with the queen's attorney and solicitor.
8. Serjeants at law.
9. The recorder of London.
10. Advocates of the civil law.
11. Barristers.

In the courts of exchequer, two of the most experienced barristers, called the *post*-man and the *tub*-man, (from the places in which they sit,) have also a precedence in motions.

(*b*) Seld. tit. *Hon.* 1, 6, 7.
(*c*) Davis, pref. 22. 1 Ch. Rep. 38.
(*d*) Davis. 23.
(*e*) *Ff.* 11, 6, 1.
(*f*) Tac. *Ann. l.* 11.

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[9] By the king's mandate, 14th Dec. 1811, the king's attorney and solicitor-general are now to have a place and audience before the king's premier serjeant.—Chitty.

[10] That is, in bank; for at trials at nisi prius in Common Pleas a barrister who is not a serjeant may even lead a cause.—Chitty.

[11] Upon the same principle a physician cannot maintain an action for his fees. 4 Term Rep. 317. It has also been held that no action lies to recover back a fee given to a barrister to argue a cause which he did not attend. Peake's R. 122. Formerly it was considered that if a counsel disclosed his client's case or neglected to attend to it, he was liable to be sued. See Vin. Abr. Actions of Assumpsit, P. But in more modern times it has been considered that no such action is sustainable. Peake's R. 96.

On the other hand, serjeants and barristers are entitled to certain privileges. Each is an esquire; and his eldest son is qualified to kill game. 1 T. R. 44. They are entitled when sued separately to have the venue laid in any action against them in Middlesex, (1 Stra. 610,) and are privileged from arrest and from being taken in execution whilst they are on their proper circuit and when they are attending the sittings at Nisi Prius. 1 Hen. Bla. 636.—Chitty.

[12] The circumstances which led to this decree, as recorded by Tacitus, deserve to be mentioned. Samius, a Roman knight of distinction, having given Suilius a fee of three thousand guineas to undertake his defence, and finding that he was betrayed by his advocate, *ferro in domo ejus incubuit.* In consequence of this, the senate insisted upon enforcing the Cincian law, *quâ cavetur antiquitùs, nequis ob causam orandam pecuniam donumve accipiat.*

Tacitus then recites the arguments of those who spoke against the payment of fees and of those who supported the practice, and concludes with telling us that Claudius Cæsar, thinking that there was more reason, though less liberality, in the arguments of the latter, *capiendis pecuniis posuit modum, usque ad dena sestertia, quem egressi repetundarum tenerentur.* 1 Ann. lib. 11, c. 5.

But, besides the acceptance of such immense fees, the perfidy of advocates had become a common traffic; for Tacitus introduces the subject by observing, *nec quidquam publicæ mercis tam venale fuit quam advocatorum perfidia.* To the honour of our courts, the corruption of judges and the treachery of counsel are crimes unheard of in this country. *Quid enim est jus civile? Quod neque inflecti gratiâ, neque perfringi potentiâ, neque adulterari pecuniâ possit.* Cic. pro Cæcina.—Christian.

speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men, (a few of whom may sometimes insinuate themselves even into the most honourable professions,) it hath been holden that a counsel is not answerable for any matter by him spoken relative to the cause in hand and suggested in his client's instructions, although it should reflect upon the reputation of another, and even prove absolutely groundless: but if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured.(*g*)[13] And counsel guilty of deceit or collusion are punishable by the statute Westm. 1, 3 Edw. I. c. 28, with imprisonment for a year and a day, and perpetual silence in the courts; a punishment still sometimes inflicted for gross misdemeanours in practice.(*h*)

CHAPTER IV.

OF THE PUBLIC COURTS OF COMMON LAW AND EQUITY.

WE are next to consider the several species and distinctions of courts of justice which are acknowledged and used in this kingdom. And these are, either such as are of public and general jurisdiction throughout the whole realm, or such as are only of a private and special jurisdiction in some particular parts of it. Of the former there are four sorts: the universally established courts of common law and equity; the ecclesiastical courts; the courts military; and courts maritime. And, first, of such public courts as are courts of common law and equity.

The policy of our antient constitution, as regulated and established by the great Alfred, was to bring justice home to every man's door, by constituting as many courts of judicature as there are manors and townships in the kingdom, wherein injuries were redressed in an easy and expeditious manner by the suffrage of neighbours and friends. These little courts, however, communicated with others of a larger jurisdiction, and those with others of a still greater power; ascending gradually from the lowest to the supreme courts, which were respectively constituted to correct the errors of the inferior ones, and to determine such causes as by reason of their weight and difficulty demanded a more solemn discussion. *The course of justice flowing in large streams from the king, as the fountain, to his superior courts of record; and being then subdivided into smaller channels, till the whole and every part of the kingdom were plentifully watered and refreshed. An institution that seems highly agreeable to the dictates of natural reason, as well as of more enlightened policy; being equally similar to that which prevailed in Mexico and Peru before they were discovered by the Spaniards, and to that which was established in [*31

(*g*) Cro. Jac. 90. (*h*) Sir T. Raym. 376.

In New Jersey, an advocate's fees are not recoverable at law. Shaver *vs.* Norris, Penning, 63. Seeley *vs.* Crane, 3 Green, 35. Van Alter *vs.* McKinney's Exrs., 1 Harrison, 236. However, the general current of decisions in the United States is in favour of the right of counsel to recover by a suit at law a reasonable compensation for their services, whether in court or out of court. Stevens *vs.* Adams, 23 Wendell, 57, S. C. 26. Ibid. 451. Newman *vs.* Washington, Martin & Yerger, 79. Stevens *vs.* Monges, 1 Harrington, 127. Bayard *vs.* McLane, 3 Harrington, 217. Duncan *vs.* Beisthaupt, 1 McCord, 149. Downing *vs.* Major, 2 Dana, 228. Christy *vs.* Douglass, Wright's Ch. Rep. 485. Webb *vs.* Hepp, 14 Missouri, 354. Vilas *vs.* Downer, 21 Vermont, 419. Lecatt *vs.* Saller, 3 Porter, 115. Gray *vs.* Brackenridge, 2 Penna. Rep. 181. Foster *vs.* Jack, 4 Watts, 33. It may be questioned whether the real interests of the profession have been promoted by the change.—SHARSWOOD.

[13] See the late important case establishing the correctness of this position. Holt, C. N. P. 621. 1 B. & A. 232. 1 Saund. Rep. 130.—CHITTY.

the Jewish republic by Moses. In Mexico each town and province had its proper judges, who heard and decided causes, except when the point in litigation was too intricate for their determination; and then it was remitted to the supreme court of the empire, established in the capital, and consisting of *twelve* judges.(*a*) Peru, according to Garcilasso de Vega, (an historian descended from the antient Incas of that country,) was divided into small districts containing *ten* families each, all registered and under one magistrate, who had authority to decide little differences and punish petty crimes. Five of these composed a higher class, of *fifty* families; and two of these last composed another, called a *hundred*. Ten hundreds constituted the largest division, consisting of a *thousand* families; and each division had its separate judge or magistrate, with a proper degree of subordination.(*b*) In like manner, we read of Moses, that, finding the sole administration of justice too heavy for him, he "chose able men out of all Israel, such as feared God, men of truth, hating covetousness: and made them heads over the people, rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens; and they judged the people at all seasons: the hard causes they brought unto Moses; but every small matter they judged themselves."(*c*) These inferior courts, at least the name and form of them, still continue in our legal constitution; but as the superior courts of record have in practice obtained a concurrent original jurisdiction with these; and as there is, besides, a power of removing plaints or actions thither from all the inferior jurisdictions; upon these accounts (amongst others) it has happened *32] that *these petty tribunals have fallen into decay, and almost into oblivion; whether for the better or the worse, may be matter of some speculation, when we consider on the one hand the increase of expense and delay, and on the other the more able and impartial decision, that follow from this change of jurisdiction.

The order I shall observe in discoursing on these several courts, constituted for the redress of *civil* injuries, (for with those of a jurisdiction merely *criminal* I shall not at present concern myself,) will be by beginning with the lowest, and those whose jurisdiction, though public and generally dispersed throughout the kingdom, is yet (with regard to each particular court) confined to very narrow limits; and so ascending gradually to those of the most extensive and transcendent power.

1. The lowest, and at the same time the most expeditious, court of justice known to the law of England, is the court of *piepoudre, curia pedis pulverizati;* so called from the dusty feet of the suitors; or, according to Sir Edward Coke,(*d*) because justice is there done as speedily as dust can fall from the foot; upon the same principle that justice among the Jews was administered in the gate of the city,(*e*) that the proceedings might be the more speedy as well as public. But the etymology given us by a learned modern writer(*f*) is much more ingenious and satisfactory; it being derived, according to him, from *pied puldreaux*, (a pedler, in old French,) and therefore signifying the court of such petty chapmen as resort to fairs or markets. It is a court of record, incident to every fair and market, of which the steward of him who owns or has the toll of the market is the judge; and its jurisdiction extends to administer justice for all commercial injuries done in that very fair or market, and not in any preceding one. So that the injury must be done, complained of, heard, and determined within the compass of one and the same day, unless the fair continues longer. The *33] court hath cognizance of *all matters of contract that can possibly arise within the precinct of that fair or market; and the plaintiff must make oath that the cause of action arose there.(*g*) From this court a writ of error lies, in the nature of an appeal, to the courts at Westminster;(*h*) which are now also bound by the statute 19 Geo. III. c. 70 to issue writs of execution, in aid of its process after judgment, where the person or effects of the defendant are not within the limits of this inferior jurisdiction; which may possibly occasion

(*a*) Mod. Un. Hist. xxxviii. 469.
(*b*) Ibid. xxxix. 14.
(*c*) Exod. xviii.
(*d*) 4 Inst. 272.
(*e*) Ruth iv.
(*f*) Barrington's Observat. on the stat. 337.
(*g*) Stat. 17 Edw. IV. c. 2.
(*h*) Cro. Eliz. 773.

the revival of the practice and proceedings in these courts, which are now in a manner forgotten. The reason of their original institution seems to have been to do justice expeditiously among the variety of persons that resort from distant places to a fair or market; since it is probable that no other inferior court might be able to serve its process, or execute its judgments, on both, or perhaps either, of the parties; and therefore, unless this court had been erected, the complainant must necessarily have resorted, even in the first instance, to some superior judicature.

II. The *court-baron* is a court incident to every manor in the kingdom, to be holden by the steward within the said manor. This court-baron is of two natures:(*i*) the one is a customary court, of which we formerly spoke,(*k*) appertaining entirely to the copyholders, in which their estates are transferred by surrender and admittance, and other matters transacted relative to their tenures only. The other, of which we now speak, is a court of common law, and it is the court of the barons, by which name the freeholders were sometimes antiently called:[1] for that it is held before the freeholders who owe suit and service to the manor, the steward being rather the registrar than the judge. These courts, though in their nature distinct, are frequently confounded together. The court we are now considering, viz., the freeholders' court, was composed of the lord's tenants, who were the *pares* of each other, and were bound by their feodal tenure to assist their lord in the dispensation of domestic justice. This was formerly held every three weeks; and its most important business is to determine, by writ of right, all controversies relating to the right of lands within the manor.[2] It may also hold plea of any personal actions of debt, trespass on the case, or the like, where the debt or damages do not *amount [*34] to forty shillings;(*l*) which is the same sum, or three marks, that bounded the jurisdiction of the antient Gothic courts in their lowest instance, or *fierding-courts*, so called because four were instituted within every superior district or hundred.(*m*) But the proceedings on a writ of right may be removed into the county-court by a precept from the sheriff called a *tolt*,(*n*) "*quia tollit atque eximit causam e curia baronum.*"(*o*) And the proceedings in all other actions may be removed into the superior courts by the king's writs of *pone*,(*p*) or *accedas ad curiam*, according to the nature of the suit.(*q*) After judgment given, a writ also of *false judgment*(*r*) lies to the courts at Westminster to rehear and review the cause, and not a writ of *error;* for this is not a court of record: and therefore, in some of these writs of removal, the first direction given is to cause the plaint to be recorded, *recordari facias loquelam.*

III. A hundred-court is only a larger court-baron, being held for all the inhabitants of a particular hundred instead of a manor. The free suitors are here also the judges, and the steward the registrar, as in the case of a court-baron. It is likewise no court of record; resembling the former in all points, except that in point of territory it is of greater jurisdiction.(*s*) This is said by Sir Edward Coke to have been derived out of the county-court for the ease of the people, that they might have justice done to them at their own doors, without any charge or loss of time;(*t*) but its institution was probably coeval with that of hundreds themselves, which were formerly observed(*u*) to have been introduced, though not invented, by Alfred, being derived from the polity

(*i*) Co. Litt. 58.
(*k*) Book ii. ch. 4, 6, and 22.
(*l*) Finch, 243.
(*m*) Stiernhook *de jure Goth. l.* 1, c. 2.
(*n*) F. N. B. 3, 4. See Append. No. I. § 2.
(*o*) 3 Rep. pref.
(*p*) See Append. No. I. § 3.
(*q*) F. N. B. 4, 70. Finch, L. 444, 445.
(*r*) F. N. B. 18.
(*s*) Finch, L. 243. 4 Inst. 267.
(*t*) 2 Inst. 71.
(*u*) Book i. p. 116.

[1] All the freeholders of the king were called barons; but the editor is not aware that it appears from any authority that this word was ever applied to those who held freeholds of a subject. See an account of the ancient barons, *ante*, 1 book, 399, n. 5. It seems to be the more obvious explanation of the court-baron that it was the court of the baron or lord of the manor, to which his freeholders owed suit and service. In like manner, we say the king's court and the sheriff's court.—CHRISTIAN.

[2] The writ of right having been abolished, (3 & 4 W. IV. c. 27, s. 36,) this branch of its jurisdiction no longer exists.—KERR.

of the antient Germans. The *centeni*, we may remember, were the principal inhabitants of a district composed of different villages, originally in number a *35] *hundred*, but afterwards only *called by that name;(*v*) and who probably gave the same denomination to the district out of which they were chosen. Cæsar speaks positively of the judicial power exercised in *their* hundred-courts and courts-baron. "*Principes regionum atque pagorum*" (which we may fairly construe, the lords of hundreds and manors) "*inter suos jus dicunt, controversiasque minuunt.*"(*w*) And Tacitus, who had examined their constitution still more attentively, informs us not only of the authority of the lords, but that of the *centeni*, the hundredors, or jury; who were taken out of the common freeholders, and had themselves a share in the determination. "*Eliguntur in conciliis et principes, qui jura per pagos vicosque reddunt: centeni singulis, ex plebe comites, consilium simul et auctoritas, adsunt.*"(*x*) This hundred-court was denominated *hæreda* in the Gothic constitution.(*y*) But this court, as causes are equally liable to removal from hence, as from the common court-baron, and by the same writs, and may also be reviewed by writ of false judgment, is therefore fallen into equal disuse with regard to the trial of actions.[3]

IV. The county-court[4] is a court incident to the jurisdiction of the sheriff. It is not a court of record, but may hold pleas of debt or damages under the value of forty shillings.(*z*) Over some of which causes these inferior courts have, by the express words of the statute of Gloucester,(*a*) a jurisdiction totally exclusive of the king's superior courts. For in order to be entitled to sue an action of trespass for goods before the king's justiciars, the plaintiff is directed to make affidavit that the cause of action does really and *bonâ fide* amount to 40*s.*; which affidavit is now unaccountably disused,(*b*) except in the

(*v*) *Centeni ex singulis pagis sunt, idque ipsum inter suos vocantur, et, quod primo numeris fuit, jam nomen et honor est.* Tac. *de Mor. Germ.* c. 6.
(*w*) *De Bell. Gall. l.* 6, c. 22.
(*x*) *De Morib. Germ.* c. 13.
(*y*) Stiernhook, *l.* 1, c. 2.
(*z*) 4 Inst. 266.
(*a*) 6 Edw. I. c. 8.
(*b*) 2 Inst. 391. 3 T. R. 363. Bac. Abr. Court of King's Bench, A. 2.

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[3] The courts-baron and hundred-courts have long been entirely obsolete as courts of civil jurisdiction; and the statute 9 & 10 Vict. c. 95 has accordingly empowered the lords of any hundred, or of any honour, manor, or liberty having any court in right thereof in which debts or demands may be recovered, to surrender the right of holding such courts to the crown, after which surrender the right of holding such courts is to cease and determine.—Kerr.

[4] As to the county-court in general, see Com. Dig. County-Courts, B. 3. Bac. Abr. Court, County-Court. Vin. Abr. Court, County, 7 vol. 5. 4 Inst. 266. No action can be brought in the county-court, unless the cause of action arose, and the defendant reside, within the county: and if that be not the case, the action may be brought in the superior court, although for a sum less than 40*s.*; for if no action can be brought in the inferior jurisdiction for so small a debt, the plaintiff is not therefore to lose it. Per Lord Kenyon, 6 T. R. 175. 8 T. R. 235. 1 Bos. & P. 75. 1 Dowl. & R. 359. So if the contract be made on the high seas, as for wages, it cannot be recovered in the county-court. 1 B. & A. 223. But the non-residence of the plaintiff within the jurisdiction constitutes no objection at common law to his proceeding in the county-court, (1 East, 352;) though in some local courts of request, constituted by particular statutes, both plaintiff and defendant must reside within the jurisdiction. 8 T. R. 236. This court has no jurisdiction over trespasses laid to have been committed *vi et armis*, (per Lord Kenyon, 3 T. R. 38;) because the county-court, not being a court of record, cannot fine the defendant. Com. Dig. County C. 8. But it is said to be otherwise when the proceedings are by justicies. Com. Dig. County C. 5. The writ of justicies does not, however, except in this instance and as respects the amount of the debt, enlarge the sheriff's jurisdiction. 1 Lev. 253. Vin. Abr. Court, County, D., a. 2, pl. 6. An entire debt exceeding 40*s.* cannot be split, so as to be sued for in this court; nor can the creditor falsely acknowledge satisfaction of a part so as to proceed for the rest. 2 Inst. 312. Palm. 564. Com. Dig. County C. 8. 2 Roll. a. 317, pl. 1. But where the debt has really been reduced by payments under 40*s.*, it may be recovered in this court. Com. Dig. County C. 8. See 1 B. & P. 223, 224. No capias against the person can issue out of this court. (Com. Dig. County C. 9;) and therefore if the defendant has no goods the plaintiff is without remedy there; but an action may at common law be brought in the superior courts on a judgment obtained in the county-court, and thus, ultimately, execution against the person may be obtained. Greenwood on Courts, 22. Finch, 318. F. N. B. 152.—Chitty.

court of exchequer.[5] The statute also 43 Eliz. c. 6, which gives the judges in many personal actions, where the jury assess less damages than 40*s.*, a power to certify the same and *abridge the plaintiff of his full costs, was also meant to prevent vexation by litigious plaintiffs; who for purposes of [*36 mere oppression might be inclinable to institute suits in the superior courts for injuries of a trifling value. The county-court may also hold plea of many real actions, and of all personal actions to any amount, by virtue of a special writ called a *justicies;* which is a writ empowering the sheriff for the sake of despatch to do the same justice in his county-court, as might otherwise be had at Westminster.(*c*) The freeholders of the county are the real judges in this court, and the sheriff is the ministerial officer. The great conflux of freeholders which are supposed always to attend at the county-court (which Spelman calls *forum plebeiæ justiciæ et theatrum comitivæ potestatis*)(*d*) is the reason why all acts of parliament at the end of every session were wont to be there published by the sheriff; why all outlawries of absconding offenders are there proclaimed; and why all popular elections which the freeholders are to make, as formerly of sheriffs and conservators of the peace, and still of coroners, verderors, and knights of the shire, must ever be made *in pleno comitatu*, or in full county-court. By the statute 2 Edw. VI. c. 25, no county-court shall be adjourned longer than for one month, consisting of twenty-eight days. And this was also the antient usage, as appears from the laws of king Edward the elder;(*e*) "*præpositus* (that is, the sheriff) *ad quartam circiter septimanam frequentem populi concionem celebrato: cuique jus dicito; litesque singulas dirimito.*" In those times the county-court was a court of great dignity and splendour, the bishop and the ealdorman, (or earl,) with the principal men of the shire, sitting therein to administer justice both in lay and ecclesiastical causes.(*f*) But its dignity was much impaired when the bishop was prohibited and the earl neglected to attend it. And, in modern times, as proceedings are removable from hence into the king's superior courts, by writ of *pone* or *recordari*,(*g*) in the same manner as from *hundred-courts and courts-baron; and as the same [*37 writ of false judgment may be had, in nature of a writ of error; this has occasioned the same disuse of bringing actions therein.[6]

(*c*) Finch, 318. F. N. B. 152.
(*d*) *Gloss. v. comitatus.*
(*e*) C. 11.
(*f*) *LL. Eadgari*, c. 5.
(*g*) F. N. B. 70. Finch, 445.

[5] And in any of the superior courts, when the debt sued for appears on the face of the declaration, (3 Burr. 1592,) or is admitted by the plaintiff or his attorney, (2 Bla. Rep. 754.) or proved by an affidavit of the defendant, (4 T. R. 495. 5 id. 64. Tidd. Prac. 8 ed. 565,) to be under 40*s.*, and the plaintiff may recover it in an inferior jurisdiction, they will stay the proceedings, it being below their dignity to proceed in such action. But the plaintiff may by affidavit show that the debt exceeds 40*s.*, or that the defendant resided out of the jurisdiction, which will retain the cause in the superior court. 6 T. R. 175. 8 T. R. 235. 1 B. & P. 75. 1 Dowl. & R. 359.—CHITTY.

[6] The new county-courts, so called in contradistinction to the county-courts before mentioned, were established by the statute 9 & 10 Vict. c. 95. They at first possessed jurisdiction only for the recovery of debts, damages, and demands, legacies and balances of partnership accounts, where the sum sued for did not exceed 20*l.* They were also charged with the power of giving a landlord possession of premises where the tenant's term had determined or he had received proper notice to quit, in cases in which the rent did not exceed 50*l.* annually and no fine had to be paid. By the statute 13 & 14 Vict. c. 61, their jurisdiction was extended to actions where the amount sued for did not exceed 50*l.*, and, if the litigants consented in writing, to actions for any amount whatever. By this statute an appeal was also given against the decision of the judge on matter of law, but only in actions for sums above 20*l.* No appeal lies from his decision in matters of fact. The other statutes relating to this branch of the jurisdiction of these courts are the 12 & 13 Vict. c. 101, and 15 & 16 Vict. c. 54. They have no jurisdiction, it may be observed, unless the parties expressly consent in writing to that effect, in actions in which the title to corporeal or incorporeal hereditaments, or to any toll or franchise, or in which the validity of any devise or bequest under a will or settlement, may come in question. Actions brought for a malicious prosecution, for libel or slander, criminal conversation, or seduction, or breach of promise of marriage, are expressly excluded.

These are the several species of common-law courts, which, though dispersed universally throughout the realm, are nevertheless of a partial jurisdiction, and confined to particular districts, yet communicating with, and, as it were, members of, the superior courts of a more extended and general nature; which are calculated for the administration of redress, not in any one lordship, hundred, or county only, but throughout the whole kingdom at large. Of which sort is,

V. The court of *common pleas*, or, as it is frequently termed in law, the court of *common bench*.

By the antient Saxon constitution, there was only one superior court of justice in the kingdom; and that court had cognizance both of civil and spiritual causes: viz., the *wittena-gemote*, or general council, which assembled annually or oftener, wherever the king kept his Christmas, Easter, or Whitsuntide, as well to do private justice as to consult upon public business. At the conquest the ecclesiastical jurisdiction was diverted into another channel; and the Conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as counsellors to the crown. He therefore established a constant court in his own hall, thence called by Bracton,(*h*) and other antient authors, *aula regia*, or *aula regis*. This court was composed of the king's great officers of state resident in his palace, and usually attendant on his person; such as the lord high constable and lord mareschal, who chiefly presided in matters of honour and of arms; determining according to the law military and the law of nations. Besides these, there were the lord high steward, and lord great chamberlain; the steward of the household; the lord chancellor, whose peculiar *business it was to keep the king's seal, and examine all such writs, grants, and letters as were to pass under that authority; and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices, and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these in their several departments transacted all secular business both criminal and civil, and likewise the matters of the revenue: and over all presided one special magistrate, called the chief justiciar, or *capitalis justiciarius totius Angliæ;* who was also the principal minister of state, the second man in the kingdom, and by virtue of his office guardian of the realm in the king's absence. And this officer it was who principally determined all the vast variety of causes that arose in this extensive jurisdiction, and from the plenitude of his power grew at length both obnoxious to the people, and dangerous to the government which employed him.(*i*)

*38]

This great universal court being bound to follow the king's household in all his progresses and expeditions, the trial of common causes therein was found very burdensome to the subject. Wherefore king John, who dreaded also the power of the justiciar, very readily consented to that article which now forms the eleventh chapter of *magna carta*, and enacts, "that *communia placita non*

(*h*) *L.* 3, *tr.* 1, c. 7. (*i*) Spelm. Gloss. 331, 332, 333. Gilb. Hist. C. P. introd. 17.

The judges must be barristers of seven years' standing. The judge decides all questions as well of fact as of law, unless one or other of the parties to the action has demanded a jury for the trial of matters of fact,—which in actions for sums above 5*l.* may be obtained as of right, and consists of five jurors summoned from the district where the court is holden.

The court is a court of record. It is held once a month. And, to encourage parties to resort to this tribunal, the plaintiff in the superior courts (in suits in which they have concurrent jurisdiction) does not recover his costs in actions of contract where he recovers no more than 20*l.*, and in actions of tort where he recovers no more than 5*l.*, unless the judge of the superior court who tries the cause certifies for costs, or it appears to the court that there was sufficient reason for bringing the action in the superior court.—Stewart.

sequantur curiam regis, sed teneantur in aliquo loco certo." This certain place was established in Westminster hall, the place where the *aula regis* originally sat, when the king resided in that city; and there it hath ever since continued. And the court being thus rendered fixed and stationary, the judges became so too, and a chief with other justices of the common pleas was thereupon appointed; with jurisdiction to hear and determine all pleas of land, and injuries merely civil, between subject and subject. Which critical establishment of this principal court of *common law, at that particular juncture and that particular place, gave rise to the inns of court in its neighbourhood; and, [*39 thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who laboured to extirpate and destroy it.(*j*) This precedent was soon after copied by king Philip the Fair in France, who about the year 1302 fixed the parliament at Paris to abide constantly in that metropolis; which before used to follow the person of the king wherever he went, and in which he himself used frequently to decide the causes that were there depending; but all were then referred to the sole cognizance of the parliament and its learned judges.(*k*) And thus also in 1495 the emperor Maximilian I. fixed the imperial chamber (which before always travelled with the court and household) to be constantly held at Worms, from whence it was afterwards translated to Spires.(*l*)

The *aula regia* being thus stripped of so considerable a branch of its jurisdiction, and the power of the chief justiciar being also considerably curbed by many articles in the great charter, the authority of both began to decline apace under the long and troublesome reign of king Henry III. And, in further pursuance of this example, the other several officers of the chief justiciar were, under Edward the First, (who new-modelled the whole frame of our judicial polity,) subdivided and broken into distinct courts of judicature. A court of chivalry was erected, over which the constable and mareschal presided; as did the steward of the household over another, constituted to regulate the king's domestic servants. The high steward, with the barons of parliament, formed an august tribunal for the trial of delinquent peers; and the barons reserved to themselves in parliament the right of reviewing the sentences of other courts in the last resort. The distribution of common justice between man and man was thrown into so provident an order, that the great judicial officers were *made to form a check upon each other: the court of chancery issuing [*40 all original writs under the great seal to the other courts; the common pleas being allowed to determine all causes between private subjects; the exchequer managing the king's revenue; and the court of king's bench retaining all the jurisdiction which was not cantoned out to other courts, and particularly the superintendence of all the rest by way of appeal; and the sole cognizance of pleas of the crown or criminal causes. For pleas or suits are regularly divided into two sorts: *pleas of the crown*, which comprehend all crimes and misdemeanours, wherein the king (on behalf of the public) is the plaintiff; and *common pleas*, which include all civil actions depending between subject and subject. The former of these were the proper object of the jurisdiction of the court of king's bench; the latter of the court of common pleas, which is a court of record, and is styled by Sir Edward Coke(*m*) the lock and key of the common law; for herein only can real actions, that is, actions which concern the right of freehold or the realty, be originally brought: and all other, or personal, pleas between man and man, are likewise here determined; though in most of *them* the king's bench has also a concurrent authority.[7]

The judges of this court are at present(*n*) four in number, one chief and three

(*j*) See book i. introd. § 1.
(*k*) Mod. Un. Hist. xxiii. 396.
(*l*) Ibid. xxix. 46.
(*m*) 4 Inst. 99.
(*n*) King James I. during the greater part of his reign appointed five judges in the courts of King's Bench and Com-

[7] The jurisdiction of each court is so well established that at this day the court of King's Bench cannot be authorized to determine a mere real action, so neither can the court of Common Pleas to inquire of felony or treason. Hawk. b. 2, ch. 1, s. 4. Bac. Abr. Courts, A. The King's Bench, however, tries titles to land by the action of ejectment.—CHITTY.

puisnè justices, created by the king's letters-patent, who sit every day in the four terms to hear and determine all matters of law arising in civil causes, whether real, personal, or mixed and compounded of both. These it takes cognizance of, as well originally as upon removal from the inferior courts before mentioned. But a writ of error, in the nature of an appeal, lies from this court into the court of king's bench.[8]

*41] *VI. The court of king's bench (so called because the king used formerly to sit there in person,(*o*) the style of the court still being *coram ipso rege*)[9] is the supreme court of common law in the kingdom; consisting of a chief justice and three *puisnè* justices, who are by their office the sovereign conservators of the peace and supreme coroners of the land. Yet, though the king himself used to sit in this court, and still is supposed so to do, he did not, neither by law is he empowered(*p*) to, determine any cause or motion, but by the mouth of his judges, to whom he hath committed his whole judicial authority.(*q*)[10]

This court, which (as we have said) is the remnant of the *aula regia*, is not, nor can be, from the very nature and constitution of it, fixed to any certain place, but may follow the king's person wherever he goes: for which reason all process issuing out of this court in the king's name is returnable "*ubicunque fuerimus in Anglia.*" It hath indeed, for some centuries past, usually sat at Westminster, being an antient palace of the crown; but might remove with the king to York or Exeter, if he thought proper to command it. And we find that, after Edward I. had conquered Scotland, it actually sat at Roxburgh.(*r*) And this movable quality, as well as its dignity and power, are fully expressed by Bracton when he says that the justices of this court are "*capitales, generales, perpetui, et majores; a latere regis residentes, qui omnium aliorum corrigere tenentur injurias et errores.*"(*s*) And it is moreover especially provided in the *articuli super cartas*,(*t*) that the king's chancellor, and the justices of his bench, shall follow him, so that he may have at all times near unto him some that be learned in the laws.

mon Pleas, for the benefit of a casting voice in case of a difference in opinion, and that the circuits might at all times be fully supplied with judges of the superior courts. And in subsequent reigns, upon the permanent indisposition of a judge, a fifth hath been sometimes appointed. Sir T. Raym. 475.

(*o*) 4 Inst. 73.

(*p*) See book i. ch. 7. The king used to decide causes in person in the *aula regia*. "*In curia domini regis ipse in propria persona jura decernit.*" *Dial. de Scacch. l.* 1, § 4.

After its dissolution king Edward I. frequently sat in the court of King's Bench, (see the records cited in 2 Burr. 851;) and in later times James I. is said to have sat there in person, but was informed by his judges that he could not deliver an opinion.

(*q*) 4 Inst. 71.

(*r*) M. 20. 21 Edw. I. Hale, Hist. C. L. 200.

(*s*) *L.* 3, c. 10.

(*t*) 28 Edw. I. c. 5.

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[8] The court now consists of five judges, one chief and four *puisnè* justices. Until the statute 11 Geo. IV. and 1 W. IV. c. 70, an appeal lay from the judgment of this court to the court of King's Bench; but now the appeal for error in law is to the justices of the court of Queen's Bench and barons of the exchequer, in the exchequer-chamber, from whose judgment an appeal lies only to the house of lords.—Stewart.

[9] This court is called the Queen's Bench in the reign of a queen; and during the protectorate of Cromwell it was styled the upper bench.—Christian.

[10] Lord Mansfield, in 2 Burr. 851, does not mean to say, nor do the records there cited warrant the conclusion, that Edward I. actually sat in the King's Bench. Dr. Henry, in his very accurate History of Great Britain, informs us that he has found no instance of any of our kings sitting in the court of justice before Edward IV. "And Edward IV.," he says, "in the second year of his reign, sat three days together during Michaelmas Term in the court of King's Bench; but it is not said that he interfered in the business of the court; and, as he was then a very young man, it is probable that it was his intention to learn in what manner justice was administered, rather than to act the part of a judge." 5 vol. 282, 4to edit. Lord Coke says that the words in *magna carta*, (c. 29,) *nec super eum ibimus nec super eum mittemus nisi*, &c., signify that we shall not sit in judgment ourselves, nor send our commissioners or judges to try him. 2 Inst. 46. But that this is an erroneous construction of these words appears from a charter granted by king John in the sixteenth year of his reign, which is thus expressed:—*Nec super eos per vim vel per arma ibimus nisi per legem regni nostri vel per judicium parium suorum.* See Introd. to Bl. Mag. Ch. p. 13. Statutes and charters in *pari materiâ* must be construed by a reference to each other; and in the more ancient charter the meaning is clear that the king will not proceed with violence against his subjects unless justified by the law of his kingdom or by a judgment of their peers.—Christian.

*The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may [*42 either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject, by speedy and summary interposition. It takes cognizance both of criminal and civil causes: the former in what is called the crown side, or crown office; the latter in the plea side of the court. The jurisdiction of the crown side is not our present business to consider: that will be more properly discussed in the ensuing book. But on the plea side, or civil branch, it hath an original jurisdiction and cognizance of all actions of trespass or other injury alleged to be committed *vi et armis;* of actions for forgery of deeds; maintenance, conspiracy, deceit, and actions on the case which allege any falsity or fraud; all of which savour of a criminal nature, although the action is brought for a civil remedy; and make the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party.(*u*) The same doctrine is also now extended to all actions on the case whatsoever:(*w*) but no action of debt or detinue, or other mere civil action, can by the *common law* be prosecuted by any subject in this court by *original* writ out of chancery;(*x*)[11] though an action of debt given by *statute* may be brought in the king's bench as well as in the common pleas.(*y*) And yet this court might always have held plea of any civil action, (other than actions real,) provided the defendant was an officer of the court; or in the custody of the marshal, or prison-keeper, of this court, for a breach of the peace or any other offence.(*z*) And, in process of time, it began by a fiction to hold plea of all personal actions whatsoever, and has continued to do so for ages:(*a*) it being surmised that the defendant is arrested for *a supposed trespass, which he never has in reality committed; and, being [*43 thus in the custody of the marshal of the court, the plaintiff is at liberty to proceed against him for any other personal injury: which surmise, of being in the marshal's custody, the defendant is not at liberty to dispute.(*b*) And these fictions of law, though at first they may startle the student, he will find upon further consideration to be highly beneficial and useful; especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law.(*c*) So true it is, that *in fictione juris semper subsistit æquitas.*(*d*) In the present case, it gives the suitor his choice of more than one tribunal before which he may institute his action; and prevents the circuity and delay of justice, by allowing that suit to be originally, and in the first instance, commenced in this court, which, after a determination in another, might ultimately be brought before it on a writ of error.[12]

For this court is likewise a court of appeal, into which may be removed by writ of error all determinations of the court of common pleas, and of all inferior courts of record in England; and to which a writ of error lies also from the court of king's bench in Ireland. Yet even this so high and honourable court is not the *dernier resort* of the subject; for, if he be not satisfied with any determination here, he may remove it by writ of error into the house of lords,

(*u*) Finch, L. 198. 2 Inst. 23. *Dyversité de courtes* c. *bank le roy.*
(*w*) F. N. B. 86, 92. 1 Lilly. Pract. Reg. 503.
(*x*) 4 Inst. 76. Trye's Jus Filizar. 101.
(*y*) Carth. 234.
(*z*) 4 Inst. 71.
(*a*) Ibid. 72.
(*b*) Thus too in the civil law: *contra fictionem non admittitur probatio: quid enim efficeret probatio veritatis, ubi fictio adversus veritatem fingit. Nam fictio nihil aliud est, quam legis adversus veritatem in re possibili ex justa causa dispositio. Gothofred. in Ff. l.* 22, *t.* 3.
(*c*) 3 Rep. 30. 2 Roll. Rep. 502.
(*d*) 11 Rep. 51. Co. Litt. 150.

[11] This is not the present practice. R. T. Hardw. 317. Tidd's Prac. 8 ed. 97.—CHITTY.
[12] But, as there is no reason for doing that indirectly which may be done directly, it was considered expedient to abolish this among other legal fictions, (2 W. IV. c. 39,) and the mode of commencing an action has for some time been and is now, uniform in all the superior courts.—STEWART.

or the court of exchequer chamber, as the case may happen, according to the nature of the suit and the manner in which it has been prosecuted.[13]

VII. The court of exchequer is inferior in rank not only to the court of king's bench, but to the common pleas also: but I have chosen to consider it in this order on account of its double capacity as a court of law and a court of equity *also. It is a very antient court of record, set up by William the Con-
*44] querer,(e) as a part of the *aula regia*,(f) though regulated and reduced to its present order by king Edward I.,(g) and intended principally to order the revenues of the crown, and to recover the king's debts and duties.(h) It is called the exchequer, *scaccharium*, from the checked cloth, resembling a chess-board, which covers the table there, and on which, when certain of the king's accounts are made up, the sums are marked and scored with counters. It consists of two divisions: the receipt of the exchequer, which manages the royal revenue, and with which these commentaries have no concern; and the court or judicial part of it, which is again subdivided into a court of equity and a court of common law.[14]

The court of equity is held in the exchequer chamber before the lord treasurer, the chancellor of the exchequer, the chief baron, and three *puisnè* ones. These Mr. Selden conjectures(i) to have been antiently made out of such as were barons of the kingdom, or parliamentary barons; and thence to have derived their name; which conjecture receives great strength from Bracton's explanation of *magna carta*, c. 14, which directs that the earls and barons be amerced by their peers; that is, says he, by the barons of the exchequer.(k) The primary and original business of this court is to call the king's debtors to account, by bill filed by the attorney-general; and to recover any lands, tenements, or hereditaments, any goods, chattels, or other profits or benefits, belonging to the crown. So that by their original constitution the jurisdiction of the court of common pleas, king's bench, and exchequer was entirely separate and distinct: the common pleas being intended to decide all controversies between subject and subject; the king's bench to correct all crimes and misdemeanours that amount to a breach of the peace, the king being then plaintiff, as such offences are in open derogation of the *jura regalia* of his crown; and the exchequer to adjust *and recover his revenue, wherein the king
*45] also is plaintiff, as the withholding and non-payment thereof is an injury to his *jura fiscalia*. But, as by a fiction almost all sorts of civil actions are now allowed to be brought in the king's bench, in like manner by another fiction all kinds of personal suits may be prosecuted in the court of exchequer. For as

(e) Lamb. *Archeion*. 24.
(f) Madox Hist. Exch. 109.
(g) Spelm. *Gail. I. in cod. leg. vet. apud* Wilkins.
(h) 4 Inst. 103–116.
(i) Tit. Hon. 2, 5, 16.
(k) *L.* 3, *tr.* 2, c. 1, § 3.

[13] The appeal from the King's or Queen's Bench is now in all cases to the justices of the Common Pleas and barons of the exchequer, in the exchequer-chamber, from whose judgment an appeal lies to the house of lords.—Stewart.

[14] Though this court is inferior in rank as well to the court of Common Pleas as the King's Bench, and though, in general, a subject has a right to resort to either of the superior courts for the redress of a civil injury, yet this court, having an original, and in many cases an exclusive, jurisdiction in fiscal matters, will not permit questions, in the decision of which the king's revenue or his officers are interested, to be discussed before any other tribunal; and therefore, if an action of trespass against a revenue-officer for his conduct in the execution of his office be brought in the court of Common Pleas or King's Bench, it may be removed into the office of pleas of this court of exchequer. 1 Anstr. 205. Hardr. 176. Parker, 143. 1 Price, 206. 8 Price, 584. Manning's Exchequer Prac. 161, 164, n. On such occasions the court interposes on motion, by ordering the proceeding to be removed into the office of pleas, which order operates by way of injunction. The usual order in cases of this nature is that the action be removed out of the King's Bench or Common Pleas, or other court in which it is depending, into the office of pleas, and that it shall be there in the same forwardness as in the court out of which the action is removed. This order, however, does not operate as a certiorari to remove the proceedings, but as a personal order on the party to stay them there, and, of course, calls on the defendant in the action to appear, accept a declaration, and put the plaintiff in the same state of forwardness in the office of pleas as he was in the other court. Per Eyre, Ch. B. 1 Anstr. 205, in notes.—Chitty.

all the officers and ministers of this court have, like those of other superior courts, the privilege of suing and being sued only in their own court; so also the king's debtors and farmers, and all accomptants of the exchequer, are privileged to sue and implead all manner of persons in the same court of equity that they themselves are called into. They have likewise privilege to sue and implead one another, or any stranger, in the same kind of common-law actions (where the personalty only is concerned) as are prosecuted in the court of common pleas.

This gives original to the common-law part of their jurisdiction, which was established merely for the benefit of the king's accomptants, and is exercised by the barons only of the exchequer, and not the treasurer or chancellor. The writ upon which all proceedings here are grounded is called a *quo minus:* in which the plaintiff suggests that he is the king's farmer or debtor, and that the defendant hath done him the injury or damage complained of; *quo minus sufficiens existit*, by which he is less able to pay the king his debt or rent. And these suits are expressly directed, by what is called the statute of Rutland,(*l*) to be confined to such matters only as specially concern the king or his ministers of the exchequer. And by the *articuli super cartas*,(*m*) it is enacted, that no common pleas be thenceforth holden in the exchequer contrary to the form of the great charter. But now, by the suggestion of privilege, any person may be admitted to sue in the exchequer as well as the king's accomptant. The surmise, of being debtor to the king, is therefore become matter of form and mere words of course, and the court is open to all the nation equally.[15] The same holds with regard to the equity side of the court: for there any person may file *a bill against another upon a bare suggestion that he is the king's accomptant; but whether he is so, or not, is never controverted. In this [*46 court on the equity side, the clergy have long used to exhibit their bills for the non-payment of tithes; in which case the surmise of being the king's debtor is no fiction, they being bound to pay him their first-fruits and annual tenths. But the chancery has of late years obtained a large share in this business.

An appeal from the equity side of this court lies immediately to the house of peers; but from the common-law side, in pursuance of the statute 31 Edw. III c. 12, a writ of error must be first brought into the court of exchequer chamber. And from the determination there had, there lies, in the *dernier resort*, a writ of error to the house of lords.[16]

VIII. The high court of chancery is the only remaining, and in matters of civil property by much the most important of any, of the king's superior and original courts of justice. It has its name of chancery, *cancellaria*, from the judge who presides here, the lord chancellor, or *cancellarius;* who, Sir Edward Coke tells us, is so termed *a cancellando*, from cancelling the king's letters patent when granted contrary to law, which is the highest point of his jurisdiction.(*n*)[17] But the office and name of chancellor (however derived) was

(*l*) 10 Edw. I. c. 11. (*m*) 28 Edw. I. c. 4. (*n*) 4 Inst. 88.

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[15] This fiction has been for some time abolished. 2 W. IV. c. 39.—STEWART.

[16] By the 31 Edward III. c. 12, this court of appeal is to consist of the chancellor and treasurer, and such justices and sage persons as they shall think fit. It is altered by 31 Eliz. c. 1, 16 Car. II. c. 2, 20 Car. II. c. 4, from which it appears that the court may consist of both the chief justices, or one of them, or of the chancellor, provided the chancellor is present when the judgment is given. See the proceedings in the case of Johnstone *vs.* Sutton in this court. 1 T. R. 493.—CHITTY.

But by statute 5 Vict. c. 5 its jurisdiction as a court of equity was transferred to the court of chancery; and it is now only a court of law and revenue, with five judges,—a chief and four puisnè barons,—like the courts of Queen's Bench and Common Pleas. From the judgment of this court an appeal lies to the justices of the Queen's Bench and Common Pleas, sitting as the court of exchequer chamber; and from that court an appeal lies to the house of lords.—KERR.

[17] According to the opinion of several learned authors, (as Mr Cambden, in his Britannia, and Dr. Cowell, in his Interpreter, have observed,) the chancery had its name originally from certain bars laid one over another crosswise, like a lattice, wherewith it was environed to keep off the press of the people, and not to hinder the view of those

certainly known to the courts of the Roman emperors: where it originally seems to have signified a chief scribe or secretary, who was afterwards invested with several judicial powers, and a general superintendency over the rest of the officers of the prince. From the Roman empire it passed to the Roman church, ever emulous of imperial state; and hence every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. But in all of them he seems to have had the supervision of all charters, letters, and such other public instruments of the crown as were authenticated in the most solemn manner: and therefore *47] *when seals came in use, he had always the custody of the king's great seal. So that the office of chancellor, or lord keeper,[18] (whose authority, by statute 5 Eliz. c. 18, is declared to be exactly the same,) is with us at this day created by the mere delivery of the king's great seal into his custody:(*o*) whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior in point of precedency to every temporal lord.(*p*) He is a privy counsellor by his office,(*q*) and, according to lord chancellor Ellesmere,(*r*) prolocutor of the house of lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom. Being formerly usually an ecclesiastic, (for none else were then capable of an office so conversant in writings,) and presiding over the royal chapel,(*s*) he became keeper of the king's conscience; visitor in right of the king, of all hospitals and colleges of the king's foundation; and patron of all the king's livings under the value of twenty marks(*t*) *per annum* in the king's books.[19] He is the general guardian of all infants, idiots, and lunatics;

(*o*) Lamb. *Archeion*. 65. 1 Roll. Abr. 385.
(*p*) Stat. 31 Hen. VIII. c. 10.
(*q*) Selden, Office of Lord Chanc. § 3.
(*r*) Of the office of lord chancellor, edit. 1651.
(*s*) Madox, Hist. of Exch. 42.
(*t*) 38 Edw. III. 3 F. N. B. 35, though Hobart (214) extends this value to twenty *pounds*.

officers who sat therein,—such gates or crossbars being by the Latins called *cancelli*. *Vid*. Dugd. 32. Cambden, Cowell, Cassiod. ep. 6, lib. 11. Pet. Pythæus, lib. 2, advers. c. 12. 1 Harr. Ch. 1. Dr. Johnson seems also inclined to this definition; and it indeed appears the most reasonable, for we have also the word "chancel," which signifies that part of the church formerly *barred* off from the body of it.—Chitty.

[18] King Henry V. had two great seals, one of gold, which he delivered to the bishop of Durham and made him lord chancellor, another of silver, which he delivered to the bishop of London to keep; and historians often confound chancellors and keepers. (1 Harr. Ch. 68, note. 4 Inst. 88:) but at this day, there being but one great seal, there cannot be both a chancellor and a lord keeper of the great seal at one time, because both are but one office, as is declared by the stat. 5 Eliz. 4 Inst. 88, and the taking away the seal determines the office. 1 Sid. 338. It seems that it is not inconsistent for the lord chancellor also to hold the office of chief justice of the King's Bench. Lord Hardwicke held both offices from 20th February till 7th June. 1 Sid. 338. Com. Dig. tit. Chancery, (B. 1.)—Chitty.

[19] With regard to the chancellor's patronage there seems to be some inaccuracy in the learned judge's text and references. I humbly conceive that a truer statement is this,—viz., that it appears from the rolls of parliament in the time of Edward III. that it had been the usage before that time for the chancellors to give all the king's livings taxed (by the subsidy assessments) at twenty marks or under, to the clerks, who were then actually *cleri* or clergymen, who had long laboured in the court of chancery; but that the bishop of Lincoln, when he was chancellor, had given such livings to his own and other clerks, contrary to the pleasure of the king and the ancient usage; and therefore it is recommended to the king by the council to command the chancellor to give such livings only to the clerks of chancery, the exchequer, and the other two benches or courts of Westminster hall. 4 Edw. III. n. 51. But since the new valuation of benefices, or the king's books, in the time of Henry the Eighth, and the clerks ceased to be in order, the chancellor has had the absolute disposal of all the king's livings, even where the presentation devolves to the crown by lapse, of the value of twenty pounds a year or under in the king's books. It does not appear how this enlarged patronage has been obtained by the chancellor; but it is probably by a private grant of the crown, from a consideration that the twenty marks in the time of Edward III. were equivalent to twenty pounds in the time of Henry VIII. Gibs. 764. 1 Burn, Ec. Law, 129.

and has the general superintendence of all charitable uses in the kingdom. And all this over and above the vast and extensive jurisdiction which he exercises in his *judicial* capacity in the court of chancery; wherein, as in the exchequer, there are two distinct tribunals: the one ordinary, being a court of common law; the other extraordinary, being a court of equity.

The ordinary legal court is much more antient than the court of equity. Its jurisdiction is to hold plea upon a *scire facias* to repeal and cancel the king's letters-patent, when made against law or upon untrue suggestions; and to hold plea of petitions, *monstrans de droit*, traverses of offices, and the like; when the king hath been advised to do any act, or is put in possession of any lands

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So far this was the note in my first edition; but a reverend gentleman has been so obliging as to suggest to me that, having once had occasion to examine the subject, he was inclined to think that the chancellor's patronage was confined to benefices under 20*l.* a year, and that livings exactly of that value belonged to the king, to be presented to by himself or his minister. Having, in consequence, looked more attentively into the subject, I am still of opinion that the authorities support what is advanced in the preceding part of the note. It cannot be doubted that since the new *valor beneficiorum*, *pounds* were intended to be substituted for *marks*, and this is expressly stated by bishop Gibson, p. 764. In the 4 Edw. III., cited above, the chancellor's patronage is stated to be of all livings of 20 marks and under, *del tax de vint marces et dedeyns*. In the 1 Hen. VI. note 25, Rolls of Parliament, there is a record appointing the duke of Bedford protector, and the duke of Gloucestor protector in his absence; and amongst other privileges it grants the protector, for the time-being, the patronage of all the livings belonging to the crown, *ultra taxam viginti marcarum usque ad taxam triginta marcarum inclusivè*, and reserves the rest of the royal patronage to the king, except the benefices belonging to the chancellor, *virtute officii sui*. The word *inclusivè* can only apply to the words *usque ad triginta;* it cannot be reconciled with *ultra*, which was intended to leave the chancellor 20 or under. This is also clearly expressed in the Registrum Brevium 307, where there is an ancient writ called *de primo beneficio ecclesiastico habendo. Volumus quod idem* A. *ad primum beneficium ecclesiasticum* (*taxationem viginti marcarum excedens*) *vacaturum, quod ad præsentionem nostram pertinuerit*, &c.

In the year-book, 38 Edw. III. 3, it is laid down as law that the king shall present to *toutz esglises que passent l'extent de* 20 *marcs;* and in the next line it is said that the chancellor shall present to all not taxed at 20 marks, and having understood that the living in question was taxed at 40*s.* he had presented to it, but as, in fact, it was taxed at 40*l.*, the king claimed it. The words in French state the general law; the rest only apply to the particular case. Yet Watson is so careless as to state the chancellor's patronage to be under 20 marks and under 20*l.*, and refers to this authority, ch. 9. But it is correctly cited by Comyns to support the position that the chancellor has the patronage of 20 marks or 20*l.* Dig. tit. Esgl. H. 5. In Fitz. N. B. 35 it is stated to be *under* 20 marks, without taking any notice of 20 exactly. And in a case in Hob. 214 the word is *under*. In that case the chancellor had presented to a living lapsed to the crown above 20*l.* a year, and it was held that the king could have no remedy, because the presentation had passed the great seal, and therefore apparently made by the king himself; but if the presentation had stated that the benefice was under the value of 20*l.*, then it would have been void, because the chancellor must have been deceived. In this case there was no occasion to state the instance of a living of the exact value of 20*l.* This was a benefice which had devolved to the crown by lapse; but no objection is made on that ground, and there seems to be no reason for any distinction, whether the benefice devolves to the king by lapse or by promotion of the incumbent, or it is part of his original patronage. I have stated the authorities which expressly give the chancellor the patronage of the value of 20 marks, or now 20*l.*, and I have referred to those which state it to be *under;* and, I cannot but observe, so far they are all consistent, as I find no authority in opposition to those above, declaring that livings of the value of 20*l.* belong to the king and not to the chancellor.

The gentleman who wished me to examine the authorities upon this subject was so obliging as to inform me that the crown has the patronage of five livings of the exact value of 20*l.* in the king's books, but that several others of that value occasionally devolve to the crown by lapse and promotion; that he has examined the church-book in the secretary of state's office, and that he finds within the last century many instances of presentations to those livings by the crown; but he admits in some modern instances where the right to the presentation has been claimed both by the chancellor and the minister, that the latter has yielded to the former. From the whole, one is led to conclude that these presentations made by the crown were owing either to the inattention or the accommodation of the chancellor.—CHRISTIAN.

or goods, in prejudice of a subject's right.(*u*) On proof of which, as the king *48] can never *be supposed intentionally to do any wrong, the law questions not but he will immediately redress the injury, and refers that conscientious task to the chancellor, the keeper of his conscience. It also appertains to this court to hold plea of all personal actions, where any officer or minister of the court is a party.(*v*) It might likewise hold plea (by *scire facias*) of partitions of land in coparcenery,(*w*) and of dower,(*x*) where any ward of the crown was concerned in interest, so long as the military tenures subsisted: as it now may also do of the tithes of forest land, where granted by the king, and claimed by a stranger against the grantee of the crown;(*y*) and of executions on statutes, or recognizances in nature thereof, by the statute 23 Henry VIII. c. 6.(*z*) But if any cause comes to issue in this court, that is, if any fact be disputed between the parties, the chancellor cannot try it, having no power to summon a jury; but must deliver the record *propria manu* into the court of king's bench, where it shall be tried by the country, and judgment shall be there given thereon.(*a*)[20] And when judgment is given in chancery upon demurrer or the like, a writ of error in nature of an appeal lies out of this ordinary court into the court of king's bench:(*b*) though so little is usually done on the common-law side of the court, that I have met with no traces of any writ of error(*c*) being actually brought, since the fourteenth year of queen Elizabeth, A.D. 1572.

In this ordinary or legal court is also kept the *officina justitiæ:* out of which all original writs that pass under the great seal, all commissions of charitable uses, sewers, bankruptcy, idiotcy, lunacy, and the like, do issue; and for which it is always open to the subject, who may there at any time demand and have, *49] *ex debito justitiæ*, any writ that his occasions *may call for. These writs (relating to the business of the subject) and the returns to them were, according to the simplicity of antient times, originally kept in a hamper, *in hanaperio;* and the others (relating to such matters wherein the crown is immediately or mediately concerned) were preserved in a little sack or bag, in *parva baga:* and thence hath arisen the distinction of the *hanaper* office and *petty bag* office, which both belong to the common-law court in chancery.

But the extraordinary court, or court of equity, is now become the court of the greatest judicial consequence. This distinction between law and equity, as administered in different courts, is not at present known, nor seems to have

(*u*) 4 Rep. 54.
(*v*) 4 Inst. 80.
(*w*) Co. Litt. 171. F. N. B. 62.
(*x*) Bro. Abr. tit. *Dower*, 66. Moor. 565.
(*y*) Bro. Abr. tit. *Dismes*, 10.
(*z*) 2 Roll. Abr. 469.
(*a*) Cro. Jac. 12. Latch. 112.
(*b*) Year-book, 18 Edw. III. 25. 17 Ass. 24. 29 Ass. 47. Dyer, 315. 1 Roll. Rep. 287. 4 Inst. 80.
(*c*) The opinion of lord-keeper North, in 1682, (1 Vern. 131. 1 Eq. Ca. Abr. 129,) that no such writ of error lay, and that an injunction might be issued against it, seems not to have been well considered.

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[20] But on the equity side of the court questions of fact may be decided without an issue; but this jurisdiction ought to be exercised very tenderly and sparingly. 9 Vesey, 168. On the trial of an issue directed out of chancery, if either party be desirous of having a special jury, it is said to be proper to move the court of chancery for that purpose. See Prec. Ch. 264. 2 P. Wms. 68. 4 M. & S. 195, 196.—Chitty.

It is important to confine this observation (which is not always done) to the common-law side of the court of chancery. Sitting as a judge at common law and trying causes according to the rules of the common law, the lord chancellor cannot decide by himself a disputed fact, and has no power of issuing process to the sheriff or other officer for summoning a jury. But on the equity side of the court, where the jurisdiction of the lord chancellor is placed entirely on other grounds than those of the common law, he is equally competent to decide on disputed facts as on disputed law; and it is matter of discretion only when he either orders or permits the parties to submit the trial of such fact to the cognizance of a jury. For the manner in which this is done, see *post*, 452. According to the later precedents, when a record comes into the King's Bench from chancery, the chancellor does not deliver it *propria manu*, but sends it by the clerk of the petty bag. 1 Eq. Ca. Abr. 128.—Coleridge.

And now, by 12 & 13 Vict. c. 109, any issue, either of fact or law, must be sent to one of the three superior courts of law, there to be determined according to the ordinary course of proceeding in those courts.—Stewart.

ever been known, in any other country at any time:(*d*) and yet the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the Romans;(*e*) the *jus prætorium*, or discretion of the prætor, being distinct from the *leges*, or standing laws,(*f*) but the power of both centred in one and the same magistrate, who was equally intrusted to pronounce the rule of law, and to apply it to particular cases by the principles of equity. With us, too, the *aula regia*, which was the supreme court of judicature, undoubtedly administered equal justice according to the rules of both or either, as the case might chance to require: and, when that was broken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition. For though equity is mentioned by Bracton(*g*) as a thing contrasted to strict law, yet neither in that writer, nor in Glanvil or Fleta, nor yet in Britton, (composed under the auspices and in the name of Edward I., and *treating particularly of courts and their several jurisdictions,) is there a syllable to be found relating to the equitable jurisdiction of the court of chancery. It seems therefore probable, that when the courts of law, proceeding merely upon the ground of the king's original writs, and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the king in person assisted by his privy-council, (from whence also arose the jurisdiction of the court of requests,(*h*) which was virtually abolished by the statute 16 Car. I. c. 10;) and they were wont to refer the matter either to the chancellor and a select committee, or by degrees to the chancellor only, who mitigated the severity or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the custom not only among our Saxon ancestors, before the institution of the *aula regia*,(*i*) but also after its dissolution, in the reign of king Edward I.;(*k*) and perhaps, during its continuance, in that of Henry II.(*l*) [*50

In these early times the chief judicial employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered. And to quicken the diligence of the clerks in the chancery, who were too much attached to antient precedents, it is provided by statute Westm. 2, 13 Edw. I. c. 24, that "whensoever from thenceforth in one case a writ shall be found in the chancery, and in a like case falling under the same right and requiring like remedy *no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one; and, if they cannot agree, it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the law,(*m*) lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors." And this accounts for the very great variety of writs of trespass on the case to be met with in the register; whereby the suitors had ready relief, according to the exigency of his business, and adapted to the specialty, reason, and equity of his very case.(*n*) Which provision (with a little accuracy in the clerks of the chancery, and a little liberality in the judges, by extending rather than narrowing the remedial effects of the writ) [*51

(*d*) The *Council of Conscience*, instituted by John III. king of Portugal, to review the sentence of all inferior courts and moderate them by equity, (Mod. Un. Hist. xxii. 237,) seems rather to have been a court of appeal.

(*e*) Thus too the parliament of Paris, the court of session in Scotland, and every other jurisdiction in Europe of which we have any tolerable account, found all their decisions as well upon principles of equity as those of positive law. Lord Kaimes's Histor. Law Tracts, i. 325, 330; Princ. of Equity, 44.

(*f*) Thus Cicero: "*jam illis promissis, non esse standum, quis non videt, quæ coactus quis metu et deceptus dolo promiserit? quæ quidem plerumque jure prætorio liberantur, nonnulla legibus.*" Offic. *l.* i.

(*g*) *L.* 2, c. 7, fol. 23.

(*h*) The matters cognizable in this court, immediately before its dissolution, were "almost all suits that, by colour of equity, or supplication made to the prince, might be brought before him; but originally and properly all poor men's suits, which were made to his majesty by supplication, and upon which they were entitled to have right, without payment of any money for the same." Smith's Commonwealth, b. 3, c. 7.

(*i*) *Nemo ad regem appellet pro aliqua lite, nisi jus domi consequi non possit. Si jus nimis severum sit, alleviatio deinde quæratur apud regem. LL. Edg.* c. 2.

(*k*) Lambard. *Archeion.* 59.

(*l*) Joannes Sarisburiensis, (who died A.D. 1182, 26 Hen. II.,) speaking of the chancellor's office in the verses prefixed to his *polycraticon*, has these lines:—

Hic est, qui leges regni cancellat iniquas
Et mandata pii principis æqua facit.

(*m*) A great variety of new precedents of writs, in cases before unprovided for, are given by this very statute of Westm. 2.

(*n*) Lamb. *Archeion.* 61.

might have effectually answered all the purposes of a court of equity;(o) except that of obtaining a discovery by the oath of the defendant.

But when, about the end of the reign of king Edward III., uses of land were introduced,(p) and, though totally discountenanced by the courts of common law, were considered as fiduciary deposits and binding in conscience by the clergy, the separate jurisdiction of the chancery as a court of equity began to be established;(q) and John Waltham, who was bishop of Salisbury and chancellor to king Richard II., by a strained interpretation of the above-mentioned statute of Westm. 2, devised the writ of *subpœna*, returnable in the court of chancery only, to make the feoffee to uses accountable to his *cestuy que use:* which process was afterwards extended to other matters wholly determinable at the common law, upon false and fictitious suggestions; for which therefore the chancellor himself is, by statute 17 Ric. II. c. 6, directed to give damages to the party unjustly aggrieved. But as the *clergy, so early as the reign of king Stephen, had attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits *pro læsione fidei*, as a spiritual offence against conscience, in case of non-payment of debts or any breach of civil contracts;(r) till checked by the constitutions of Clarendon,(s) which declared that "*placita de debitis, quæ fide interposita debentur, vel absque interpositione fidei, sint in justitia regis:*" therefore probably the ecclesiastical chancellors, who then held the seal, were remiss in abridging their own new-acquired jurisdiction; especially as the spiritual courts continued(t) to grasp at the same authority as before in suits *pro læsione fidei* so late as the fifteenth century,(u) till finally prohibited by the unanimous concurrence of all the judges. However, it appears from the parliament rolls,(w) that in the reigns of Henry IV. and V. the commons were repeatedly urgent to have the writ of *subpœna* entirely suppressed, as being a novelty devised by the subtlety of chancellor Waltham against the form of the common law; whereby no plea could be determined unless by examination on oath of the parties, according to the form of the law civil, and the law of holy church, in subversion of the common law. But though Henry IV., being then hardly warm in his throne, gave a palliating answer to their petitions, and actually passed the statute 4 Hen. IV. c. 23, whereby judgments at law are declared irrevocable unless by attaint or writ of error, yet his son put a negative at once upon their whole application: and in Edward IV.'s time the process by bill and *subpœna*, was become the daily practice of the court.(x)

*52]

*But this did not extend very far: for in the antient treatise entitled *diversité des courtes*,(y) supposed to be written very early in the sixteenth century, we have a catalogue of the matters of conscience then cognizable by *subpœna* in chancery, which fall within a very narrow compass. No regular judicial system at that time prevailed in the court; but the suitor, when he thought himself aggrieved, found a desultory and uncertain remedy, according to the private opinion of the chancellor, who was generally an ecclesiastic, or sometimes (though rarely) a statesman: no lawyer having sat in the court of chancery from the times of the chief justices Thorp and Knyvet, successively chancellors to king Edward III. in 1372 and 1373,(z) to the promotion of Sir Thomas More by king Henry VIII. in 1530. After which the great seal was indiscriminately committed to the custody of lawyers, or courtiers,(a) or church-

*53]

(o) This was the opinion of Fairfax, a very learned judge in the time of Edward the Fourth. "*Le subpœna* (says he) *ne serroit my cy sovenement use come il est ore, si nous attendomus tiels actions sur les cases, et mainteinomus le jurisdiction de ceo court, et d'auter courts.*" Year-book, 21 Edw. IV. 23.

(p) See book ii. ch. 20.

(q) Spelm. Gloss. 106. 1 Lev. 242.

(r) Lord Lyttelt. Hen. II. b. iii. p. 361, note.

(s) 10 Hen. II. c. 15. Speed. 458.

(t) In 4 Hen. III., suits in court Christian *pro læsione fidei* upon temporal contracts were adjudged to be contrary to law. Fitz. Abr. tit. *Prohibition*, 15. But in the statute or writ of *circumspecte agatis*, supposed by some to have issued 13 Edw. I., but more probably (3 Pryn. Rec. 336) 9 Edw. II., suits *pro læsione fidei* were allowed to the ecclesiastical courts; according to some ancient copies, (Berthelet *stat. antiq.* Lond. 1531, 90, b. 3 Pryn. Rec. 386,) and the common English translation of that statute; though in Lyndewode's copy (*Prov. l.* 2, *t.* 2) and in the Cotton MS. (*Claud.* D. 2) that clause is omitted.

(u) Year-book. 2 Hen. IV. 10. 11 Hen. IV. 88. 38 Hen. VI. 29. 20 Edw. IV. 10.

(w) *Rot. Parl.* 4 Hen. IV. N° 78 and 110. 3 Hen. V. N° 46, cited in Prynne's Abr. of Cotton's Records, 410, 422, 424, 548. 4 Inst. 83. 1 Roll Abr. 370, 371, 372.

(x) *Rot. Parl.* 14 Edw. IV. N° 33, (not 14 Edw. III.) as cited 1 Roll. Abr. 370, &c.

(y) Tit. *Chancery*, fol. 296. Rastell's edit. A.D. 1534.

(z) Spelm. Gloss. 111. Dugd. *Chron. Ser.* 50.

(a) Wriothesly, St. John, and Hatton.

men,(*b*) according as the convenience of the times and the disposition of the prince required, till serjeant Puckering was made lord keeper in 1592; from which time to the present the court of chancery has always been filled by a lawyer, excepting the interval from 1621 to 1625, when the seal was intrusted to Dr. Williams, then dean of Westminster, but afterwards bishop of Lincoln; who had been chaplain to lord Ellesmere when chancellor.(*c*)

In the time of lord Ellesmere (A.D. 1616) arose that notable dispute between the courts of law and equity, set on foot by Sir Edward Coke, then chief justice of the court of king's bench; whether a court of equity could give relief after or against a judgment at the common law? This contest was so warmly carried on, that indictments were preferred against the suitors, solicitors, the counsel, and even a master in chancery; for having incurred a *præmunire* by questioning in a court of equity a judgment in the court of king's bench obtained by gross fraud and imposition.(*d*) This matter, being brought before the king, was by him referred *to his learned counsel for their advice and opinion; who reported so strongly in favour of the courts of equity,(*e*) that his ma- [*54 jesty gave judgment in their behalf; but, not contented with the irrefragable reasons and precedents produced by his counsel, (for the chief justice was clearly in the wrong,) he chose rather to decide the question by referring it to the plenitude of his royal prerogative.(*f*) Sir Edward Coke submitted to the decision,(*g*) and thereby made atonement for his error: but this struggle, together with the business of *commendams*, (in which he acted a very noble part,)(*h*) and his controlling the commissioners of sewers,(*i*) were the open and avowed causes,(*k*) first of his suspension, and soon after of his removal, from his office.

Lord Bacon, who succeeded lord Ellesmere, reduced the practice of the court into a more regular system; but did not sit long enough to effect any considerable revolution in the science itself: and few of his decrees which have reached us are of any great consequence to posterity. His successors, in the reign of Charles I., did little to improve upon his plan: and even after the restoration the seal was committed to the earl of Clarendon, who had withdrawn from practice, as a lawyer, near twenty years; and afterwards to the earl of Shaftesbury, who (though a lawyer by education) had never practised at all. Sir Heneage Finch, who succeeded in 1673, *and became afterwards [*55 earl of Nottingham, was a person of the greatest abilities and most uncorrupted integrity; a thorough master and zealous defender of the laws and constitution of his country; and endued with a pervading genius that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade and the abolition of military tenures, co-operated in establishing his plan, and enabled him, in the course of nine years, to build a system of jurisprudence and jurisdiction upon wide and rational foundations; which have also been extended and improved by many great men who have since presided in chancery. And from that time to this the power and business of the court have increased to an amazing degree.[21]

(*b*) Goodrick, Gardiner, and Heath.

(*c*) Biog. Brit. 4278.

(*d*) Bacon's Works, iv. 611, 612, 682.

(*e*) Whitelocke of Parl. ii. 390. 1 Chanc. Rep. Append. 11.

(*f*) "For that it appertaineth to our princely office only to judge over all judges, and to discern and determine such differences as at any time may and shall arise between our several courts touching their jurisdiction, and the same to settle and determine as we in our princely wisdom shall find to stand most with our honour," &c. 1 Chanc. Rep. Append. 26

(*g*) See the entry in the council-book, 26 July, 1616. Biog. Brit. 1390.

(*h*) In a cause of the bishop of Winchester, touching a *commendam*, king James, conceiving that the matter affected his prerogative, sent letters to the judges not to proceed in it till himself had been first consulted. The twelve judges joined in a memorial to his majesty, declaring that their compliance would be contrary to their oaths and the law; but, upon being brought before the king and council, they all retracted and promised obedience in every such case for the future, except Sir Edward Coke, who said "that, when the case happened, he would do his duty." Biog. Brit. 1398.

(*i*) See that article in ch. 6.

(*k*) See lord Ellesmere's speech to Sir Henry Montague, the new chief justice, 15 Nov. 1616, Moor's Reports, 828. Though Sir Edward might probably have retained his seat, if, during his suspension, he would have complimented lord Villiers (the new favourite) with the disposal of the most lucrative office in his court. Biog. Brit. 1391.

[21] Besides the chancellor, the *master of the rolls* has jurisdiction of judging causes on the

From this court of equity in chancery, as from the other superior courts, an appeal lies to the house of peers. But there are these differences between appeals from a court of equity, and writs of error from a court of law: 1. That the former may be brought upon any interlocutory matter; the latter upon

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extraordinary side of the court of chancery. Cardinal Wolsey was, it is said, the first who introduced this power, though then much objected to; yet now it seems he is authorized by special commission under the great seal. Wyatt, Prac. Reg. 278. Com. Dig. Chancery, B. 4. The time and place of his sitting are usually at six o'clock in the evening at his own court in the rolls yard. All decrees made by him must be signed by the lord chancellor before they are enrolled. 3 Geo. II. c. 30, s. 1. By statute 23 Geo. II. c. 25, s. 6, a yearly sum of 1200*l.* was granted to him; and by the late act 6 Geo. IV. c. 84 his salary is raised to 7000*l.* He holds his office by patent for life, and takes the oath prescribed by 18 Edw. III. in open court. Wyatt, Prac. Reg. 277. He takes precedence next after the chancellor, before all other of the judges.

Owing to the great increase of business, and which is still increasing, it was provided, by the 53 Geo. III. c. 24, that his majesty might appoint an additional judge-assistant, called the *vice-chancellor*, to assist the chancellor, who must be a barrister of fifteen years' standing, to hold his office during good behaviour, subject to removal upon the address of both houses. By sect. 2, he shall hear such cases as the chancellor shall direct. His decrees shall be subject to reversal by the chancellor, and must be signed by the latter before they are enrolled. By sect. 3, he cannot alter or vary a decree of chancellor or master of rolls. Sect. 4 directs in what court he shall sit; and he is to rank next after the master of rolls. Sect. 5 appoints his officers. Sect. 6, how he is to be removed. Sect. 7, oath of office. Sect. 8, his salary, (5000*l.*, increased by 6 Geo. IV. c. 84 to 6000*l.*) Sect. 12, that he and his officers shall receive no fees for business done. Query, Whether the vice-chancellor has power to hear, by consent, a motion to discharge or alter an order made by the lord chancellor? See 1 J. & W. 429. If he is authorized to discharge it, he is not to alter it. Id. ib. When sitting *for* the lord chancellor, he has no jurisdiction to alter or discharge orders made by the chancellor. Id. 431.

Besides the master of the rolls, (the chief,) there are eleven other *masters in chancery*. Com. Dig. Chancery, B. 5. All answers and affidavits are sworn before one of them and signed; all matters of account, exceptions to answers, &c., irregularities, contempts, and such like, are referred to them. 13 Car. II. st. 6. 12 Geo. I. c. 32. 5 Geo. III. c. 28. 32 Geo. III. c. 42. 9 Geo. III. c. 19. 46 Geo. III. c. 128. Besides these, there are *masters extraordinary*, appointed in the country to take affidavits, &c. Next in precedence are the *six clerks*, each of whom has ten sworn clerks under him. The six clerks are principally concerned in matters in equity, and it is their business to transact and file all proceedings by bill and answer, and also to issue certain patents which pass the great seal, as pardons of men for chance medley, patents for ambassadors, sheriff's patents, and some others. All these matters are transacted by their under-clerks. 1 Harr. Ch. P. 75. Though formerly otherwise, clients are now at liberty to choose their own clerks. Ord. Ch. 107. They claim, besides fees of six clerks' offices, others as comptrollers of the hanaper, and for enrolling warrants, for patents, grants, and other matters passing under the great seal and returned into hanaper office. Six clerks and three clerks of petty bag are by letters-patent (16 Eliz.) incorporated and styled clerks of the enrolment of the high court of chancery, and have two deputies. See 14 & 15 Hen. VIII. c. 8.

The office of *registrar* of this court is of great importance. Com. Dig. Chancery, B. 6. The registrar has four deputies, two of whom always sit in court and take notes of orders and decrees, &c.; and before the same are entered he signs them. 45 Geo. III. c. 75. Besides these, there are the master of the subpœna office, registrar of affidavits, examiners, ushers, accountant-general, (12 Geo. I. c. 32. 12 Geo. II. c. 24. 9 Geo. III. c. 19. 32 Geo. III. c. 42. 46 Geo. III. c. 129. 54 Geo. III. c. 14,) cursitors, clerks of the petty-bag office, serjeant-at-arms, warden of the fleet, clerk of the chapel of the rolls, &c.—Chitty.

The master of the rolls has long administered justice according to the rules of equity, in a separate court. He is appointed by letters-patent, and was formerly the chief merely of the masters in chancery, who carried out the decrees and performed the ministerial functions of the courts of equity. A recent statute (15 & 16 Vict. c. 80) has provided, however, for the gradual abolition of the masters in chancery and the transference of their functions, under an amended procedure, to the judges and their chief clerks. The jurisdiction of the master of the rolls is regulated by the statute 3 Geo. II. c. 30, by which all decrees and orders made by him, except in matters of bankruptcy and lunacy, which when this statute was passed were appropriated exclusively to the lord chancellor, are to be valid, subject, however, to their being discharged or altered on appeal to the lord chancellor. His jurisdiction is extended by the 3 & 4 W. IV. c. 94; and an appeal now lies from his judgment to the lord chancellor, or to the court of

nothing but only a definitive judgment. 2. That on writs of error the house of lords pronounces the judgment; on appeals it gives direction to the court below to rectify its own decree.

IX. The next court that I shall mention is one that hath no original jurisdiction, but is only a court of appeal, to correct the errors of other jurisdictions. This is the court of exchequer chamber; which was first erected by statute 31 Edw. III. c. 12 to determine causes by writs of error from the common-law side of the court of exchequer. And to that end it consists of the lord chancellor and lord treasurer, taking unto them the justices of the king's bench and common pleas. In imitation of which, a second court of exchequer chamber was erected by statute 27 Eliz. c. 8, consisting of the justices of the common pleas, and the barons of the exchequer, before whom writs of error may be brought to reverse judgments *in certain suits(*l*) originally begun in the court of king's bench.[22] Into the court also of exchequer chamber (which then [*56 consists of all the judges of the three superior courts, and now and then the lord chancellor also) are sometimes adjourned from the other courts such causes as the judges upon argument find to be of great weight and difficulty, before any judgment is given upon them in the court below.(*m*)

From all the branches of this court of exchequer chamber a writ of error lies to

X. The house of peers, which is the supreme court of judicature in the kingdom, having at present no original jurisdiction over causes, but only upon appeals and writs of error, to rectify any injustice or mistake of the law com-

(*l*) See ch. xxv. p. 411. (*m*) 4 Inst. 119. 2 Bulst. 146.

appeal in chancery. The master of the rolls is, by 1 & 2 Vict. c. 94, the custodier of the public records.

In 1813, an additional judge in chancery, or vice-chancellor, was created, with power to hear and determine all matters depending in the court of chancery, according to the direction of the lord chancellor. This additional assistance was soon found insufficient to keep under the business which flowed into this court; and in 1832 it was relieved from the jurisdiction in bankruptcy, which it had previously exercised, and which was then transferred to the courts of bankruptcy, an appeal, however, being still open to one of the vice-chancellors appointed to sit in bankruptcy. But this appeal must now be made to the court of appeal in chancery. It was still, however, generally admitted that the court of chancery was inadequate to relieve the crowd of suitors who awaited its judgments, and an increase of judges was loudly called for. Accordingly, when the equity jurisdiction of the court of exchequer was transferred to the court of chancery in 1841, two additional vice-chancellors were appointed, (5 Vict. c. 5;) and a third vice-chancellor's court has since been created. 14 & 15 Vict. c. 4. 15 & 16 Vict. c. 80. These judges are to hear and determine all matters depending in the court of chancery,—either as a court of law or equity,—or which have been or shall be submitted to the jurisdiction of the said court or of the lord chancellor by the special authority of any act of parliament.

There is an appeal from the judgment of any of the vice-chancellors, either to the lord chancellor or to the court of appeal in chancery.

The court of appeal in chancery was created by the stat. 14 & 15 Vict. c. 83. It consists of two lords-justices, appointed by letters-patent, with whom the lord chancellor sometimes sits to form a full court, but who, with or without the lord chancellor, exercise all the jurisdiction in equity possessed by him, without prejudice to his sitting alone and exercising such jurisdiction alone as formerly. This court may consist of the lord chancellor and the two lords-justices, or of the chancellor and one of such judges, or of the two lords-justices sitting together. The appeal in bankruptcy, formerly to one of the vice-chancellors, is now to the two lords-justices, who, together and exclusive of the lord chancellor, constitute the court of appeal in bankruptcy, whose judgment in such cases is final. An appeal from any judgment or order of the master of the rolls or any of the vice-chancellors lies to this court or to the lord chancellor.

From these courts of equity in chancery, as from the other superior courts, an appeal lies to the house of peers.—STEWART.

[22] By the stat. 11 Geo. IV. and 1 W. IV. c. 70, these courts have been abolished, and the court of exchequer chamber, as it now exists, constituted in their place. Error brought upon (that is to say, an appeal presented against) any judgment given by the courts of Queen's Bench, Common Pleas, or Exchequer is to be heard and determined only by the judges—or judges and barons, as the case may be—of the other two courts in the exchequer chamber, from the judgment of which court no error lies except to the house of lords.—STEWART.

mitted by the courts below To this authority this august tribunal succeeded of course upon the dissolution of the *aula regia*. For, as the barons of parliament were constituent members of that court; and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside; it followed, that the right of receiving appeals, and superintending all other jurisdictions, still remained in the residue of that noble assembly, from which every other great court was derived. They are therefore in all causes the last resort, from whose judgment no further appeal is permitted; but every subordinate tribunal must conform to their determinations; the law reposing an entire confidence in the honour and conscience of the noble persons who compose this important assembly, that (if possible) they will make themselves masters of those questions which they undertake to decide, and in all dubious cases refer themselves to the opinions of the judges who are summoned by writ to advise them; since upon their decision all property must finally depend.[23]

Hitherto may also be referred the tribunal established by statute 14 Edw. III. c. 5, consisting (though now out of use) of one prelate, two earls, and two

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[23] It is to be observed that it is not now the practice of the whole body of the house of peers to attend to its judicial business. This is usually transacted entirely by the lord chancellor, or other peers who have filled judicial stations. Deputy speakers of the legal profession not members of the body have been appointed at various times to preside in the absence of the lord chancellor. The attendance of three other lay peers during these sessions of the house is a matter of form settled by rotation; but the lay peers, although thus present, properly abstain from voting on judicial matters,—the arguments on which it would be unreasonable to suppose that they can perfectly understand, and to which they have not always entirely attended. The propriety of their so abstaining has been recently recognised in a case of great importance,—O'Connell *vs.* The Queen, 11 C. & F. 421. The appellate jurisdiction of the house of lords must, however, be admitted to be in an unsettled and unsatisfactory state. 1 Stewart's Blackst. 9.

"There can be no doubt," says Mr. Lewis, "that, both recently and of old, well-founded complaints have been heard of defects in the constitution of the upper house as the final court of appeal and error. The paucity of its legal members, the absence of any constitutional obligation upon their legal members (excepting the chancellor) to attend the transaction of the judicial business, the irregularity of attendance which the engrossing avocations of those who hold judicial office elsewhere renders in their case unavoidable, the advanced years to which most have in general attained who by success in forensic life reach the peerage,—these various circumstances have led to a want of confidence in the constitution of this high court, and a feeling of uncertainty in its administration of justice, which has occasionally been justified by the spectacle of one peer sitting in error from the judgment of a court composed of a plurality of judges; or, again, the decision of judges specially versed and accomplished, it may be, in the branch of jurisprudence involved, reviewed by a peer or peers having no such experience and endowed with no such special knowledge; or, again, two peers only attending and differing,—the one agreeing in and the other dissenting from the decision under review, and thus in effect nullifying the suitor's right to a decision by leaving the case precisely where it was; or, lastly, (and which is perhaps more to be regretted than all,) a single legal peer sitting alone in one character to adjudicate upon a complaint against the decision already pronounced by him in another." Papers of Juridical Society, vol. i. p. 142. With the view of strengthening the judicial staff in the house of peers, baron Parke was recently made a peer for life only, with the title of lord Wensleydale, the object being that hereafter eminent lawyers may be introduced into the highest court without involving any *permanent* addition to the hereditary peerage or to the aristocratic section of the legislature, and without entailing the burden of a hereditary title when there may not be adequate means of supporting it. Great dissatisfaction having been expressed at this movement, as tending to subject the house of peers to the influence and power of the crown and to injuriously affect the balance of the constitution, a patent has been since issued to lord Wensleydale in the usual form.

In New York and New Jersey, and some other States, the plan of investing the Senate or the more permanent branch of the legislature with the functions of a high court of errors and appeals has been fairly tried, and, after an experience of many years in the two States named, has been abandoned. To subject the decisions of lawyers to be reversed in the highest courts by the votes of laymen was found to be productive of confusion and uncertainty, and consequent insecurity to titles and property,—than which a greater evil cannot afflict any community.—Sharswood.

barons, who are to be chosen at every new parliament, to hear complaints of grievances and delays of justice in the king's courts, and (with the advice of the chancellor, treasurer, and justices of both benches) to give directions for remedying these *inconveniences in the courts below. This committee seems to have been established lest there should be a defect of justice for [*57 want of a supreme court of appeal during any long intermission or recess of parliament; for the statute further directs, that if the difficulty be so great that it may not well be determined without assent of parliament, it shall be brought by the said prelate, earls, and barons, unto the *next* parliament, who shall finally determine the same.

XI. Before I conclude this chapter, I must also mention an eleventh species of courts of general jurisdiction and use, which are derived out of, and act as collateral auxiliaries to, the foregoing. I mean the courts of assize and *nisi prius*.

These are composed of two or more commissioners, who are twice in every year sent by the king's special commission all round the kingdom, (except London and Middlesex, where courts of *nisi prius* are holden in and after every term, before the chief or other judge of the several superior courts;[24] and except the four northern counties, where the assizes are holden only once a year,) to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of Westminster hall. These judges of assize came into use in the room of the antient justices in eyre, *justiciarii in itinere*, who were regularly established, if not first appointed, by the parliament of Northampton, A.D. 1176, 22 Hen. II.,(*n*) with a delegated power from the king's great court, or *aula regia*, being looked upon as members thereof; and they afterwards made their circuit round the kingdom once in seven years for the purpose of trying causes.(*o*) They were afterwards directed, by *magna carta*, c. 12, to be sent into every county once a year to take (or receive the verdict of the jurors or recognitors in certain actions, then called) recognitions or assizes; the most difficult of which they are directed to adjourn into the court of common pleas to be there determined. The itinerant justices were sometimes mere justices of assize, or of dower, or of gaol-delivery, and the like; and *they had sometimes a more general commission to determine [*58 all manner of causes, being constituted *justiciarii ad omnia placita*:(*p*) but the present justices of assize and *nisi prius* are more immediately derived from the statute Westm. 2, 13 Edw. I. c. 30, which directs them to be assigned out of the king's sworn justices, associating to themselves one or two discreet knights of each county. By statute 27 Edw. I. c. 4, (explained by 12 Edw. II. c. 3,) assizes and inquests were allowed to be taken before any one justice of the court in which the plea was brought, associating to him one knight or other approved man of the county. And lastly, by statute 14 Edw. III. c. 16,

(*n*) Seld. *Jan. l.* 2, § 5. Spelm. *Cod.* 399.

(*o*) Co. Litt. 293.—*Anno* 1261, *justiciarii itinerantes venerunt apud Wigorniam in octavis S. Johannes Baptistæ;—et totus comitatus eos admittere recusavit, quod* septem *anni nondum erant elapsi, postquam justiciarii ibidem ultimo sederunt. Annal. Eccl. Wigorn. in Whart. Angl. Sacr.* i. 495.

(*p*) Bract. *l.* 3, *tr.* 1, c. 11.

[24] The courts of *Nisi Prius* in London and Middlesex are called *sittings*. Those for Middlesex were established by the legislature in the reign of queen Elizabeth. In ancient times all issues in actions brought in that county were tried at Westminster in the terms, at the bar of the court in which the action was instituted; but when the business of the courts increased these trials were found so great an inconvenience that it was enacted, by the 18 Eliz. c. 12, that the chief-justice of the King's Bench should be empowered to try within the term, or within four days after the end of the term, all the issues joined in the court of chancery and King's Bench; and that the chief-justice of the Common Pleas and the chief-baron should try in like manner the issues joined in their respective courts. In the absence of any one of the chiefs, the same authority was given to two of the judges or barons of his court. The statute 12 Geo. I. c. 31 extended the time to eight days after term, and empowered one judge or baron to sit in the absence of the chief. The 24 Geo. II. c. 18 has extended the time after term still further to fourteen days.—CHRISTIAN.

And the time was afterwards, and still continues, unlimited during the vacation next after the term, by the 1 Geo. IV. c. 55. Before the passing of the 1 Geo. IV. c. 21, the nisi prius sittings in Middlesex were confined to Westminster hall; but by that act they may be held at any other fit place within the city of Westminster.—CHITTY.

inquests of *nisi prius* may be taken before any justice of either bench, (though the plea be not depending in his own court,) or before the chief baron of the exchequer, if he be a man of the law; or otherwise before the justices of assize, so that one of such justices be a judge of the king's bench or common pleas, or the king's serjeant sworn.[25] They usually make their circuits in the respective vacations after Hilary and Trinity terms; assizes being allowed to be taken in the holy time of lent by consent of the bishops at the king's request, as expressed in statute Westm. 1, 3 Edw. I. c. 51. And it was also usual, during the times of popery, for the prelates to grant annual licenses to the justices of assize to administer oaths in holy times; for, oaths being of a sacred nature, the logic of those deluded ages concluded that they must be of ecclesiastical cognizance.(*q*) The prudent jealousy of our ancestors ordained(*r*) that no man of law should be judge of assize in his own county, wherein he was born or doth inhabit;[26] and a similar prohibition is found in the civil law,(*s*) which has carried this principle so far that it is equivalent to the crime of sacrilege for a man to be governor of the province in which he was born or has any civil connexion.(*t*)

The judges upon their circuits now sit by virtue of five several authorities. 1. The commission of the *peace*. 2. A commission of *oyer* and *terminer*. 3. A commission of general *gaol-delivery*. The consideration of all which belongs *59] properly *to the subsequent book of these commentaries. But the fourth commission is, 4. A commission of *assize*, directed to the justices and serjeants therein named, to take (together with their associates) assizes in the several counties,—that is, to take the verdict of a peculiar species of jury, called an assize, and summoned for the trial of *landed* disputes, of which hereafter. The other authority is, 5. That of *nisi prius*, which is a consequence of the commission of *assize*,(*u*) being annexed to the office of those justices by the statute of Westm. 2, 13 Edw. I. c. 30, and it empowers them to try all questions of fact issuing out of the courts of Westminster that are then ripe for trial by jury.[27] These, by the course of the courts,(*w*) are usually appointed to be tried at Westminster in some Easter or Michaelmas Term, by a jury returned from the county wherein the cause of action arises; but with this proviso, *nisi prius, unless before* the day prefixed the judges of assize come into the county in question. This they are sure to do in the vacations preceding each Easter and Michaelmas Term, which saves much expense and trouble. These commissions are constantly accompanied by writs of *association*, in pursuance of the statutes of Edward I. and II. before mentioned; whereby certain persons (usually the clerk of assize and his subordinate officers) are directed to associate themselves with the justices and serjeants, and they are required to admit the said persons into their society, in order to take the assizes, &c., that a sufficient supply of commissioners may never be wanting. But, to prevent the delay of justice by

(*q*) Instances hereof may be met with in the appendix to Spelman's original of the terms, and in Mr. Parker's Antiquities, 209.

(*r*) Stat. 4 Edw. III. c. 2. 8 Ric. II. c. 2. 33 Hen. VIII. c. 24.

(*s*) *Ff.* 1, 22, 3.

(*t*) C. 9, 29, 4.

(*u*) Salk. 454.

(*w*) See ch. xxii. p. 353.

[25] And now, by 1 Geo. IV. c. 55, s. 5, any judge or baron may, on his circuit, amend a record and make any order in any cause, although it was not in a suit depending in his own court.—Chitty.

[26] This restriction was construed to extend to every commission of the judges; but, it being found very inconvenient, the 12 Geo. II. c. 27 was enacted for the express purpose of authorizing the commissioners of *oyer* and *terminer* and of gaol-delivery to execute their commissions in the criminal courts within the counties in which they were born or in which they reside. See 4 book, 271. This restriction as to commissioners of assize and nisi prius was taken off by the 49 Geo. III. c. 91.—Chitty.

[27] An important act, the 3 Geo. IV. c. 10, was lately passed to remedy the defect of the commission not being opened on the day appointed; by which it is enacted that the commission may be opened on the succeeding day to the one appointed; and if such succeeding day be a Sunday, or any other day of public rest, then on the next following day, provided the opening the commission on the appointed day was prevented by the pressure of business elsewhere, or by some unforeseen cause or accident.—Chitty.

the absence of any of them, there is also issued of course a writ of *si non omnes*, directing that if all cannot be present, any two of them (a justice or a serjeant being one) may proceed to execute the commission.

These are the several courts of common law and equity which are of public and general jurisdiction throughout the kingdom. And, upon the whole, we cannot but admire the wise economy and admirable provision of our ancestors in settling the distribution of justice in a method so well calculated for cheapness, expedition, and ease. By the constitution which they established, all trivial debts and injuries of small consequence were to be recovered or redressed in every *man's own county, hundred, or perhaps parish. Pleas of free- [*60 hold, and more important disputes of property, were adjourned to the king's court of common pleas, which was fixed in one place for the benefit of the whole kingdom. Crimes and misdemeanours were to be examined in a court by themselves, and matters of the revenue in another distinct jurisdiction. Now indeed, for the ease of the subject and greater despatch of causes, methods have been found to open all the three superior courts for the redress of private wrongs; which have remedied many inconveniences, and yet preserved the forms and boundaries handed down to us from high antiquity. If facts are disputed, they are sent down to be tried in the country by the neighbours; but the law arising upon those facts is determined by the judges above: and, if they are mistaken in point of law, there remain in both cases two successive courts of appeal to rectify such their mistakes. If the rigour of general rules does in any case bear hard upon individuals, courts of equity are open to supply the defects, but not sap the fundamentals, of the law. Lastly, there presides over all one great court of appeal, which is the last resort in matters of both law and equity, and which will therefore take care to preserve a uniformity and *equilibrium* among all the inferior jurisdictions: a court composed of prelates selected for their piety, and of nobles advanced to that honour for their personal merit, or deriving both honour and merit from an illustrious train of ancestors; who are formed by their education, interested by their property, and bound upon their conscience and honour, to be skilled in the laws of their country. This is a faithful sketch of the English juridical constitution, as designed by the masterly hand of our forefathers, of which the great original lines are still strong and visible; and if any of its minuter strokes are by the length of time at all obscured or decayed, they may still be with ease restored to their pristine vigour; and that not so much by fanciful alterations and wild experiments (so frequent in this fertile age) as by closely adhering to the wisdom of the antient plan, concerted by Alfred and perfected by Edward I., and by attending to the spirit, without neglecting the forms, of their excellent and venerable institutions.

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*CHAPTER V. [*61

OF COURTS ECCLESIASTICAL, MILITARY, AND MARITIME.

BESIDES the several courts which were treated of in the preceding chapter, and in which all injuries are redressed that fall under the cognizance of the common law of England, or that spirit of equity which ought to be its constant attendant, there still remain some other courts of a jurisdiction equally public and general, which take cognizance of other species of injuries of an ecclesiastical, military, and maritime nature; and therefore are properly distinguished by the title of ecclesiastical courts, courts military, and maritime.

I. Before I descend to consider particular ecclesiastical courts, I must first of all in general premise that in the time of our Saxon ancestors there was no sort of distinction between the lay and the ecclesiastical jurisdiction: the county-court was as much a spiritual as a temporal tribunal: the rights of the church

were ascertained and asserted at the same time, and by the same judges, as the rights of the laity. For this purpose the bishop of the diocese, and the alderman, or in his absence the sheriff of the county, used to sit together in the county-court, and had there the cognizance of all causes, as well ecclesiastical as civil: a superior deference being paid to the bishop's opinion in spiritual matters, and to that of the lay judges in temporal.(a) This union of power was very advantageous to them both; the presence of the *bishop added weight and reverence to the sheriff's proceedings; and the authority of the sheriff was equally useful to the bishop, by enforcing obedience to his decrees in such refractory offenders as would otherwise have despised the thunder of mere ecclesiastical censures.

*62]

But so moderate and rational a plan was wholly inconsistent with those views of ambition that were then forming by the court of Rome. It soon became an established maxim in the papal system of policy, that all ecclesiastical persons and all ecclesiastical causes should be solely and entirely subject to ecclesiastical jurisdiction only; which jurisdiction was supposed to be lodged in the first place and immediately in the pope, by divine indefeasible right and investiture from Christ himself, and derived from the pope to all inferior tribunals. Hence the canon law lays it down as a rule, that "*sacerdotes a regibus honorandi sunt, non judicandi;*"(b) and places an emphatic reliance on a fabulous tale which it tells of the emperor Constantine, that when some petitions were brought to him, imploring the aid of his authority against certain of his bishops accused of oppression and injustice, he caused (says the holy canon) the petitions to be burnt in their presence, dismissing them with this valediction, "*ite et inter vos causas vestras discutite, quia dignum non est ut nos judicemus Deos.*"(c)

It was not, however, till after the Norman conquest that this doctrine was received in England; when William I. (whose title was warmly espoused by the monasteries, which he liberally endowed, and by the foreign clergy, whom he brought over in shoals from France and Italy and planted in the best preferments of the English church) was at length prevailed upon to establish this fatal encroachment, and separate the ecclesiastical court from the civil: whether actuated by principles of bigotry, or by those of a more refined policy, in order to discountenance the laws of king Edward, abounding with the spirit of Saxon liberty, is not altogether *certain. But the latter, if not the cause, was undoubtedly the consequence, of this separation; for the Saxon laws were soon overborne by the Norman justiciaries, when the county-court fell into disregard by the bishop's withdrawing his presence, in obedience to the charter of the Conqueror;(d) which prohibited any spiritual cause from being tried in the secular courts, and commanded the suitors to appear before the bishop only, whose decisions were directed to conform to the canon law.(e)

*63]

King Henry the First, at his accession, among other restorations of the laws of king Edward the Confessor, revived this of the union of the civil and ecclesiastical courts.(f) Which was, according to Sir Edward Coke,(g) after the great heat of the conquest was past, only a restitution of the antient law of England. This, however, was ill relished by the popish clergy, who, under the guidance of that arrogant prelate, archbishop Anselm, very early disapproved of a measure that put them on a level with the profane laity, and subjected spiritual men and causes to the inspection of the secular magistrates: and therefore in their synod at Westminster, 3 Hen. I., they ordained that no bishop

(a) *Celeberrimo huic conventui episcopus et aldermannus inter sunto; quorum alter jura divina, alter humana populum edoceto. LL. Eadgar.* c. 5.

(b) *Decret. part.* 2, *caus.* 11, *qu.* 1, c. 41.

(c) Ibid.

(d) Hale, Hist. C. L. 102. Selden, in *Eadm.* p. 6, *l.* 24. 4 Inst. 259. Wilk. *LL. Angl. Sax.* 292.

(e) *Nullus episcopus vel archidiaconus de legibus episcopalibus amplius in hundret placita teneant, nec causam, quæ ad regimen animarum pertinet ad judicium secularium hominum adducant: sed quicunque secundum episcopales leges, de quacunque causa vel culpa interpellatus fuerit, ad locum, quem ad hoc episcopus elegerit et nominaverit, veniat; ibique de causa sua respondeat; et non secundum hundret, sed secundum canones et episcopales leges, rectum Deo et episcopo suo faciat.*

(f) *Volo et præcipio, ut omnes de comitatu eant ad comitatus et hundreda, sicut fecerint tempore regis Edwardi. Cart. Hen. I. in Spelm. Cod. vet. legum,* 305. And what is here obscurely hinted at is fully explained by his code of laws extant in the red book of the exchequer, though in general but of doubtful authority. *Cap.* 8. *Generalia comitatuum placita certis locis et vicibus teneantur. Intersint autem episcopi, comites, &c.; et agantur primo debita veræ christianitatis jura, secunda regis placita, prostremo causæ singulorum dignis satisfactionibus expleantur.*

(g) 2 Inst. 70.

should attend the discussion of temporal causes;(*h*) which soon dissolved this newly-effected union. And when, upon the death of king Henry the First, *the usurper Stephen was brought in and supported by the clergy, we find one article of the oath which they imposed upon him was, that eccle- [*64 siastical persons and ecclesiastical causes should be subject only to the bishop's jurisdiction.(*i*) And as it was about that time that the contest and emulation began between the laws of England and those of Rome,(*k*) the temporal courts adhering to the former, and the spiritual adopting the latter as their rule of proceeding, this widened the breach between them, and made a coalition afterwards impracticable; which probably would else have been effected at the general reformation of the church.

In briefly recounting the various species of ecclesiastical courts, or, as they are often styled, courts christian, (*curiæ christianitatis*,) I shall begin with the lowest, and so ascend gradually to the supreme court of appeal.(*l*)

1. The *archdeacon's* court is the most inferior court in the whole ecclesiastical polity. It is held in the archdeacon's absence before a judge appointed by himself, and called his official; and its jurisdiction is sometimes in concurrence with, sometimes in exclusion of, the bishop's court of the diocese. From hence, however, by statute 24 Hen. VIII. c. 12, an appeal lies to that of the bishop.

2. The *consistory* court of every diocesan bishop is held in their several cathedrals, for the trial of all ecclesiastical causes arising within their respective dioceses. The bishop's chancellor, or his commissary, is the judge; and from his sentence an appeal lies, by virtue of the same statute, to the archbishop of each province respectively.

3. The court of *arches* is a court of appeal belonging to the archbishop of Canterbury; whereof the judge is called *the *dean of the arches*, because he antiently held his court in the church of Saint Mary *le bow*, (*sancta* [*65 *Maria de arcubus*,) though all the principal spiritual courts are now holden at doctors' commons. His proper jurisdiction is only over the thirteen peculiar parishes belonging to the archbishop in London; but the office of dean of the arches having been for a long time united with that of the archbishop's principal official, he now, in right of the last-mentioned office, (as doth also the official principal of the archbishop of York,) receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. And from him an appeal lies to the king in chancery, (that is, to a court of delegates appointed under the king's great seal,) by statute 25 Hen. VIII. c. 19, as supreme head of the English church, in the place of the bishop of Rome, who formerly exercised this jurisdiction; which circumstance alone will furnish the reason why the popish clergy were so anxious to separate the spiritual court from the temporal.

4. The court of *peculiars* is a branch of and annexed to the court of arches. It has a jurisdiction over all those parishes dispersed through the province of Canterbury in the midst of other dioceses, which are exempt from the ordinary's jurisdiction and subject to the metropolitan only. All ecclesiastical causes arising within these peculiar or exempt jurisdictions are, originally, cognizable by this court; from which an appeal lay formerly to the pope, but now, by the statute 25 Hen. VIII. c. 19, to the king in chancery.

5. The *prerogative* court is established for the trial of all testamentary causes where the deceased hath left *bona notabilia* within two different dioceses. In which case the probate of wills belongs, as we have formerly seen,(*m*) to the archbishop of the province, by way of special prerogative. And all causes relating to the wills, administrations, or legacies of such persons are, originally, cognizable herein, before a judge appointed by the archbishop, called the judge *of the prerogative court: from whom an appeal lies, by statute 25 Hen. [*66 VIII. c. 19, to the king in chancery, instead of the pope, as formerly.

(*h*) *Ne episcopi sæcularium placitorum officium suscipiant.* Spelm. *Cod.* 301.
(*i*) Spelm. *Cod.* 301.
(*k*) See book i. introd. § 1.
(*l*) For further particulars, see Burn's Ecclesiastical Law, Wood's Institute of the Common Law, and Oughton's *Ordo Judiciorum.*
(*m*) Book ii. ch. 32.

I pass by such ecclesiastical courts as have only what is called a *voluntary*, and not a *contentious*, jurisdiction; which are merely concerned in doing or selling what no one opposes, and which keep an open office for that purpose, (as granting dispensations, licenses, faculties, and other remnants of the papal extortions,) but do not concern themselves with administering redress to any injury: and shall proceed to

6. The great court of appeal in all ecclesiastical causes, viz., the court of *delegates, judices delegati*, appointed by the king's commission under his great seal, and issuing out of chancery, to represent his royal person, and hear all appeals to him made by virtue of the before-mentioned statute of Henry VIII. This commission is frequently filled with lords, spiritual and temporal, and always with judges of the courts at Westminster, and doctors of the civil law. Appeals to Rome were always looked upon by the English nation, even in the times of popery, with an evil eye, as being contrary to the liberty of the subject, the honour of the crown, and the independence of the whole realm; and were first introduced in very turbulent times in the sixteenth year of king Stephen, (A.D. 1151,) at the same period (Sir Henry Spelman observes) that the civil and canon laws were first imported into England.(*n*) But, in a few years after, to obviate this growing practice, the constitutions made at Clarendon, 11 Hen. II., on account of the disturbances raised by archbishop Becket and other zealots of the holy see, expressly declare,(*o*) that appeals in causes ecclesiastical ought to lie, from the archdeacon to the diocesan; from the diocesan to the archbishop of the province; and from the archbishop to the king; and are not to proceed any further without special license from the crown. But the unhappy advantage that was given, in the reigns of king John and his son Henry the Third, to the encroaching *power of the pope, who was ever vigilant to improve *67] all opportunities of extending his jurisdiction hither, at length riveted the custom of appealing to Rome in causes ecclesiastical so strongly, that it never could be thoroughly broken off till the grand rupture happened in the reign of Henry the Eighth; when all the jurisdiction usurped by the pope in matters ecclesiastical was restored to the crown, to which it originally belonged: so that the statute 25 Hen. VIII. was but declaratory of the antient law of the realm.(*p*) But in case the king himself be party in any of these suits, the appeal does not then lie to him in chancery, which would be absurd; but, by the statute 24 Hen. VIII. c. 12, to all the bishops of the realm, assembled in the upper house of convocation.[1]

7. A commission of *review* is a commission sometimes granted, in extraordinary cases, to revise the sentence of the court of delegates, when it is apprehended they have been led into a material error. This commission the king may grant, although the statutes 24 & 25 Hen. VIII. before cited, declare the sentence of the delegates definitive: because the pope, as supreme head by the canon law, used to grant such commission of review; and such authority as the pope heretofore exerted is now annexed to the crown(*q*) by statutes 26 Hen. VIII. c. 1, and 1 Eliz. c. 1. But it is not matter of right, which the subject may demand *ex debito justitiæ*, but merely a matter of favour, and which therefore is often denied.

These are now the principal courts of ecclesiastical jurisdiction: none of which are allowed to be courts of record; no more than was another much more favourable jurisdiction, but now deservedly annihilated, viz., the court of the king's *high commission* in causes ecclesiastical. This court was erected and

(*n*) *Cod. vet. leg.* 315.
(*o*) Ch. 8.
(*p*) 4 Inst. 341.
(*q*) Ibid.

[1] No such assembly can exist as all the bishops of the realm in any house of convocation. But the statute says that the appeal shall be to the bishops, abbots, and priors of the upper house of the convocation of the province in which the cause of the *suit arises*. Therefore, in the province of York, the appeal lies now to the archbishop and his three bishops; in the province of Canterbury, to the rest of the bench of bishops. See 1 Book, 280, n. 36. When the delegates are equally divided in opinion, so that no judgment can be pronounced, a commission of adjuncts may issue. See an instance referred to in

united to the legal power(r) by virtue of the statute 1 Eliz. c. 1, instead of a larger jurisdiction which had before been exercised under the pope's authority. It was intended *to vindicate the dignity and peace of the church, by reforming, ordering, and correcting the ecclesiastical state and persons, [*68 and all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities. Under the shelter of which very general words, means were found, in that and the two succeeding reigns, to vest in the high commissioners extraordinary and almost despotic powers of fining and imprisoning; which they exerted much beyond the degree of the offence itself, and frequently over offences by no means of spiritual cognizance. For these reasons this co irt was justly abolished by statute 16 Car. I. c. 11. And the weak and illegal attempt that was made to revive it, during the reign of king James the Second, served only to hasten that infatuated prince's ruin.

II. Next, as to the courts military. The only court of this kind known to, and established by, the permanent laws of the land, is the court of *chivalry*, formerly held before the lord high constable and earl marshal of England jointly, but since the attainder of Stafford, duke of Buckingham, under Henry VIII., and the consequent extinguishment of the office of lord high constable, it hath usually, with respect to civil matters, been held before the earl marshal only.(s) This court, by statute 13 Ric. II. c. 2, hath cognizance of contracts and other matters touching deeds of arms and war, as well out of the realm as within it. And from its sentences an appeal lies immediately to the king in person.(t) This court was in great reputation in the times of pure chivalry, and afterwards during our connexions with the continent, by the territories which our princes held in France: but is now grown almost entirely out of use, on account of the feebleness of its jurisdiction, and want of power to enforce its judgments, as it can neither fine nor imprison, not being a court of record.(u)

III. The maritime courts, or such as have power and jurisdiction to determine all maritime injuries, arising upon the *seas, or in parts out of the reach of the common law, are only the court of admiralty and its courts of [*69 appeal. The court of admiralty is held before the lord high admiral of England, or his deputy, who is called the judge of the court. According to Sir Henry Spelman,(w) and Lambard,(x) it was first of all erected by king Edward the Third. Its proceedings are according to the method of the civil law, like those of the ecclesiastical courts; upon which account it is usually held at the same place with the superior ecclesiastical courts, at doctors' commons in London.[2] It is no court of record, any more than the spiritual courts. From the sentences of the admiralty judge an appeal always lay, in ordinary course, to

(r) 4 Inst. 324.
(s) 1 Lev. 230. Show. Parl. Cas. 60.
(t) 4 Inst. 125.
(u) 7 Mod. 127.
(w) Gloss. 13.
(x) *Archeion.* 41.

4 Burr. 2254. A commission of review was applied for in the court of chancery in Michaelmas Term, 1798, when the chancellor, upon hearing the arguments of civilians and barristers respecting the judgment of the delegates, determined to recommend to the king to grant a commission of review. See 4 Ves. Jr. 186.—CHRISTIAN.

But the jurisdiction of the court of delegates has, by statutes 2 & 3 W. IV. c. 92 and 3 & 4 W. IV. c. 41, been transferred to the judicial committee of the privy council, which is now the great court of appeal in all ecclesiastical causes. This court is composed of the president of the council, the lord chancellor, the chief justice of the court of King's Bench, the master of the rolls, the lord-justices of the court of appeal in chancery, vice-chancellors, (if privy councillors,) the chief justice of the Common Pleas, the lord chief baron, the judge of the prerogative court, the judge of the high court of admiralty, the members of the privy council who shall have held any of these offices, and two other privy councillors, who may be appointed by sign manual; and two privy councillors who shall have held the office of judge in the East Indies or any of the king's dominions beyond seas shall attend the sittings of the judicial committee. By stat. 6 & 7 Vict. c. 38, appeals may be heard by not less than three of its members, under a special order of the queen. This court is a court of record, and has full power to punish contempts and enforce its decrees, to award costs and have them taxed.—STEWART.

[2] The practice of the court of admiralty has been improved and its jurisdiction extended by statute 3 & 4 Vict. c. 65.—STEWART.

the king in chancery, as may be collected from statute 25 Hen. VIII. c. 19, which directs the appeal from the archbishop's courts to be determined by persons named in the king's commission, "like as in case of appeal from the admiral-court." But this is also expressly declared by statute 8 Eliz. c. 5, which enacts, that upon appeal made to the chancery, the sentence definitive of the delegates appointed by commission shall be final.

Appeals from the vice-admiralty courts in America, and our other plantations and settlements, may be brought before the courts of admiralty in England, as being a branch of the admiral's jurisdiction, though they may also be brought before the king in council.[3] But in case of prize vessels, taken in time of war, in any part of the world, and condemned in any courts of admiralty or vice-admiralty as lawful prize, the appeal lies to certain commissioners of appeals consisting chiefly of the privy council, and not to judges delegates. And this by virtue of divers treaties with foreign nations; by which particular courts are established in all the maritime countries of Europe for the decision of this question, whether lawful prize or not;[4] for, this being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of either country, to determine it. The original court, to which this question is *permitted in England, is the court of admiralty;[5] and the court of appeal is in effect the king's privy council, the members of which are, in consequence of treaties, commissioned under the great seal for this purpose. In 1748, for the more speedy determination of appeals, the judges of the courts of Westminster hall, though not privy counsellors, were added to the commission then in being. But doubts being conceived concerning the validity of that commission on account of such addition, the same was confirmed by statute 22 Geo. II. c. 3, with a proviso that no sentence given under it should be valid unless a majority of the commissioners present were actually privy counsellors. But this did not, I apprehend, extend to any future commissions: and such an addition became indeed totally unnecessary in the course of the war which commenced in 1756; since during the whole of that war, the commission of appeals was regularly attended and all its decisions conducted by a judge whose masterly acquaintance with the law of nations was known and revered by every state in Europe.(y)[6]

*70]

(y) See the sentiments of the president Montesquieu and M. Vattel (a subject of the king of Prussia) on the answer transmitted by the English court to his Prussian majesty's *Exposition des Motifs*, &c. A.D. 1753. Montesquieu's Letters, 5 Mar. 1753. Vattel's *droit de gens*, l. 2, c. 7, § 84.

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[3] But now, by stat. 3 & 4 W. IV. c. 41, s. 2, all appeals are to be made to the queen in council from the court of admiralty or vice-admiralty, or any other court in America and other her majesty's dominions abroad; and, by s. 3, all appeals may be referred to the judicial committee.—Stewart.

[4] And, in order to give effect to this, the prize acts passed at the commencement of a war usually provide that ships and goods taken from the enemy, whether by the royal navy or by privateers, must first be condemned in some court of admiralty as lawful prize before any right in point of solid enjoyment can accrue to the captors; and specific directions are prescribed for duly proceeding to such sentence. See the 19 Geo. III. c. 67. 1 Wils. 229. 4 Rob. 55.—Chitty.

[5] This seems incorrect; for questions of this nature are tried in the prize court, which is quite distinct from the admiralty court, otherwise called the instance court. The whole system of litigation and jurisprudence in the prize court is peculiar to itself. See Doug. 594. The judge of the admiralty court, though also the judge of the prize court, is appointed by a commission under the great seal, which enumerates particularly, as well as generally, every object of his jurisdiction, but not a word of prize. See Doug. 614. The judge of the prize court is appointed, and the court authorized, by a commission under the great seal directed to him, to will and require the court of admiralty, and the lieutenant and judge of the same court, his surrogate or surrogates, and they are thereby authorized and required to proceed upon all and all manner of captures, seizures, prize, and reprisals, of all ships and goods that are or shall be taken, and to hear and determine according to the course of the admiralty and the law of nations. See id.; and see further, as to the jurisdiction and proceedings in the prize court, *post*.—Chitty.

[6] Lord Mansfield is here alluded to. The answer to the *Exposition des Motifs*, &c. is signed by Sir G. Lee, judge of the prerogative court, Dr. Paul, advocate-general, Sir D. Ryder, attorney, and Sir W. Murray, solicitor-general; but lord Mansfield frequently

CHAPTER VI.

OF COURTS OF A SPECIAL JURISDICTION.

IN the two preceding chapters we have considered the several courts whose jurisdiction is public and general, and which are so contrived that some or other of them may administer redress to every possible injury that can arise in the kingdom at large. There yet remain certain others, whose jurisdiction is private and special, confined to particular spots, or instituted only to redress particular injuries. These are,

I. The forest courts, instituted for the government of the king's forests in different parts of the kingdom, and for the punishment of all injuries done to the king's deer or *venison*, to the *vert* or greensward, and to the *covert* in which such deer are lodged. These are the courts of *attachments*, of *regard*, of *swein-mote*, and of *justice-seat*. 1. The court of *attachments*, *wood-motes*, or forty-days court is to be held before the verderors of the forest once in every forty days;(*a*) and is instituted to inquire into all offenders against vert and venison;(*b*) who may be attached by their bodies, if taken with the mainour, (or *mainoeuvre*, *a manu*,) that is, in the very act of killing venison, or stealing wood, or preparing so to do, or by fresh and immediate pursuit after the act is done;(*c*) else they must be attached by their goods. And in this forty-days court the foresters or keepers are to bring their attachments, or presentments *de viridi et venatione;* and the verderors are to receive the same, and to enroll them, and to certify them under their seals to the court of justice-seat or sweinmote:(*d*) for this court can only inquire of, but not convict, offenders. 2. The court of *regard*, or survey of dogs, is to be holden every third year for the lawing or expeditation of mastiffs, which is done by cutting off the claws and ball (or *pelote) of the forefeet, to prevent them from running after deer.(*e*) No other dogs [*72 but mastiffs are to be thus lawed or expeditated, for none others were permitted to be kept within the precincts of the forest; it being supposed that the keeping of these, and these only, was necessary for the defence of a man's house.(*f*) 3. The court of *sweinmote* is to be holden before the verderors, as judges, by the steward of the swein-mote, thrice in every year,(*g*) the sweins or freeholders within the forest composing the jury. The principal jurisdiction of this court is, first, to inquire into the oppressions and grievances committed by the officers of the forest; "*de super-oneratione forestariorum, et aliorum ministrorum forestæ; et de eorum oppressionibus populo regis illatis;*" and, secondly, to receive and try presentments certified from the court of attachment against

(*a*) *Cart. de forest.* 9 Hen. III. c. 8.
(*b*) 4 Inst. 289.
(*c*) Carth. 79.
(*d*) *Cart. de forest.* c. 16.
(*e*) Ibid.
(*f*) 4 Inst. 308.
(*g*) *Cart. de forest.* c. 8.

declared to his friends that it was entirely his own composition. Holliday's Life of Lord M. p. 424. Montesquieu calls it *une réponse sans replique.*—COLERIDGE.

And now, by stat. 3 & 4 W. IV. c. 41, § 2, all appeals or applications in prize suits shall be made to the king in council, and, by stat. 6 & 7 Vict. c. 38, may be referred to the judicial committee of the privy council, which is now the great court of appeal as well in all maritime as ecclesiastical matters.—STEWART.

Prior to the Revolution, courts of admiralty existed in most of the colonies which afterwards became the United States. By the Articles of Confederation, Congress was authorized to appoint courts for the trial of piracies and felonies committed on the high seas, and to establish courts for receiving and determining finally appeals in all cases of captures. By the constitution of the United States, art. 3, it is provided that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. The cognizance of all cases of admiralty and maritime jurisdiction, including cases of captures made within the waters of the United States or within a marine league of the coasts or shores thereof, is now vested in the district courts of the United States. From these courts an appeal lies to the *circuit courts*, and from thence to the Supreme Court of the United States. Act of Congress 24 Sept. 1789, s. 9. 1 Story's Laws U. S. 56.—SHARSWOOD.

offences in vert and venison.(*h*) And this court may not only inquire, but convict also, which conviction shall be certified to the court of justice-seat under the seals of the jury; for this court cannot proceed to judgment.(*i*) But the principal court is, 4, The court of *justice-seat*, which is held before the chief justice in eyre, or chief itinerant judge, *capitalis justiciarius in itinere*, or his deputy; to hear and determine all trespasses within the forest, and all claims of franchises, liberties, and privileges, and all pleas and causes whatsoever therein arising.(*k*) It may also proceed to try presentments in the inferior courts of the forests, and to give judgment upon conviction of the sweinmote. And the chief justice may therefore, after presentment made, or indictment found, but not before,(*l*) issue his warrant to the officers of the forest to apprehend the offenders. It may be held every third year; and forty days' notice ought to be given of its sitting. This court may fine and imprison for offences within the forest,(*m*) it being a court of record: and therefore a writ of error *73] lies from hence to the court of *king's bench, to rectify and redress any mal-administrations of justice;(*n*) or the chief justice in eyre may adjourn any matter of law into the court of king's bench.(*o*) These justices in eyre were instituted by king Henry II., A.D. 1184,(*p*)[1] and their courts were formerly very regularly held: but the last court of justice-seat of any note was that holden in the reign of Charles I., before the earl of Holland; the rigorous proceedings at which are reported by Sir William Jones. After the restoration another was held, *pro forma* only, before the earl of Oxford;(*q*) but since the era of the revolution in 1688, the forest laws have fallen into total disuse, to the great advantage of the subject.[2]

II. A second species of restricted courts is that of commissioners of *sewers*. This is a temporary tribunal, erected by virtue of a commission under the great seal; which formerly used to be granted *pro re nata* at the pleasure of the crown,(*r*) but now at the discretion and nomination of the lord chancellor, lord treasurer, and chief justices, pursuant to the statute 23 Hen. VIII. c. 5. Their jurisdiction is to overlook the repairs of sea-banks and sea-walls, and the cleansing of rivers, public streams, ditches, and other conduits whereby any waters are carried off: and is confined to such county, or particular district, as the commission shall expressly name. The commissioners are a court of record, and may fine and imprison for contempt;(*s*) and in the execution of their duty may proceed by jury, or upon their own view, and may take order for the removal of any annoyances, or the safeguard and conservation of the sewers within their commission, either according to the laws and customs of Romney marsh,(*t*) or otherwise at their own discretion. They may also assess such rates, or scots, upon the owners of lands within their district as they shall judge necessary; and, if any person refuses to pay them, the commissioners may levy the same by distress of his goods and chattels; or they may, by statute 23 Hen. VIII. c. 5, sell his freehold lands (and, by the 7 Anne, c. 10, his *74] copyhold also) in order to pay such *scots or assessments. But their conduct is under the control of the court of king's bench, which will prevent or

(*h*) Stat. 34 Edw. I. c. 1.
(*i*) 4 Inst. 289.
(*k*) 4 Inst. 291.
(*l*) Stat. 1 Edw. III. c. 8. 7 Ric. II. c. 4.
(*m*) 4 Inst. 313.
(*n*) Ibid. 297.
(*o*) Ibid. 295.
(*p*) Hoveden.
(*q*) North's Life of Lord Guildford, 45.
(*r*) F. N. B. 118.
(*s*) Sid. 145.
(*t*) Romney marsh, in the county of Kent, a tract containing 24,000 acres, is governed by certain ancient and equitable laws of sewers, composed by Henry de Bathe, a venerable judge in the reign of king Henry the Third, from which laws all commissioners of sewers in England may receive light and direction. 4 Inst. 276.

[1] By the 57 Geo. III. c. 61, the offices of these justices are abolished on the termination of their then existing interests, and the salaries of the abolished offices are to make part of the consolidated fund.—CHITTY.

[2] All the forests which were made after the conquest, except New Forest in Hampshire, created by William the Conqueror, were disafforested by the *charta de foresta*. The forest of Hampton Court was established by the authority of parliament in the reign of Hen. VIII. The number of forests in England is sixty-nine. 4 Inst. 319. Charles I. enforced the odious forest laws, as a source of revenue independent of the parliament.—CHRISTIAN.

punish any illegal or tyrannical proceedings.(u) And yet, in the reign of king James I., (8 Nov. 1616,) the privy counsel took upon them to order that no action or complaint should be prosecuted against the commissioners unless before that board; and committed several to prison, who had brought such actions at common law, till they should release the same: and one of the reasons for discharging Sir Edward Coke from his office of lord chief justice was for countenancing those legal proceedings.(v) The pretence for which arbitrary measures was no other than the tyrant's plea(w) of the *necessity* of unlimited powers in works of evident utility to the public, "the supreme reason above all reasons, which is the salvation of the king's lands and people." But now it is clearly held, that this (as well as all other inferior jurisdictions) is subject to the discretionary coercion of his majesty's court of king's bench.(x)

III. The court of *policies of insurance*, when subsisting, is erected in pursuance of the statute 43 Eliz. c. 12, which recites the immemorial usage of policies of assurance, "by means whereof it cometh to pass, upon the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavy upon few, and rather upon them that adventure not than upon those that do adventure: whereby all merchants, especially those of the younger sort, are allured to venture more willingly and more freely: and that heretofore such assurers had used to stand so justly and precisely upon their credits as few or no controversies had arisen thereupon; and if any had grown, the same had from time to time been ended and ordered by certain grave and discreet merchants appointed by the lord mayor of the city of London; as men by reason of their experience fittest to understand and speedily decide those causes:" but that of late years divers persons had withdrawn themselves from that course of arbitration, and had driven the assured to bring separate actions at law against each assurer: it therefore enables the *lord chancellor yearly to grant a standing commission to the judge of the admiralty, the recorder of London, two doctors of the civil [*75 law, two common lawyers, and eight merchants; any three of which, one being a civilian or a barrister, are thereby and by the statute 13 & 14 Car. II. c. 23, empowered to determine in a summary way all causes concerning policies of assurance in London, with an appeal (by way of bill) to the court of chancery. But the jurisdiction being somewhat defective, as extending only to London, and to no other assurances but those on merchandise,(y) and to suits brought by the assured only, and not by the insurers,(z) no such commission has of late years issued: but insurance causes are now usually determined by the verdict of a jury of merchants, and the opinion of the judges in case of any legal doubts; whereby the decision is more speedy, satisfactory, and final: though it is to be wished that some of the parliamentary powers invested in these commissions, especially for the examination of witnesses, either beyond the seas or speedily going out of the kingdom,(a) could at present be adopted by the courts of Westminster hall, without requiring the consent of parties.

IV. The court of the *marshalsea*, and the *palace-court* at Westminster, though two distinct courts, are frequently confounded together. The former was originally holden before the steward and marshal of the king's house, and was instituted to administer justice between the king's domestic servants, that they might not be drawn into other courts and thereby the king lose their service.(b) It was formerly held in, though not a part of, the *aula regis*,(c) and, when that was subdivided, remained a distinct jurisdiction: holding plea of all trespasses committed within the verge of the court, where only one of the parties is in the king's domestic service, (in which case the inquest shall be taken by a jury of the country,) and of all debts, contracts, and covenants where both of the contracting parties belong to the royal household; and then the inquest shall be composed of men of the house*hold only.(d) By the statute of 13 Ric. [*76

(u) Cro. Jac. 336.
(v) Moor. 825, 826. See page 55.
(w) Milt. Paradise Lost. iv. 393.
(x) 1 Ventr. 66. Salk. 146.
(y) Styl. 166.
(z) 1 Show. 396.
(a) Stat. 13 & 14 Car. II. c. 22, §§ 3, 4.
(b) 1 Bulstr. 211.
(c) Flet. l. 2, c. 2.
(d) *Artic. sup. cart.* 28 Edw. I. c. 3. Stat. 5 Edw. III. c. 2. 10 Edw III. st. 2, c. 2.

II. st. 1, c. 3, (in affirmance of the common law,)(*e*) the verge of the court in this respect extends for twelve miles round the king's place of residence.(*f*) And, as this tribunal was never subject to the jurisdiction of the chief justiciary, no writ of error lay from it (though a court of record) to the king's bench, but only to parliament,(*g*) till the statutes of 5 Edw. III. c. 2, and 10 Edw. III. st. 2, c. 3, which allowed such writ of error before the king in his palace. But this court being ambulatory, and obliged to follow the king in all his progresses, so that by the removal of the household actions were frequently discontinued,(*h*) and doubts having arisen as to the extent of its jurisdiction,(*i*) king Charles I., in the sixth year of his reign, by his letters-patent erected a new court of record, called the *curia palatii*, or *palace-court*, to be held before the steward of the household and knight-marshal, and the steward of the court, or his deputy, with jurisdiction to hold plea of all manner of personal actions whatsoever which shall arise between any parties within twelve miles of his majesty's palace at Whitehall.(*k*) The court is now held once a week, together with the antient court of marshalsea, in the borough of Southwark: and a writ of error lies from thence to the court of king's bench. But if the cause is of any considerable consequence, it is usually removed on its first commencement, together with the custody of the defendant, either into the king's bench or common pleas, by a writ of *habeas corpus cum causa:* and the inferior business of the court hath of late years been much reduced by the new courts of conscience erected in the environs of London: in consideration of which, the four counsel belonging to these courts had salaries granted them for their lives by the statute 23 Geo. II. c. 27.[3]

*77] V. *A fifth species of private courts of a limited, though extensive, jurisdiction, are those of the principality of Wales, which, upon its thorough reduction, and the settling of its polity in the reign of Henry the Eighth,(*l*) were erected all over the country; principally by the statute 34 & 35 Hen. VIII. c. 26, though much had been before done, and the way prepared, by the statute of Wales, 12 Edw. I., and other statutes. By the statute of Henry the Eighth before mentioned, court-barons, hundred, and county courts are there established, as in England. A session is also to be held twice in every year in each county, by judges(*m*) appointed by the king, to be called the great sessions of the several counties in Wales: in which all pleas of real and personal actions shall be held, with the same form of process, and in as ample a manner, as in the court of common pleas at Westminster:(*n*) and writs of error shall lie from judgments therein (it being a court of record) to the court of king's bench at Westminster. But the ordinary original writs of process of the king's courts at Westminster do not run into the principality of Wales:(*o*) though process of execution does;(*p*) as do also prerogative writs, as writs of *certiorari, quo minus, mandamus*, and the like.(*q*) And even in causes between subject and subject, to prevent injustice through family factions or prejudices, it is held lawful (in causes of freehold at least, and it is usual in all others) to bring an action in the English courts, and try the same in the next English county adjoining to that part of Wales where the cause arises,(*r*) and where the venue is laid. But, on the other hand, to prevent trifling and frivolous suits, it is enacted, by statute 13 Geo. III. c. 51, that in *personal* actions, *tried* in any English county where the cause of action arose, and the defendant resides in Wales, if the plaintiff shall not recover a verdict for ten pounds, he shall be non-suited and pay the

(*e*) 2 Inst. 548.

(*f*) By the ancient Saxon constitution, the *pax regia*, or privilege of the king's palace, extended from his palace-gate to the distance of three miles, three furlongs, three acres, nine feet, nine palms, and nine barley-corns, as appears from a fragment of the *Textus Roffensis* cited in Dr. Hickes's *Dissertat. Epistol.* 114.

(*g*) 1 Bulstr. 211. 10 Rep. 79.

(*h*) F. N. B. 241. 2 Inst. 548.

(*i*) 1 Bulstr. 208.

(*k*) 1 Sid. 180. Salk. 439.

(*l*) See book i. introd. § 4.

(*m*) Stat. 18 Eliz. c. 8.

(*n*) See, for further regulations of the practice of these courts, stat 5 Eliz. c. 25. 8 Eliz. c. 20. 8 Geo. I. c. 25, § 6. 6 Geo. II. c. 14. 13 Geo. III. c. 51.

(*o*) 2 Roll. Rep. 141.

(*p*) 2 Bulstr. 156. 2 Saund. 193. Raym. 206.

(*q*) Cro. Jac. 484.

(*r*) Vaugh. 413. Hardr. 66.

[3] The business of the court was much reduced,—first, by the erection of courts of conscience in the environs of London, and next by the establishment of the county courts; and the court itself was finally abolished by statute 12 & 13 Vict. c. 101.—Kerr.

defendant's costs, unless it be certified by the judge that the freehold or title came principally in question, or that the cause was proper *to be tried, in such English county. And if any *transitory* action, the cause whereof [*78 arose and the defendant is resident in Wales, shall be *brought* in any English county, and the plaintiff shall not recover a verdict for ten pounds, the plaintiff shall be nonsuited, and shall pay the defendant's costs, deducting thereout the sum recovered by the verdict.[4]

VI. The court of the duchy chamber of Lancaster is another special jurisdiction, held before the chancellor of the duchy or his deputy, concerning all matter of equity relating to lands holden of the king in right of the duchy of Lancaster:(*s*) which is a thing very distinct from the county palatine, (which hath also its separate chancery, for sealing of writs, and the like,)(*t*) and comprises much territory which lies at a vast distance from it; as particularly a very large district surrounded by the city of Westminster. The proceedings in this court are the same as on the equity side in the courts of exchequer and chancery;(*u*) so that it seems not to be a court of record; and indeed it has been holden that those courts have a concurrent jurisdiction with the duchy court, and may take cognizance of the same causes.(*v*)

VII. Another species of private courts, which are of a limited local jurisdiction, and have at the same time an exclusive cognizance of pleas, in matters of both law and civil equity,(*w*) are those which appertain to the counties palatine of Chester, Lancaster, and Durham, and the royal franchise of Ely.(*x*)[5] In all these, as in the principality of Wales, the king's ordinary writs, issuing under the great seal out of chancery, do not run; that is, they are of no force. For as originally all *jura regalia* were granted to the lords of these counties palatine, they had of course the sole administration of justice by their own judges, appointed by themselves and not by the crown. It would therefore be incongruous for the king to send his writ to direct the judge of another's court in what manner to administer justice between the suitors. But when the privileges of these counties palatine and franchises were abridged by statute 27 Hen. VIII. c. 24, it was *also enacted that all writs and process should be made [*79 in the king's name, but should be *tested* or witnessed in the name of the owner of the franchise. Wherefore all writs whereon actions are founded and which have current authority here must be under the seal of the respective franchises; the two former of which are now united to the crown, and the two latter under the government of their several bishops. And the judges of assize who sit therein sit by virtue of a special commission from the owners of the several franchises, and under the seal thereof, and not by the usual commission under the great seal of England. Hither also may be referred the courts of the *cinque ports*, or five most important havens, as they formerly were esteemed, in the kingdom, viz., Dover, Sandwich, Romney, Hastings, and Hythe, to which

(*s*) Hob. 77. 2 Lev. 24.
(*t*) 1 Ventr. 257.
(*u*) 4 Inst. 206.
(*v*) 1 Ch. Rep. 55. Toth. 145. Hardr. 171.
(*w*) 4 Inst. 213, 218. Finch, R. 452.
(*x*) See book i. introd. § 4.

[4] But these distinctions are now entirely abolished: for, by stat. 11 Geo. IV. and 1 W. IV. c. 70, s. 14, it is enacted that from the 12th of October, 1830, all power and jurisdiction of the judges and courts of great sessions, both at law and in equity, shall cease, and that all suits in equity then depending should be transferred into the court of exchequer; and, by s. 13, it is enacted that the king's writ shall be directed and obeyed, and the jurisdiction of the courts of common law and the judges thereof shall extend and be exercised in like manner as the jurisdiction of such courts is now exercised in and over the counties of England. The administration of justice in Wales is thus and by subsequent statutes (5 Vict. s. 2, c. 33, 8 Vict. c. 11) rendered uniform in every respect with that of England.—STEWART.

See construction of this act, Tidd, 8 ed. index, tit. Wales. If goods be delivered in London to be carried into Wales, the debt, though under 10*l.*, may be sued for in London. 2 Starkie, 33.—CHITTY.

[5] The two former of which are now united to the crown, (6 W. IV. c. 19,) while that of Chester has been, by stat. 11 Geo. IV. and 7 W. IV. c. 70, abolished, and that of Ely, by stat. 6 & 7 W. IV. c. 87, and 7 W. IV. and 1 Vict. c. 53, also extinguished.—STEWART.

Winchelsea and Rye have been since added, which have also similar franchises in many respects(*y*) with the counties palatine, and particularly an exclusive jurisdiction, (before the mayor and jurats of the ports,) in which exclusive jurisdiction the king's ordinary writ does not run. A writ of error lies from the mayor and jurats of each port to the lord warden of the *cinque ports*, in his court of *Shepway*, and from the court of *Shepway* to the king's bench.(*z*) So likewise a writ of error lies from all the other jurisdictions to the same supreme court of judicature,(*a*) as an ensign of superiority reserved to the crown at the original creation of the franchises. And all prerogative writs (as those of *habeas corpus*, prohibition, *certiorari*, and *mandamus*) may issue for the same reason to all these exempt jurisdictions;(*b*) because the privilege, that the king's writ runs not, must be intended between party and party, for there can be no such privilege against the king.(*c*)

VIII. The stannary courts in Devonshire and Cornwall, for the administration of justice among the tinners therein, are also courts of record, but of the same private and exclusive nature. They are held before the lord warden and his substitutes, in virtue of a privilege granted to the workers in the *tin-mines *80] there to sue and be sued only in their own courts, that they may not be drawn from their business, which is highly profitable to the public, by attending their law-suits in other courts.(*d*) The privileges of the tinners are confirmed by a charter, 33 Edw. I., and fully expounded by a private statute,(*e*) 50 Edw. III., which has since been explained by a public act, 16 Car. I. c. 15. What relates to our present purpose is only this,—that all tinners and labourers in and about the stannaries shall, during the time of their working therein *bona fide*, be privileged from suits of other courts, and be only impleaded in the stannary court in all matters, excepting pleas of land, life, and member. No writ of error lies from hence to any court in Westminster hall, as was agreed by all the judges(*f*) in 4 Jac. I. But an appeal lies from the steward of the court to the under-warden; and from him to the lord-warden; and thence to the privy council of the prince of Wales, as duke of Cornwall,(*g*) when he hath had livery or investiture of the same.(*h*) And from thence the appeal lies to the king himself in the last resort.(*i*)

IX. The several courts within the city of London,(*j*) and other cities, boroughs, and corporations throughout the kingdom, held by prescription, charter, or act of parliament, are also of the same private and limited species. It would exceed the design and compass of our present inquiries, if I were to enter into a particular detail of these, and to examine the nature and extent of their several jurisdictions. It may, in general, be sufficient to say that they arose originally from the favour of the crown to those particular districts wherein we find them erected, upon the same principle that hundred-courts, and the like, were established for the convenience of the inhabitants, that they may prosecute their suits and *receive justice at home: that, for the most part, *81] the courts at Westminster hall have a concurrent jurisdiction with these, or else a superintendency over them,(*k*) and are bound by the statute 19 Geo. III. c. 70 to give assistance to such of them as are courts of record, by issuing writs of execution, where the person or effects of the defendant are not within the inferior jurisdiction: and that the proceedings in these special courts ought to be according to the course of the common law, unless otherwise ordered by parliament; for though the king may erect new courts, yet he cannot alter the established course of law.

But there is one species of courts, constituted by act of parliament, in the city

(*b*) 1 Sid. 166.
(*c*) Jenk. 71. *Dyversyté des courtes*, tit. *bank le roy*. 1 Sid. 356.
(*a*) Bro. Abr. tit. *error*, 74, 101. Davis, 62. 4 Inst. 38, 214, 218.
(*b*) 1 Sid. 92.
(*c*) Cro. Jac. 543.
(*d*) 4 Inst. 232.
(*e*) See this at length in 4 Inst. 232.
(*f*) 4 Inst. 231.
(*g*) Ibid. 230.
(*h*) 3 Bulstr. 183.
(*i*) Doddridge, Hist. of Cornw. 94.
(*j*) The chief of those in London are the *sheriffs' courts*, holden before their steward or judge, from which a writ of error lies to the *court of hustings*, before the mayor, recorder, and sheriffs, and from thence to justices appointed by the king's commission, who used to sit in the church of St. Martin le Grand, (F. N. B. 32;) and from the judgment of those justices a writ of error lies immediately to the house of lords.
(*k*) Salk. 144, 263.

of London, and other trading and populous districts, which in their proceedings so vary from the course of common law that they may deserve a more particular consideration. I mean the courts of requests, or courts of conscience, for the recovery of small debts.[6] The first of these was established in London, so early as the reign of Henry the Eighth, by an act of their common council; which, however, was certainly insufficient for that purpose and illegal, till confirmed by statute 3 Jac. I. c. 15, which has since been explained and amended by statute 14 Geo. II. c. 10.[7] The constitution is this: two aldermen, and four commoners, sit twice a week to hear all causes of debt not exceeding the value of forty shillings; which they examine in a summary way, by the oath of the parties or other witnesses, and make such order therein as is consonant to equity and good conscience. The time and expense of obtaining this summary redress are very inconsiderable, which make it a great benefit to trade; and thereupon divers trading towns and other districts have obtained acts of parliament, for establishing in them courts of conscience upon nearly the same plan as that in the city of London.[8]

*The anxious desire that has been shown to obtain these several acts, proves clearly that the nation in general is truly sensible of the great inconvenience arising from the disuse of the antient county and hundred courts; wherein causes of this small value were always formerly decided, with very little trouble and expense to the parties. But it is to be feared, that the general remedy which of late hath been principally applied to this inconvenience (the erecting these new jurisdictions) may itself be attended in time with very ill consequences: as the method of proceeding therein is entirely in derogation of the common law; as their large discretionary powers create a petty tyranny in a set of standing commissioners; and as the disuse of the trial by jury may tend to estrange the minds of the people from that valuable prerogative of Englishmen, which has already been more than sufficiently excluded in many instances. How much rather is it to be wished, that the proceedings in the county and hundred courts could again be revived, without burdening the freeholders with too frequent and tedious attendances; and *at the same time removing the delays that have insensibly crept into their proceedings, and the power that either party have of transferring, at pleasure their suits to the courts at Westminster! And we may with satisfaction observe, that this experiment has been actually tried, and has succeeded, in the populous county of Middlesex; which might serve as an example for others. For by statute 23 Geo. II. c. 33, it is enacted, 1. That a special county-court should be held, at least once a month, in every hundred of the county of Middlesex, by the county-clerk. 2. That twelve freeholders of that hundred, qualified to serve on juries, and struck by the sheriff, shall be summoned to appear at such court by rotation; so as none shall be summoned oftener than once a year. 3. That in all causes not exceeding the value of forty shillings, the county-clerk and twelve suitors shall proceed in a summary way, examining the parties and witnesses on oath, without the formal process antiently used; and shall make such order therein as they shall judge agreeable to conscience. 4. That no plaints shall be removed out of this court by any process whatsoever; but the determination herein shall be final. 5. That if any action be brought in any of the superior courts against a person resident in Middlesex, for a debt or contract, upon the trial whereof the jury shall find less than 40*s.* damages, the plaintiff shall recover no costs, but shall pay the [*82 [*83

[6] See all the acts and cases thereon, relating to courts of requests, ably collected in Tidd's Prac. 8 ed. 989 to 996.—CHITTY.

[7] The act is still further extended by the 39 & 40 Geo. III. c. 104. See Tidd's Prac. 8 ed. 989.—CHITTY.

[8] By the 25 Geo. III. c. 45 and 26 Geo. III. c. 38, no debtor or defendant, in any court for the recovery of small debts, where the debt does not exceed 20*s.*, shall be committed to prison for more than twenty days, and if the debt does not exceed 40*s.*, for more than forty days, unless it be proved to the satisfaction of the court that he has money or goods which he fraudulently conceals; and in the first case the imprisonment may be extended to thirty days, and in the latter to sixty.

defendant double costs; unless upon some special circumstances, to be certified by the judge who tried it. 6. Lastly, a table of very moderate fees is prescribed and set down in the act; which are not to be exceeded upon any account whatsoever. This is a plan entirely agreeable to the constitution and genius of the nation; calculated to prevent a multitude of vexatious actions in the superior courts, and at the same time to give honest creditors an opportunity of recovering small sums; which now they are frequently deterred from by the expense of a suit at law; a plan which, one would think, wants only to be generally known, in order to its universal reception.

X. There is yet another species of private courts, which I must not pass over in silence: *viz.*, the chancellor's courts in the two universities of England.[9] Which two learned bodies enjoy the sole jurisdiction, in exclusion of the king's *84] *courts, over all civil actions and suits whatsoever, when a scholar or privileged person is one of the parties; excepting in such cases where the right of freehold is concerned. And these by the university charter they are at liberty to try and determine, either according to the common law of the land, or according to their own local customs, at their discretion; which has generally led them to carry on their process in a course much conformed to the civil law, for reasons sufficiently explained in a former book.(*l*)

These privileges were granted, that the students might not be distracted from their studies by legal process from distant courts, and other forensic avocations. And privileges of this kind are of very high antiquity, being generally enjoyed by all foreign universities as well as our own, in consequence (I apprehend) of a constitution of the emperor Frederick, A.D. 1158.(*m*) But as to England in particular, the oldest charter that I have seen, containing this grant to the university of Oxford, was 28 Hen. III. A.D. 1244. And the same privileges were confirmed and enlarged by almost every succeeding prince, down to Henry the Eighth; in the fourteenth year of whose reign the largest and most extensive charter of all was granted. One similar to which was afterwards granted to Cambridge in the third year of queen Elizabeth. But yet, notwithstanding these charters, the privileges granted therein, of proceeding in a course different from the law of the land, were of so high a nature that they were held to be invalid; for though the king might erect new courts, yet he could not alter the course of law by his letters-patent. Therefore in the reign of queen Elizabeth an act of parliament was obtained,(*n*) confirming all the charters of the two universities, and those of 14 Hen. VIII. and 3 Eliz. by name. Which *blessed act*, as Sir Edward Coke entitles it,(*o*) established this high privilege without any

(*l*) Book i. introd. § 1.
(*m*) *Cod.* 4, *tit.* 13.
(*n*) 13 Eliz. c. 29.
(*o*) 4 Inst. 227.

[9] As the object of the privilege is that students and others connected with the universities should not be distracted from the studies and duties to be there performed, the party proceeded against must in general be a resident member of the university, and that fact must be expressly sworn, or be collected from the affidavit. The privilege of Cambridge differs from that of Oxford: in the former it only extends to causes of action accruing in the town and its suburbs; but in Oxford it extends to all personal causes arising anywhere. R. T. Hardw. 241. 2 Wils. 406. Bac. Abr. Universities. The claim of conusance must be made in due form and in due time. 2 Wils. 406. Claim of conusance of an action of trespass, brought in King's Bench against a resident member of the university of *Cambridge*, for a cause of action verified by affidavit not to have arisen within the town and suburbs of Cambridge, was allowed upon the claim of the vice-chancellor on behalf of the chancellor, masters, and scholars of the university, entered on the roll in due form, setting out their jurisdictions under charters confirmed by statute, and averring that the cause of action arose within such jurisdiction. 12 East, 12. And claim of conusance by the university of *Oxford* was allowed in an action of trespass in King's Bench against a proctor, a pro-proctor, and the marshal of the university, though the affidavit of the latter, describing him as of a parish in the suburbs of Oxford, only verified that he then was, and had been for the last fourteen years, a common servant of the university, called marshal of the university, and that he was sued for an act done by him in the discharge of his duty, and in obedience to the orders of the other two defendants, without stating that he resided within the university, or was matriculated. 15 East, 634. —Chitty.

doubt or opposition:(p) or, as Sir Matthew Hale(q) very fully expresses the sense *of the common law and the operation of the act of parliament, "although king Henry the Eighth, 14 *A. R. sui*, granted to the university [*85 a liberal charter, to proceed according to the use of the university; *viz.*, by a course much conformed to the civil law, yet that charter had not been sufficient to have warranted such proceedings without the help of an act of parliament. And therefore in 13 Eliz. an act passed, whereby that charter was in effect enacted; and it is thereby that at this day they have a kind of civil-law procedure, even in matters that are of themselves of common-law cognizance, where either of the parties is privileged."

This privilege, so far as it relates to civil causes, is exercised at Oxford in the chancellor's court; the judge of which is the vice-chancellor, his deputy or assessor. From his sentence an appeal lies to delegates appointed by the congregation; from thence to other delegates of the house of convocation; and if they all three concur in the same sentence it is final at least by the statutes of the university,(r) according to the rule of the civil law.(s) But, if there be any discordance or variation in any of the three sentences, an appeal lies in the last resort to judges delegates appointed by the crown under the great seal in chancery.

I have now gone through the several species of private, or special, courts, of the greatest note in the kingdom, instituted for the local redress of private wrongs; and must, in the close of all, make one general observation from Sir Edward Coke:(t) that these particular jurisdictions, derogating from the general jurisdiction of the courts of common law, are ever strictly restrained, and cannot be extended further than the express letter of their privileges will most explicitly warrant

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CHAPTER VII.

OF THE COGNIZANCE OF PRIVATE WRONGS.

*WE now proceed to the cognizance of private wrongs; that is, to consider in which of the vast variety of courts, mentioned in the three pre- [*86 ceding chapters, every possible injury that can be offered to a man's person or property is certain of meeting with redress.

The authority of the several courts of private and special jurisdiction, or of what wrongs such courts have cognizance, was necessarily remarked as those respective tribunals were enumerated, and therefore need not be here again repeated; which will confine our present inquiry to the cognizance of civil injuries in the several courts of public or general jurisdiction. And the order in which I shall pursue this inquiry will be by showing: 1. What actions may be brought, or what injuries remedied, in the ecclesiastical courts. 2. What in the military. 3. What in the maritime. And 4. What in the courts of common law.

And, with regard to the three first of these particulars, I must beg leave not so much to consider what hath at any time been *claimed* or pretended to belong to their jurisdiction, by the officers and judges of those respective courts; but what the common law *allows* and permits to be so. For these eccentrical tribunals, (which are principally guided by the rules of the imperial and canon laws,) as they subsist and are *admitted in England, not by any right of [*87 their own,(a) but upon bare sufferance and toleration from the municipal laws, must have recourse to the laws of that country wherein they are thus adopted, to be informed how far their jurisdiction extends, or what causes are permitted, and what forbidden, to be discussed or drawn in question before them.

(p) Jenk. Cent. 2, pl. 88; Cent. 3, pl. 33. Hardr. 504. Godbolt. 201.
(q) Hist. C. L. 33.
(r) Tit. 21, § 19.
(s) *Cod.* 7, 70, 1.
(t) 2 Inst. 543.
(a) See book i. introd. § 1.

It matters not therefore what the pandects of Justinian, or the decretals of Gregory, have ordained. They are here of no more intrinsic authority than the laws of Solon and Lycurgus: curious perhaps for their antiquity, respectable for their equity, and frequently of admirable use in illustrating a point of history. Nor is it at all material in what light other nations may consider this matter of jurisdiction. Every nation must and will abide by its own municipal laws; which various accidents conspire to render different in almost every country in Europe. We permit some kinds of suits to be of ecclesiastical cognizance, which other nations have referred entirely to the temporal courts; as concerning wills and successions to intestates' chattels; and perhaps we may in our turn prohibit them from interfering in some controversies, which on the continent may be looked upon as merely spiritual. In short, the common law of England is the one uniform rule to determine the jurisdiction of our courts: and, if any tribunals whatsoever attempt to exceed the limits so prescribed them, the king's courts of common law may and do prohibit them; and in some cases punish their judges.(*b*)

Having premised this general caution, I proceed now to consider,

1. The wrongs or injuries cognizable by the ecclesiastical courts. I mean such as are offered to private persons or individuals;[1] which are cognizable by the ecclesiastical court, not for reformation of the offender himself or party *injuring*, (*pro salute animæ*, as is the case with immoralities in general, when unconnected with private injuries,) but for the sake of the party *injured*, to *88] make him a satisfaction and redress for *the damage which he has sustained. And these I shall reduce under three general heads; of causes *pecuniary*, causes *matrimonial*, and causes *testamentary*.

1. Pecuniary causes, cognizable in the ecclesiastical courts, are such as arise either from the withholding ecclesiastical dues, or the doing or neglecting some act relating to the church, whereby some damage accrues to the plaintiff; towards obtaining a satisfaction for which he is permitted to institute a suit in the spiritual court.

The principal of these is the subtraction or withholding of *tithes* from the parson or vicar, whether the former be a clergyman or a lay appropriator.(*c*) But herein a distinction must be taken: for the ecclesiastical courts have no jurisdiction to try the *right* of tithes unless between spiritual persons;(*d*) but, in ordinary cases between spiritual men and lay men, are only to compel the payment of them, when the right is not disputed.(*e*) By the statute, or rather writ,(*f*) of *circumspecte agatis*,(*g*) it is declared that the court Christian shall not

(*b*) Hal. Hist. C. L. c. 2.
(*c*) Stat. 32 Hen. VIII. c. 7.
(*d*) 2 Roll. Abr. 309, 310. Bro. Abr. c. *Jurisdiction*, 85.
(*e*) 2 Inst. 364, 489, 490.
(*f*) See Barrington, 123. 3 Pryn. Rec. 336.
(*g*) 13 Edw. 1. st. 4, or rather 9 Edw. II.

[1] See, in general, Bac. Abr. tit. Courts Ecclesiastical, D. and tit. Slander; Com. Dig. Prohibition; where see G. when the ecclesiastical court has jurisdiction and when not. The ecclesiastical court has no jurisdiction over trusts; and therefore, where a party sued as a trustee was arrested on a writ *de contumace capiendo*, the court of King's Bench discharged him out of custody. 1 B. & C. 655.

Suits for *defamation may be added* to the three heads above considered. As to these in general, see Burn, Eccl. L. Defamation. Com. Dig. Prohibition, G. 14. Bac. Abr. Slander, T. U. Stark on Slander, 32, 464. Words imputing an offence merely *spiritual* are not in themselves actionable at law, unless followed by special damage, and the party slandered can only institute a suit in the spiritual court; and though the law discourages suits of this kind, yet redress for the insult and injury is not denied. 2 Phil. Ec. Cases, 106. *Words* which impute an offence merely cognizable in a spiritual court may be punished in that court, as calling a person heretic, adulterer, fornicator, whore, &c.; but if the words are coupled with others for which an action at law would lie, as calling a woman a whore and a thief, the ecclesiastical court has no jurisdiction, and a prohibition lies. 2 Roll. Abr. 297. 1 Sid. 404. 3 Mod. 74. 1 Hagg. Rep. 463, in notes. So a suit cannot be instituted in the spiritual court for a written libel, because any slander of a person reduced into writing, and which can be the subject of any proceeding, is actionable or indictable. Comb. 71. Bac. Abr. Courts Ecclesiastical, D. The power of the ecclesiastical court is confined to the infliction of penance *pro salute animæ* and awarding costs, and does not extend to the awarding damages to the injured party. 4 Co. 20. 2 Inst. 492.—Chitty.

be prohibited from holding plea, "*si rector petat versus parochianos oblationes et decimas debitas et consuetas:*" so that if any dispute arises whether such tithes be *due* and *accustomed*, this cannot be determined in the ecclesiastical court, but before the king's court of the common law; as such question affects the temporal inheritance, and the determination must bind the real property. But where the *right* does not come into question, but only the *fact* whether or no the tithes allowed to be due are really subtracted or withdrawn, this is a transient personal injury, for which the remedy may properly be had in the spiritual court; viz., the recovery of the tithes, or their equivalent. By statute 2 & 3 Edw. VI. c. 13, it is enacted, that if any person shall carry off his predial tithes (viz., of corn, hay, or the like) before the tenth part *is duly set forth, or agreement is made with the proprietor, or shall willingly withdraw [*89 his tithes of the same, or shall stop or hinder the proprietor of the tithes, or his deputy, from viewing or carrying them away; such offender shall pay *double* the value of the tithes, with costs to be recovered before the ecclesiastical judge, according to the king's ecclesiastical laws. By a former clause of the same statute, the *treble* value of the tithes, so subtracted or withheld, may be sued for in the temporal courts, which is equivalent to the *double* value to be sued for in the ecclesiastical. For one may sue for and recover in the ecclesiastical courts the tithes themselves, or a recompense for them, by the antient law; to which the suit for the *double* value is superadded by the statute. But as no suit lay in the temporal courts for the subtraction of tithes themselves, therefore the statute gave a *treble* forfeiture, if sued for there; in order to make the course of justice uniform, by giving the same reparation in one court as in the other.(*h*)[2] However, it now seldom happens that tithes are sued for at all in the spiritual court; for if the defendant pleads any custom, *modus*, composition, or other matter whereby the right of tithing is called in question, this takes it out of the jurisdiction of the ecclesiastical judges: for the law will not suffer the existence of such a right to be decided by the sentence of any single, much less an ecclesiastical, judge; without the verdict of a jury. But a more summary method than either of recovering small tithes under the value of 40*s.* is given by statute 7 & 8 W. III. c. 6, by complaint to two justices of the peace; and, by another statute of the same year, c. 34, the same remedy is extended to all tithes withheld by Quakers under the value of ten pounds.[3]

Another pecuniary injury, cognizable in the spiritual courts, is the *non-payment* of other ecclesiastical *dues* to the clergy; as pensions, mortuaries, compositions, offerings, and whatsoever falls under the denomination of surplice-fees, for marriages or other ministerial offices of the church: all which injuries are redressed by a decree for their actual *payment. Besides which, all [*90 offerings, oblations, and obventions not exceeding the value of 40*s.* may be recovered in a summary way before two justices of the peace.(*i*) But care must be taken that these are real and not imaginary dues; for, if they be con-

(*h*) 2 Inst. 250. (*i*) Stat. 7 & 8 W. III. c. 6.

[2] This statute enacts that every person shall justly divide, set out, yield, and pay all manner of predial tithes in such manner as they have been of right yielded and paid within forty years, or of right or custom ought to have been paid, before the making of that act, under the forfeiture of treble value of the tithes so carried away; and in an action upon this statute, in which the declaration stated that the tithes were within forty years before the statute yielded and payable, and yielded and paid, it was held that evidence that the land had been, as far as any witness knew, in pasture, and that it was never known to pay in predial tithe, was not sufficient to defeat the action. The same action might also be supported to recover tithes of lands enclosed out of wastes, which never paid tithes before. Mitchell *vs.* Walker, 5 T. R. 260.—CHRISTIAN.

[3] The 53 Geo. III. c. 127 extends the jurisdiction of the two justices to tithes, oblations, and compositions, of the value of 10*l.*; and in respect of tithes and church-rates, due from Quakers, to 50*l.*, see statute and proceedings, Burn, J., Tithes. The 54 Geo. III. c. 68 extends the same provisions to Ireland.—CHITTY.

It is hardly necessary to observe that the commutation of tithes, under the provisions of the statute 6 & 7 W. IV. c. 71 and numerous subsequent statutes, will eventually put an end to all suits for the subtraction of tithes.—STEWART.

trary to the common law, a prohibition will issue out of the temporal courts to stop all suits concerning them. As where a fee was demanded by the minister of the parish for the baptism of a child, which was administered in another place;(*j*) this, however authorized by the canon, is contrary to common right: for of common right, no fee is due to the minister even for performing such branches of his duty, and it can only be supported by a special custom;(*k*) but no custom can support the demand of a fee without performing them at all.

For *fees* also, settled and acknowledged to be due to the officers of the ecclesiastical courts, a suit will lie therein: but not if the *right* of the fees is at all disputable; for then it must be decided by the common law.(*l*) It is also said, that if a curate be licensed, and his salary appointed by the bishop, and he be not paid, the curate has a remedy in the ecclesiastical court;(*m*) but, if he be not licensed, or hath no such salary appointed, or hath made a special agreement with the rector, he must sue for a satisfaction at common law;(*n*) either by proving such special agreement, or else by leaving it to a jury to give damages upon a *quantum meruit*, that is, in consideration of what he reasonably deserved in proportion to the service performed.

Under this head of pecuniary injuries may also be reduced the several matters of spoliation, dilapidations, and neglect of repairing the church and things thereunto belonging; for which a satisfaction may be sued for in the ecclesiastical court.

Spoliation is an injury done by one clerk or incumbent to another, in taking *91] the fruits of his benefice without any *right thereunto, but under a pretended title. It is remedied by a decree to account for the profits so taken. This injury, when the *jus patronatus* or right of advowson does not come in debate, is cognizable in the spiritual court: as if a patron first presents A. to a benefice, who is instituted and inducted thereto; and then, upon pretence of a vacancy, *the same* patron presents B. to the same living, and he also obtains institution and induction. Now, if the fact of the vacancy be disputed, then, that clerk who is kept out of the profits of the living, whichever it be, may sue the other in the spiritual court for spoliation, or taking the profits of his benefice. And it shall there be tried, whether the living were or were not vacant: upon which the validity of the second clerk's pretensions must depend.(*o*) But if the right of patronage comes at all into dispute, as if one patron presented A., and another patron presented B., there the ecclesiastical court hath no cognizance, provided the tithes sued for amount to a fourth part of the value of the living, but may be prohibited at the instance of the patron by the king's writ of *indicavit*.(*p*) So also if a clerk, without any colour of title, ejects another from his parsonage, this injury must be redressed in the temporal courts: for it depends upon no question determinable by the spiritual law, (as plurality of benefices or no plurality, vacancy or no vacancy,) but is merely a civil injury.

For *dilapidations*, which are a kind of ecclesiastical waste, either voluntary, by pulling down; or permissive, by suffering the chancel, parsonage-house, and other buildings thereunto belonging, to decay; an action also lies, either in the spiritual court by the canon law, or in the courts of common law,(*q*) and it may be brought by the successor against the predecessor, if living, or, if dead, then against his executors. It is also said to be good cause of deprivation, if the bishop, parson, vicar, or other ecclesiastical person, dilapidates the buildings, or *92] cuts down timber growing on the patrimony of *the church, unless for necessary repairs:(*r*) and that a writ of prohibition will also lie against him in the courts of common law.(*s*) By statute 13 Eliz. c. 10, if any spiritual person makes over or alienates his goods with intent to defeat his successors of

(*j*) Salk. 332.
(*k*) Ibid. 334. Lord Raym. 450, 1558. Fitz. 55.
(*l*) 1 Ventr. 165.
(*m*) 1 Burn, Eccl. Law, 438.
(*n*) 1 Freem. 70.
(*o*) F. N. B. 36.
(*p*) *Circumspecte agatis;* 13 Edw. I. st. 4, *Artic. cleri.* 9 Edw. II. c. 2. F. N. B. 45.
(*q*) Cart. 224. 3 Lev. 268.
(*r*) 1 Roll. Rep. 86. 11 Rep. 98. Godb. 259.
(*s*) 3 Bulstr. 138. 1 Roll. Rep. 335.

their remedy for dilapidations, the successor shall have such remedy against the alienee, in the ecclesiastical court, as if he were the executor of his predecessor. And by statute 14 Eliz. c. 11, all money recovered for dilapidations shall within two years be employed upon the buildings in respect whereof it was recovered, on penalty of forfeiting double the value to the crown.

As to the neglect of reparations of the church, churchyard, and the like, the spiritual court has undoubted cognizance thereof;(*t*) and a suit may be brought therein for non-payment of a rate made by the church-wardens for that purpose. And these are the principal pecuniary injuries, which are cognizable, or for which suits may be instituted, in ecclesiastical courts.

2. Matrimonial causes, or injuries respecting the rights of marriage, are another, and a much more undisturbed, branch of the ecclesiastical jurisdiction Though if we consider marriages in the light of mere civil contracts, they do not seem to be properly of spiritual cognizance.(*u*) But the Romanists having very early converted this contract into a holy sacramental ordinance, the church of course took it under her protection, upon the division of the two jurisdictions. And in the hands of such able politicians, it soon became an engine of great importance to the papal scheme of a universal monarchy over Christendom. The numberless canonical impediments that were invented, and occasionally dispensed with, by the holy see, not only enriched the coffers of the church, but gave it a vast ascendant over princes of all denominations; whose marriages were sanctified or reprobated, their issue legitimated or bastardized, and the succession to their thrones established or rendered precarious, according *to the humour or interest of the reigning pontiff: besides a thousand nice and difficult scruples, with which the clergy of those ages [*93 puzzled the understandings, and loaded the consciences of the inferior orders of the laity; and which could only be unravelled and removed by these their spiritual guides. Yet, abstracted from this universal influence, which affords so good a reason for their conduct, one might otherwise be led to wonder that the same authority, which enjoined the strictest celibacy to the priesthood, should think them the proper judges in causes between man and wife. These causes indeed, partly from the nature of the injuries complained of, and partly from the clerical method of treating them,(*v*) soon became too gross for the modesty of a lay tribunal. And causes matrimonial are now so peculiarly ecclesiastical that the temporal courts will never interfere in controversies of this kind, unless in some particular cases. As if the spiritual court do proceed to call a marriage in question after the death of either of the parties; this the courts of common law will prohibit, because it tends to bastardize and disinherit the issue; who cannot so well defend the marriage, as the parties themselves, when both of them living, might have done.(*w*)

Of matrimonial causes, one of the first and principal is, 1. *Causa jactitationis matrimonii;* when one of the parties boasts[4] or gives out that he or she is married to the other, whereby a common reputation of their matrimony may ensue. On this ground the party injured may libel the other in the spiritual court; and, unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head; which is the only remedy the ecclesiastical courts can give for this injury.[5] 2. Another

(*t*) *Circumspecte agatis.* 5 Rep. 66.
(*u*) Warb. Alliance, 173.
(*v*) Some of the impurest books that are extant in any language are those written by the popish clergy on the subjects of matrimony and divorce.
(*w*) Inst. 614.

[4] But the boasting must be malicious; for where lord Hawke had permitted the party to assume herself to be lady Hawke in his presence and had introduced and acknowledged her to be clothed with that character, the court dismissed the suit. Lord Hawke *vs.* Corri, 2 Dr. Hagg. 220.—CHITTY.

[5] It is not enough for the maintenance of this suit that one party falsely "boasts or gives out that he or she is married to the other:" the boasting must be malicious as well as false. In the case of Lord Hawke *vs.* Corri, the learned judge, in stating the defences which may be made to such a suit, says, "A third defence of more rare occurrence is that though no marriage has passed, yet the pretension was fully authorized by the complainant; and therefore, though the representation is false, yet it is not malicious, and cannot

species of matrimonial causes was, when a party contracted to another brought a suit in the ecclesiastical court to compel a celebration of the marriage in pursuance of such contract; but this branch of causes is now cut off entirely by the act for preventing clandestine marriages, 26 Geo. II. *c. 33, which *94] enacts, that for the future no suit shall be had in any ecclesiastical court, to compel a celebration of marriage *in facie ecclesiæ*, for or because of any *contract* of matrimony whatsoever. 3. The suit for *restitution of conjugal rights* is also another species of matrimonial causes: which is brought whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason; in which case the ecclesiastical jurisdiction will compel them to come together again, if either party be weak enough to desire it, contrary to the inclination of the other. 4. *Divorces* also, of which, and their several distinctions, we treated at large in a former book,(*x*) are causes thoroughly matrimonial, and cognizable by the ecclesiastical judge. If it becomes improper, through some supervenient cause arising *ex post facto*, that the parties should live together any longer; as through intolerable cruelty,[6] adultery, a perpetual disease, and the like;[7] this unfitness or inability for the marriage state may be looked upon as an injury to the suffering party; and for this the ecclesiastical law administers the remedy of separation, or a divorce *a mensa et thoro*. But if the cause existed previous to the marriage, and was such a one as rendered the marriage unlawful *ab initio*, as consanguinity, corporal imbecility, or the like; in this case the law looks upon the marriage to have been always null and void, being contracted *in fraudem legis*, and decrees not only a separation from bed and board, but *a vinculo matrimonii* itself. 5. The last species of matrimonial causes is a consequence drawn from one of the species of divorce, that *a mensa et thoro;* which is the suit for *alimony*, a term which signifies maintenance: which suit the wife, in case of separation, may have against her husband, if he neglects or refuses to make her an allowance suitable to their station in life. This is an injury to the wife, and the court Christian will redress it by assigning her a competent maintenance, and compelling the husband by ecclesiastical censures to pay it. But no alimony will be assigned in case of a divorce for adultery on her part; for as that amounts to a forfeiture of her *dower after his death, it is also a sufficient reason why she should *95] not be partaker of his estate when living.

3. Testamentary causes are the only remaining species belonging to the ecclesiastical jurisdiction;[8] which, as they are certainly of a mere temporal na-

(*x*) Book i. ch. 15.

be complained of as such by the party who has denounced it." In that case, such a defence having been fully made out, the court dismissed the suit. 2 Haggard's Rep. 280. —Coleridge.

[6] We have seen in the first book, pages 440, 441, that it is stated that a divorce *a mensa et thoro*, when marriage is just and lawful *ab initio*, is only allowed, for some supervenient cause, when it has become improper or impossible for the parties to live together, and that intolerable ill temper was there considered to be a sufficient cause,—a position which, it was submitted by the editor, was not tenable. Upon this interesting subject the reader is referred to the eloquent decisions of Sir William Scott, from which it will appear that a husband or a wife may sustain a suit for a divorce on the ground of cruelty, even in a single instance, when it really endangers life, limb, or health, and that even words menacing such danger are sufficient ground; but that mere insult, irritation, coldness, unkindness, ill temper, or even desertion, is not alone a sufficient ground for a divorce. Evans *vs.* Evans, 1 Hagg. Rep. 36, 364, 409, 458. 2 id. 154, 158. 2 Phil. Ec. C. 132.—Chitty.

[7] It has been determined by the court of delegates that the public infamy of the husband, arising from a judicial conviction of an attempt to commit an unnatural crime, is a sufficient cause for the ecclesiastical courts to decree a separation *a mensa et thoro*. Feb. 1794.—Christian.

[8] Com. Dig. Prohibition, G. 16. Although the ecclesiastical courts have by length of time acquired the original jurisdiction *in rebus testamentariis*, courts of equity have nevertheless obtained a concurrent jurisdiction with them in determinations upon personal bequests, as relief in those cases is generally dependent upon a discovery and an account of assets. And an executor being considered a trustee for the several legatees named in

ture,(y) may seem at first view a little oddly ranked among matters of a spiritual cognizance. And indeed (as was in some degree observed in a former book,)(z) they were originally cognizable in the king's courts of common law, viz., the county-courts;(a) and afterwards transferred to the jurisdiction of the church, by the favour of the crown, as a natural consequence of granting to the bishops the administration of intestates' effects.

(y) Warburt. Alliance, 173. (z) Book ii. ch. 32. (a) Hickes's *Dissert. Epistolar.* p. 8, 58.

the testament, the execution of trusts is never refused by courts of equity. 1 P. Wms. 544, 575. These courts, indeed, in some other instances which frequently occur upon the present subject, exercise a jurisdiction in exclusion of the ecclesiastical, inasmuch as the relief given by the former is more efficient than that administered by the latter. One of these cases happens when a *husband* endeavours to obtain payment of his wife's legacy: equity will oblige him to make a proper settlement upon her, before a decree will be made for payment of the money to him; but this the ecclesiastical court cannot do: therefore, if the baron libel in that court for his wife's legacy, the court of chancery will grant an injunction to stay proceedings in it, he not having made any settlement or provision for her. 1 Dick. Rep. 373. Also 1 Atk. 491, 516. 2 Atk. 420. Prec. Cha. 548, S. P. Another of those instances occurs when legacies are given to *infants;* for equity will protect their interests, and give proper directions for securing and improving the fund for their benefit, which could not be effected in the ecclesiastical court. 1 Vern. 26. It has been already observed that the probate of wills belongs exclusively to the ecclesiastical court, except in the instance above adduced; whence it follows that, if a probate has been granted of a will obtained by fraud, the ecclesiastical court alone can revoke it, (2 Vern. 8. 1 P. Wms. 388;) and a person cannot be convicted of forging a will of a deceased person of personal property until the probate thereof has been sealed by the ecclesiastical court. 3 T. R. 127.

Although a court of equity cannot set aside a will of personal estate the probate of which has been obtained from the spiritual court, yet the court will interfere when a probate has been granted by the fraud of the person obtaining it, and either convert the wrong-doer into a *trustee*, in respect of such probate, or oblige him to consent to a repeal or revocation of it in the court from which it was granted. 1 Ves. 119, 284, 287. A court of equity will also interfere and prevent a person from taking an undue advantage by contesting the validity of a probate, when such person *has acted under it* and *admitted facts* material to its validity. 1 Atk. 628.

The jurisdiction of the ecclesiastical courts is confined to testaments merely, or, in other words, to dispositions of personalty: if, therefore, real estate be the subject of a devise to be sold for payment of debts or portions, these courts cannot hold plea in relation to such bequests, but the proper forum is a court of equity. Dyer, 151, b. Palm. 120, S. P. But the ecclesiastical courts' jurisdiction may extend to affect interests arising out of real property, when those interests are less than freehold, as in devises of terms for years, or of rents payable out of them; for such dispositions relate to *chattels real* only. 2 Keb. 8. Cro. J. 279. Buls. 153. If a legatee alter the nature of his demand, and change it into a debt or duty, as by accepting a bond from the executor for payment of the legacy, it seems that the effect of the transaction will be either to deprive the ecclesiastical court of its jurisdiction, or to give an option to the person entitled, to sue in that or in a temporal court, at his discretion. 2 Roll. R. 160. Yelv. 39. 8 Mod. 327.

Cases have occurred in which *courts of common law* have assumed jurisdiction of testamentary matters, and permitted actions to be instituted for the recovery of legacies, upon proof of an express *assumpsit* or undertaking by the executor to pay them. Sid. 45. 11 Mod. 91. Ventr. 120. 2 Lev. 3. Cowp. 284. But it seems to be the opinion of modern judges that this jurisdiction extends to cases of *specific* legacies only; for when the executor assents to those bequests, the legal interests vest in the legatees, which enable them to enforce their rights at law. 3 East, R. 120. It seems to be the better opinion that when the legacy is not specific, but merely a gift out of the *general* assets, and particularly when a *married woman* is the legatee, a court of common law will not entertain jurisdiction to compel payment of such a legacy, upon the ground that a court of common law is, from its rules, incompetent to administer that complete justice to the parties which courts of equity have the power, and are in the constant habit, of doing. 5 Term Rep. K. B. 690. 7 T. R. 667. 2 P. Wms 641. Peake's C. N. P. 73. There is one case in the books where the declaration states that, in consideration of a forbearance by the plaintiff to sue, the executor promised to pay the legacy, and the court held that the action might be maintained; but the circumstance of that action being brought on a promise, in consideration of forbearance, shows that it was understood that the bare possession of assets was not alone sufficient. 5 T. R. 693. 2 Lev. 3. But it has been suggested that it should seem that upon an express promise and admission of assets an executor may be sued. 2 Saund. by Patteson, 137, note a.—CHITTY.

This spiritual jurisdiction of testamentary causes is a peculiar constitution of this island; for in almost all other (even in popish) countries all matters testamentary are under the jurisdiction of the civil magistrate. And that this privilege is enjoyed by the clergy in England, not as a matter of ecclesiastical right, but by the special favour and indulgence of the municipal law, and as it should seem by some public act of the great council, is freely acknowledged by Lindewode, the ablest canonist of the fifteenth century. Testamentary causes, he observes, belong to the ecclesiastical courts "*de consuetudine Angliæ, et super consensu regio et suorum procerum in talibus ab antiquo concesso.*"(*b*) The same was, about a century before, very openly professed in a canon of archbishop Stratford, viz., that the administration of intestates' goods was "*ab olim*" granted to the ordinary, "*consensu regio et magnatum regni Angliæ.*"(*c*) The constitutions of cardinal Othobon also testify that this provision "*olim a prælatis cum approbatione regis et baronum dicitur emanasse.*"(*d*) And archbishop Parker,(*e*) in queen Elizabeth's time, affirms in express words, that originally in matters testamentary "*non ullam habebant episcopi authoritatem, præter eam quam a rege acceptam referebant. Jus testamenta probandi non *habebant: administrationis potestatem cuique delegare non poterant.*" *96]

At what period of time the ecclesiastical jurisdiction of testaments and intestacies began in England, is not ascertained by any antient writer: and Lindewode(*f*) very fairly confesses, "*cujus regis temporibus hoc ordinatum sit, non reperio.*" We find it indeed frequently asserted in our common-law books, that it is but of *late years* that the church hath had the probate of wills.(*g*) But this must only be understood to mean that it hath not *always* had this prerogative: for certainly it is of very high antiquity. Lindewode, we have seen, declares that it was "*ab antiquo;*" Stratford, in the reign of king Edward III., mentions it as "*ab olim ordinatum;*" and cardinal Othobon, in the 52 Hen. III., speaks of it as an antient tradition. Bracton holds it for clear law, in the same reign of Henry III., that matters testamentary belonged to the spiritual court.(*h*) And, yet earlier, the disposition of intestates' goods "*per visum ecclesiæ*" was one of the articles confirmed to the prelates by king John's *magna carta.*(*i*) Matthew Paris also informs us that king Richard I. ordained in Normandy "*quod distributio rerum quæ in testamento relinquuntur autoritate ecclesiæ fiet.*" And even this ordinance of king Richard was only an introduction of the same law into his ducal dominions, which before prevailed in this kingdom; for in the reign of his father Henry II. Glanvil is express, that "*si quis aliquid dixerit contra testamentum, placitum illud in curia christianitatis audiri debet et terminari.*"(*j*) And the Scots book, called *regiam majestatem*, agrees *verbatim* with Glanvil in this point.(*k*)

It appears that the foreign clergy were pretty early ambitious of this branch of power; but their attempts to assume *it on the continent were effectually curbed by the edict of the emperor Justin,(*l*) which restrained the insinuation or probate of testaments (as formerly) to the office of the *magister census:* for which the emperor subjoins this reason: "*absurdum et enim clericis est, immo etiam opprobriosum, si peritos se velint ostendere disceptationum esse forensium.*" But afterwards by the canon law(*m*) it was allowed that the bishop might compel by ecclesiastical censures the performance of a bequest to *pious uses.* And therefore, as that was considered as a cause *quæ secundum canones et episcopales leges ad regimen animarum pertinuit*, it fell within the jurisdiction of the spiritual courts by the express words of the charter of king William I., which separated those courts from the temporal. And afterwards, when king Henry I. by his coronation-charter directed that the goods of an intestate should be divided for the good of his soul,(*n*) this made all intestacies immediately spiritual causes, as much as a legacy to pious uses had been before. This therefore, *97]

(*b*) *Provincial, l.* 3, *t.* 13, *fol.* 176.
(*c*) Ibid. *l.* 3, *t.* 38, *fol.* 263.
(*d*) *Cap.* 23.
(*e*) See 9 Rep. 38.
(*f*) Fol. 263.
(*g*) Fitz. Abr. tit. *testament*, pl. 4. 2 Roll. Abr. 217. 9 Rep. 37. Vaugh. 207.
(*h*) *L.* 5, *de exceptionibus*, c. 10.
(*i*) *Cap.* 27, edit. *Oxon.*
(*j*) *L.* 7, c. 8.
(*k*) *L.* 2, *c.* 38.
(*l*) *Cod.* 1, 3, 41.
(*m*) *Decretal.* 3, 26, 17. Gilb. Rep. 204, 205.
(*n*) *Si quis baronum seu hominum meorum,—pecuniam suam non dederit vel dare disposuerit, uxor sua, sive liberi, aut parentes et legitimi homines ejus, eam* pro anima ejus *dividant, sicut eis melius visum fuerit. Text. Roffens.* c. 34, p. 51.

we may probably conjecture, was the era referred to by Stratford and Othobon, when the king, by the advice of the prelates and with the consent of his barons, invested the church with this privilege. And accordingly in king Stephen's charter it is provided that the goods of an intestate ecclesiastic shall be distributed *pro salute animæ ejus, ecclesiæ consilio;*(o) which latter words are equivalent to *per visum ecclesiæ* in the great charter of king John before mentioned. And the Danes and Swedes (who received the rudiments of Christianity and ecclesiastical discipline from England about the beginning of the twelfth century) have thence also adopted the spiritual cognizance of intestacies, testaments, and legacies.(*p*)

This jurisdiction, we have seen, is principally exercised with us in the consistory courts of every diocesan *bishop, and in the prerogative court of the metropolitan, originally; and in the arches court and court of delegates [*98 by way of appeal. It is divisible into three branches; the probate of wills, the granting of administrations, and the suing for legacies. The two former of which, when no opposition is made, are granted merely *ex officio et debito justitiæ*, and are then the object of what is called the *voluntary*, and not the *contentious*, jurisdiction. But when a *caveat* is entered against proving the will or granting administration, and a suit thereupon follows to determine either the validity of the testament, or who hath a right to administer; this claim and obstruction by the adverse party are an injury to the party entitled, and as such are remedied by the sentence of the spiritual court, either by establishing the will or granting the administration. Subtraction, the withholding or detaining of legacies, is also still more apparently injurious, by depriving the legatees of that right with which the laws of the land and the will of the deceased have invested them: and therefore, as a consequential part of testamentary jurisdiction, the spiritual court administers redress herein, by compelling the executor to pay them. But in this last case the courts of equity exercise a concurrent jurisdiction with the ecclesiastical courts, as incident to some other species of relief prayed by the complainant; as to compel the executor to account for the testator's effects, or assent to the legacy, or the like. For, as it is beneath the dignity of the king's courts to be merely ancillary to other inferior jurisdictions, the cause, when once brought there, receives there also its full determination.[9]

These are the principal injuries for which the party grieved either must, or may, seek his remedy in the spiritual courts. But before I entirely dismiss this head, it may not be improper to add a short word concerning the *method of proceeding* in these tribunals, with regard to the redress of injuries.

It must (in the first place) be acknowledged, to the honour of the spiritual courts, that though they continue to this *day to decide many questions [*99 which are properly of temporal cognizance, yet justice is in general so ably and impartially administered in those tribunals (especially of the superior

(o) Lord Lyttlet. Hen. II. vol. i. 536. Hearne *ad Gul. Neubr.* 711.

(p) Stiernhook, *de jure Sueon. l.* 3, c. 3.

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[9] No action at law can be maintained against an executor for a legacy where there is no further proof of his assent to the legacy than what the law can infer from an acknowledgment by him of assets sufficient to pay it. Convenience is much in favour of this rule, because, if the person who was *legally* entitled could recover at *law*, he would do so *absolutely* and for his own use; and though the legacy might have been intended for the benefit of another, a court of law would have no means of compelling the legatee so to apply it, as in the case of a legacy to the wife, which would become the husband's absolutely; and the court of law could not oblige him, as a court of equity now will, to make provision for his wife out of it. Deeks *vs.* Strutt, 5 T. R. 690. But where the executor admits assets and expressly promises to pay in the case of a pecuniary legacy, or where the legacy being specific he assents to it, such promise and assent vest the property in the legatee, and he may maintain an action against the executor. Atkins *vs.* Hill, Cowp. 284. Lord Say and Sele *vs.* Guy, 3 E. R. 120.

It is omitted to be observed in the text that causes of defamation are within the jurisdiction of the ecclesiastical court. Suits of this kind are entertained for the use of words which, not importing or producing any temporal danger or loss, are not actionable in the courts of common law: and the use of them is punished by penance with or without costs, at the discretion of the court.—COLERIDGE.

kind) and the boundaries of their power are now so well known and established, that no material inconvenience at present arises from this jurisdiction still continuing in the antient channel. And, should an alteration be attempted, great confusion would probably arise, in overturning long-established forms, and new-modelling a course of proceedings that has now prevailed for seven centuries.

The establishment of the civil-law process in all the ecclesiastical courts was indeed a masterpiece of papal discernment, as it made a coalition impracticable between them and the national tribunals, without manifest inconvenience and hazard. And this consideration had undoubtedly its weight in causing this measure to be adopted, though many other causes concurred. The time when the pandects of Justinian were discovered afresh, and rescued from the dust of antiquity, the eagerness with which they were studied by the popish ecclesiastics, and the consequent dissensions between the clergy and the laity of England, have formerly(*q*) been spoken to at large. I shall only now remark upon those collections, that their being written in the Latin tongue, and referring so much to the will of the prince and his delegated officers of justice, sufficiently recommended them to the court of Rome, exclusive of their intrinsic merit. To keep the laity in the darkest ignorance, and to monopolize the little science, which then existed, entirely among the monkish clergy, were deep-rooted principles of papal policy. And, as the bishops of Rome affected in all points to mimic the imperial grandeur, as the spiritual prerogatives were moulded on the pattern of the temporal, so the canon-law process was formed on the model of the civil law: the prelates embracing with the utmost ardour a method of judicial proceedings which was carried on in a language unknown to the bulk of the people, which banished the intervention of a jury, (that bulwark of *Gothic liberty,) which placed an arbitrary power of decision in the breast of a single man. *100]

The proceedings in the ecclesiastical courts are therefore regulated according to the practice of the civil and canon laws; or rather according to a mixture of both, corrected and new-modelled by their own particular usages, and the interposition of the courts of common law. For, if the proceedings in the spiritual court be ever so regularly consonant to the rules of the Roman law, yet if they be manifestly repugnant to the fundamental maxims of the municipal laws, to which upon principles of sound policy the ecclesiastical process ought in every state to conform,(*r*) (as if they require two witnesses to prove a fact, where one will suffice at common law;) in such cases a prohibition will be awarded against them.(*s*) But, under these restrictions, their ordinary course of proceeding is: first, by *citation*, to call the party injuring before them. Then, by *libel*, *libellus*, a little book, or by articles drawn out in a formal *allegation*, to set forth the complainant's ground of complaint. To this succeeds the *defendant's answer* upon oath, when, if he denies or extenuates the charge, they proceed to *proofs* by witnesses examined, and their depositions taken down in writing, by an officer of the court. If the defendant has any circumstances to offer in his defence, he must also propound them in what is called his *defensive allegation*, to which he is entitled in his turn to the *plaintiff's answer* upon oath, and may from thence proceed to *proofs* as well as his antagonist. The canonical doctrine of *purgation*, whereby the parties were obliged to answer upon oath to any matter, however criminal, that might be objected against them, (though long ago overruled in the court of chancery, the genius of the English law having broken through the bondage imposed on it by its clerical chancellors, and asserted the doctrines of judicial as well as civil liberty,) continued to the middle of the last century to be upheld by the spiritual courts; when the legislature was obliged to interpose, to teach them a lesson of similar moderation. By the *statute of 13 Car. II. c. 12, it is enacted that it shall not be lawful for any bishop or ecclesiastical judge to tender or administer, to any person whatsoever, the oath usually called the oath *ex officio*, or any other oath whereby he may be compelled to confess, accuse, or purge himself of any criminal matter or thing, whereby he may be liable to any censure or punishment. When all the pleadings and proofs are con- [*101

(*q*) Book i. introd. § 1. (*r*) Warb. Alliance, 179. (*s*) 2 Roll. Abr. 300, 302.

cluded, they are referred to the consideration, not of a jury, but of a single judge; who *takes information* by hearing advocates on both sides, and thereupon forms his *interlocutory decree* or *definitive sentence* at his own discretion: from which there generally lies an *appeal*, in the several stages mentioned in a former chapter;(*t*) though if the same be not appealed from in fifteen days, it is final by the statute 25 Hen. VIII. c. 19.

But the point in which these jurisdictions are the most defective, is that of enforcing their sentences when pronounced; for which they have no other process but that of *excommunication;* which is described(*u*) to be twofold; the less, and the greater, excommunication. The less is an ecclesiastical censure, excluding the party from the participation of the sacraments; the greater proceeds further, and excludes him not only from these, but also from the company of all Christians. But, if the judge of any spiritual court excommunicates a man for a cause of which he hath not the legal cognizance, the party may have an action against him at common law, and he is also liable to be indicted at the suit of the king.(*w*)[10]

Heavy as the penalty of excommunication is, considered in a serious light, there are, notwithstanding, many obstinate or profligate men, who would despise the *brutum fulmen* of mere ecclesiastical censures, especially when pronounced by a petty surrogate in the country, for railing or contumelious words, for non-payment of fees, or costs, or for other trivial causes. The common law therefore compassionately steps in to *the aid of the ecclesiastical jurisdiction, and kindly lends a supporting hand to an otherwise tottering authority. [*102 Imitating herein the policy of our British ancestors, among whom, according to Cæsar,(*x*) whoever were interdicted by the Druids from their sacrifices, "*in numero impiorum ac sceleratorum habentur: ab iis omnes decedunt, aditum eorum sermonemque defugiunt, ne quid ex contagione incommodi accipiant: neque iis petentibus jus redditur, neque honos ullus communicatur.*" And so with us by the common law an excommunicated person is disabled to do any act that is required to be done by one that is *probus et legalis homo.* He cannot serve upon juries, cannot be a witness in any court, and, which is the worst of all, cannot bring an action, either real or personal, to recover lands or money due to him.(*y*) Nor is this the whole: for if, within forty days after the sentence has been published in the church, the offender does not submit and abide by the sentence of the spiritual court, the bishop may certify such contempt to the king in chancery. Upon which there issues out a writ to the sheriff of the county, called, from the bishop's certificates, a *significavit;* or, from its effects, a writ *de excommunicato capiendo:* and the sheriff shall thereupon take the offender, and imprison him in the county gaol, till he is reconciled to the church, and such reconciliation certified by the bishop; under which another writ, *de excommunicato deliberando,* issues out of chancery to deliver and release him.(*z*) This process seems founded on the charter of separation (so often referred to) of William the Conqueror. "*Si aliquis per superbiam elatus ad justitiam episcopalem venire noluerit, vocetur semel, secundo, et tertio: quod si nec ad emendationem venerit, excommunicetur; et, si opus fuerit, ad hoc vindicandum fortitudo et justitia regis sive vicecomitis adhibeatur.* And in case of subtraction of tithes, a more summary and expeditious assistance

(*t*) Ch. 5.
(*u*) Co Litt. 133.
(*w*) 2 Inst. 623.
(*x*) *De bello Gall. l.* 6.
(*y*) Litt. § 201.
(*z*) F. N. B. 62.

[10] The recent act, 53 Geo. III. c. 127, prohibits excommunication and the writ *de excommunicato capiendo* as a mode of enforcing performance or obedience to ecclesiastical orders and decrees; and, instead of the sentence of excommunication in those cases, the court is to pronounce the defendant contumacious, and the ecclesiastical judge is to send his *significavit* in the prescribed form to the chancery, from which a *writ de contumace capiendo* is to issue in the prescribed form, and which is to have the same force as the ancient writ. There is a similar act as to Ireland, 54 Geo. III. c. 68. In other cases not of disobedience to the orders and decrees of the court, there may be excommunication, and a writ *de excommunicato capiendo,* as heretofore. In the proceedings under this statute, it must clearly appear that the ecclesiastical court had jurisdiction, and that the form of proceedings has been duly observed. 5 Bar. & Ald. 791. 3 Dowl. & R. 570, *ante,* 87, note 1.—CHITTY.

is given by the statutes of 27 Hen. VIII. c. 20, and 32 Hen. VIII. c. 7, which enact, that upon complaint of any contempt or misbehaviour of the ecclesiastical judge by the defendant in any suit for tithes, any privy counsellor, or *103] any* two justices of the peace (or, in case of disobedience to a definitive sentence, any two justices of the peace,) may commit the party to prison without bail or mainprize, till he enters into a recognizance with sufficient sureties to give due obedience to the process and sentence of the court. These timely aids, which the common and statute laws have lent to the ecclesiastical jurisdiction, may serve to refute that groundless notion which some are too apt to entertain, that the courts at Westminster hall are at open variance with those at doctors' commons. It is true that they are sometimes obliged to use a parental authority, in correcting the excesses of these inferior courts, and keeping them within their legal bounds; but, on the other hand, they afford them a parental assistance in repressing the insolence of contumacious delinquents, and rescuing their jurisdiction from that contempt which for want of sufficient compulsive powers would otherwise be sure to attend it.[11]

II. I am next to consider the injuries cognizable in the *court military*, or court of *chivalry*. The jurisdiction of which is declared by statute 13 Ric. II. c. 2 to be this: "that it hath cognizance of contracts touching deeds of arms or of war, out of the realm, and also of things which touch war within the realm, which cannot be determined or discussed by the common law; together with other usages and customs to the same matters appertaining." So that wherever the common law can give redress, this court hath no jurisdiction: which has thrown it entirely out of use as to the matter of contracts, all such being usually cognizable in the courts of Westminster hall, if not directly, at least by fiction of law: as if a contract be made at Gibraltar, the plaintiff may suppose it made at Northampton; for the locality, or place of making it, is of no consequence with regard to the validity of the contract.

The words "other usages and customs" support the claim of this court, 1. To give relief to such of the nobility and gentry as think themselves aggrieved in matters of honour; and 2. To keep up the distinction of degrees and *104] *quality. Whence it follows, that the civil jurisdiction of this court of chivalry is principally in two points; the redressing injuries of honour, and correcting encroachments in matters of coat-armour, precedency, and other distinctions of families.

As a court of honour, it is to give satisfaction to all such as are aggrieved in that point; a point of a nature so nice and delicate, that its wrongs and injuries escape the notice of the common law, and yet are fit to be redressed somewhere. Such, for instance, as calling a man a coward, or giving him the lie; for which, as they are productive of no immediate damage to his person or property, no action will lie in the courts at Westminster; and yet they are such injuries as will prompt every man of spirit to demand some honourable amends, which by the antient law of the land was appointed to be given in the court of chivalry.(*a*) But modern resolutions have determined, that how much soever such a jurisdiction may be expedient, yet no action for words will at present lie therein.(*b*) And it hath always been most clearly holden,(*c*) that as this court cannot meddle with any thing determinable by the common law, it therefore can give no pecuniary satisfaction or damages, inasmuch as the quantity and determination thereof is ever of common-law cognizance. And therefore this

(*a*) Year-book, 37 Hen. VI. 21. Selden of Duels, c. 10. Hal. Hist. C. L. 37.

(*b*) Salk. 533. 7 Mod. 125. 2 Hawk. P. C. 11.

(*c*) Hal. Hist. C. L. 37.

[11] In the ecclesiastical courts the maxim is that *nullum tempus occurrit ecclesiæ*, or that there is no limitation to a prosecution for a spiritual offence; and it was thought a great grievance that the peace of families might be disturbed by a prosecution for a crime of incontinence committed many years before. It was therefore enacted by the 27 Geo. III. c. 44 that no prosecution should be commenced in the spiritual courts for defamation after six months, or for fornication or incontinence, or for striking or brawling in a church or churchyard, after eight months; and that in no case parties who had intermarried should be prosecuted for their previous fornication.—Christian.

court of chivalry can at most only order reparation in point of honour; as, to compel the defendant *mendacium sibi ipsi imponere*, or to take the lie that he has given upon himself, or to make such other submission as the laws of honour may require.(*d*) Neither can this court, as to the point of reparation in honour, hold plea of any such word or thing wherein the party is relievable by the courts of common law. As if a man gives another a blow, or calls him thief or murderer; for in both these cases the common law has pointed out his proper remedy by action.

*As to the other point of its civil jurisdiction, the redressing of encroachments and usurpations in matters of heraldry and coat-armour: [*105 it is the business of this court, according to Sir Matthew Hale, to adjust the right of armorial ensigns, bearings, crests, supporters, pennons, &c.; and also rights of place or precedence, where the king's patent or act of parliament (which cannot be overruled by this court) have not already determined it.

The proceedings in this court are by petition, in a summary way; and the trial not by a jury of twelve men, but by witnesses, or by combat.(*e*) But as it cannot imprison, not being a court of record, and as by the resolutions of the superior courts it is now confined to so narrow and restrained a jurisdiction, it has fallen into contempt and disuse. The marshalling of coat-armour, which was formerly the pride and study of all the best families in the kingdom, is now greatly disregarded; and has fallen into the hands of certain officers and attendants upon this court, called heralds, who consider it only as a matter of lucre, and not of justice: whereby such falsity and confusion have crept into their records, (which ought to be the standing evidence of families, descents, and coat-armour,) that, though formerly some credit has been paid to their testimony, now even their common seal will not be received as evidence in any court of justice in the kingdom.(*f*) But their original visitation books, compiled when progresses were solemnly and regularly made into every part of the kingdom, to inquire into the state of families, and to register such marriages and descents as were verified to them upon oath, are allowed to be good evidence of pedigrees.(*g*) And it is much to be wished, that this practice of visitation at certain periods were revived; for the failure of inquisitions *post mortem*, by the abolition of military tenures, combined with the negligence of the heralds in omitting their usual progresses, has rendered the proof of a modern descent, *for the recovery of an estate or succession to a title of honour, more difficult [*106 than that of an antient. This will be indeed remedied for the future, with respect to claims of peerage, by a late standing order(*h*) of the house of lords; directing the heralds to take exact accounts, and preserve regular entries, of all peers and peeresses of England, and their respective descendants; and that an exact pedigree of each peer and his family shall, on the day of his first admission, be delivered to the house by garter the principal king-at-arms. But the general inconvenience, affecting more private successions, still continues without a remedy.

III. Injuries cognizable by the courts maritime, or admiralty courts, are the next object of our inquiries. These courts have jurisdiction and power to try and determine all maritime causes; or such injuries which, though they are in their nature of common-law cognizance, yet being committed on the high seas, out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. All admiralty causes must be therefore causes arising wholly upon the sea, and not within the precincts of any county.(*i*)[12] For the statute 13 Ric. II. c. 5 directs that the admiral and his deputy shall not meddle with any thing, but only things done upon the sea; and the statute 15 Ric. II. c. 3 declares that the court of the admiral hath no manner of cognizance of any contract, or of any other thing, done within the body of any county,

(*d*) 1 Roll. Abr. 128.
(*e*) Co. Litt. 261.
(*f*) 2 Roll. Abr. 686. 2 Jon. 224.
(*g*) Comb. 63.
(*h*) 11 May, 1767.
(*i*) Co. Litt. 260. Hob. 79.

[12] See much learning respecting the jurisdiction of the court of admiralty in the case of Le Caux *vs.* Eden, Doug. 572.—CHRISTIAN.

either by land or water; nor of any wreck of the sea: for that must be cast on land before it becomes a wreck.(*j*) But it is otherwise of things *flotsam, jetsam*, and *ligan;* for over them the admiral hath jurisdiction, as they are in and upon the sea.(*k*) If part of any contract, or other cause of action, doth arise upon the sea, and part upon the land, the common law excludes the admiralty court from its jurisdiction; for, part belonging properly to one cognizance and part to another, the common or general law takes place of the particular.(*l*) *107] *Therefore, though pure maritime acquisitions, which are earned and become due on the high seas, as seamen's wages, are one proper object of the admiralty jurisdiction, even though the contract for them be made upon land;(*m*) yet, in general, if there be a contract made in England and to be executed upon the seas, as a charter-party or covenant that a ship shall sail to Jamaica, or shall be in such a latitude by such a day; or a contract made upon the sea to be performed in England, as a bond made on shipboard to pay money in London, or the like; these kinds of mixed contracts belong not to the admiralty jurisdiction, but to the courts of common law.(*n*) And indeed it hath been further holden, that the admiralty court cannot hold plea of any contract under seal.(*o*)[13]

(*j*) See book i. ch. 8.
(*k*) 5 Rep. 106.
(*l*) Co. Litt. 261.
(*m*) 1 Ventr. 146.
(*n*) Hob. 12. Hal. Hist. C. L. 35.
(*o*) Hob. 212.

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[13] The case referred to in the text is that of Palmer *vs.* Pope, Hobart's Rep. p. 79 and p. 212; but it does not seem to warrant the position. The libel in the admiralty court there stated an agreement, made *super altum mare*, that Pope should carry certain sugars, and that the agreement was after put in writing, in the port of Gado, on the coast of Barbary; a breach was then assigned. The court resolved "that a prohibition lay, because the original contract, though it were made at sea, yet was changed when it was put in writing and sealed, *which, being at land*, changed the jurisdiction; but if it had been a writing only without seal, a mere remembrance of the agreement, it had made no change." By this is to be understood that the sealed contract destroyed the original parol contract, which a mere writing would not have done; and as that new contract was made *on land*, though out of the king's dominions, still it was not within the admiralty jurisdiction. It cannot, therefore, be inferred from this case that the admiralty court cannot hold plea of *any* contract under seal. The same point, however, is undoubtedly laid down in Opy *vs.* Addison and others, 12 Mod. 38. S. C. Salk. 31. Day *vs.* Searle, 2 Strange, 968, (which, however, was decided only on the authority of the preceding case,) and Howe *vs.* Nappier, 4 Burr. 1950. Perhaps, however, upon an examination of the authorities, it would appear that there is nothing to warrant the position that the admiralty court has not jurisdiction where the specialty contract is made *on the sea* and to be performed on the sea, or where it relates to a subject-matter over which the court has jurisdiction. The 4 Inst. p. 135, which has been cited to support this, does not go so far; and the case of Menetone *vs.* Gibbons, 3 T. R. 267, virtually overruled the cases on which lord Mansfield relied in Howe *vs.* Nappier, because there it was determined that the admiralty court *had* jurisdiction respecting an hypothecation *bond*, though executed on land and under seal, *because* it had jurisdiction over the subject-matter of the hypothecation of ships, and it was expressly negatived that the circumstance of the instrument being under seal could deprive them of their jurisdiction. Now, the cases alluded to were suits for mariners' wages, and it was admitted that the admiralty had jurisdiction over the subject-matter; but it was said that the special agreement and the seal took it away.

It will be observed that the reasoning in this note on the case of Palmer *vs.* Pope proceeds further than the text, and assumes that in the case of contracts it is not necessary to bring the matter within the precincts of a county in order to oust the admiralty of jurisdiction. In that case it is expressly laid down that the jurisdiction is limited to the *seas* only, that the libel must allege the matter to have arisen *super altum mare*, and that if it arise upon any continent, port, or haven, in the world, of the king's dominions, the statutes take away the jurisdiction. This must be qualified, it is conceived, by the principle laid down in Menetone *vs.* Gibbons. See H. C. L. c. 2.—Coleridge.

And now, by stat. 3 & 4 Vict. c. 65, s. 6, the court may in certain cases adjudicate on claims for services and repairs, although not on the high seas: and by 9 & 10 Vict. c. 99 its jurisdiction in matters of wreck and salvage is regulated.—Stewart.

All civil injuries cognizable in the court of admiralty in England are in like manner cognizable in the district courts of the United States, which are courts of admiralty *quoad hoc*. Captures within the waters of the United States or within a marine league of the coasts, by whomsoever made, are likewise cognizable therein,—saving to suitors, in all

And also, as the courts of common law have obtained a concurrent jurisdiction with the court of chivalry with regard to foreign contracts, by supposing them made in England; so it is no uncommon thing for a plaintiff to feign that a contract, really made at sea, was made at the royal exchange, or other inland place, in order to draw the cognizance of the suit from the courts of admiralty to those of Westminster hall.(*p*) This the civilians exclaim against loudly, as inequitable and absurd; and Sir Thomas Ridley(*q*) hath very gravely proved it to be impossible for the ship in which such cause of action arises to be really at the royal exchange in Cornhill. But our lawyers justify this fiction, by alleging (as before) that the locality of such contracts is not at all essential to the merits of them; and that learned civilian himself seems to have forgotten how much such fictions are adopted and encouraged in the Roman law: that a son killed in battle is supposed to live forever for the benefit of his parents;(*r*) and that, by the fiction of *postliminium* and the *lex Cornelia*, captives, when freed from bondage, were held to have never been prisoners,(*s*) and such as died in captivity were supposed to have died in their own country.(*t*)

*Where the admiral's court hath no original jurisdiction of the cause, though there should arise in it a question that is proper for the cognizance of that court, yet that doth not alter nor take away the exclusive jurisdiction of the common law.(*u*) And so, *vice versa*, if it hath jurisdiction of the original, it hath also jurisdiction of all consequential questions, though properly determinable at common law.(*v*) Wherefore, among other reasons, a suit for beaconage of a beacon standing on a rock in the sea may be brought in the court of admiralty, the admiral having an original jurisdiction over beacons.(*w*) In case of prizes also in time of war, between our own nation and another, or between two other nations, which are taken at sea, and brought into our [*108

(*p*) 4 Inst. 134.
(*q*) View of the Civil Law, b. iii. p. 1, § 3.
(*r*) Inst. 1. tit. 25.
(*s*) *Ff.* 49, 15, 12, § 6.
(*t*) *Ff.* 49, 15, 18.
(*u*) Comb. 462.
(*v*) 13 Rep. 53. 2 Lev. 25. Hardr. 183.
(*w*) 1 Sid. 158.

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cases, the right of a common-law remedy where the common law is competent to give it. Act Sept. 24, 1789. 1 Story's Laws, 56. Act of June 5, 1794, 1 Story's Laws, 353. Seamen's wages are there also recoverable: and a summary method of compelling payment, by application to the district judge, or, in case of his residence being more than three miles from the place, or of his absence, to any judge or justice of the peace, is given by the act for the government of seamen in the merchants' service; saving to them the right of maintaining an action at common law. Act of July 20, 1790, 1 Story's Laws, 105.

It was at first questioned whether the district courts had jurisdiction under the act of Congress as prize courts, in virtue of the clause vesting in them all civil causes of admiralty jurisdiction. The Supreme Court of the United States settled this question by deciding that the district courts of the United States possessed all the powers of courts of admiralty, whether considered as instance or as prize courts. Glass *vs.* The Sloop Betsy, 3 Dallas, 6.

In regard to the powers of the district courts as instance courts, it seems to be settled that the federal courts, as courts of admiralty, can only exercise such criminal jurisdiction as is expressly conferred upon them by acts of Congress. United States *vs.* Hudson & Goodwin, 7 Cranch, 32. United States *vs.* Coolidge, 1 Wheaton, 415. The Judiciary Act of 1789 provides that the trial of all issues in fact in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.

In regard to the extent of the powers of the district courts in civil causes of admiralty jurisdiction, it was held, in De Lovio *vs.* Boit and others, 2 Gallison, 398, that the admiralty has jurisdiction over all maritime contracts, wheresoever the same may be made or executed, and whatever may be the form of the stipulations: that it has also jurisdiction over all torts and injuries committed upon the high seas and in ports or harbours within the ebb and flow of the tide; and that the like causes are within the jurisdiction of the district courts of the United States, by virtue of the delegation of authority in all civil causes of admiralty and maritime jurisdiction. The doctrines of this case have been denied, and the question has been much discussed in subsequent cases. Ramsay *vs.* Allegre, 12 Wheat. 638. Bains *vs.* The Schooner James and Catherine, Baldwin, 544. Waring *vs.* Clarke, 5 Howard, 441. New Jersey Steam. Nav. Co. *vs.* Merchants' Bank, 6 ibid. 344. Cutler *vs.* Rae, 7 ibid. 729. United States *vs.* The New Bedford Bridge, 1 Wood and Minot, 401.—SHARSWOOD.

ports, the courts of admiralty have an undisturbed and exclusive jurisdiction to determine the same according to the law of nations.(x)[14]

The proceedings of the courts of admiralty bear much resemblance to those of the civil law, but are not entirely founded thereon; and they likewise adopt and make use of other laws, as occasion requires; such as the Rhodian laws and the laws of Oleron.(y) For the law of England, as has frequently been observed, doth not acknowledge or pay any deference to the civil law, considered as such; but merely permits its use in such cases where it judged its determinations equitable, and therefore blends it, in the present instance, with other marine laws: the whole being corrected, altered, and amended by acts of parliament and common usage; so that out of this composition a body of jurisprudence is extracted, which owes its authority only to its reception here by consent of the crown and people. The first process in these courts is fre-

(x) 2 Show. 232. Comb. 474. (y) Hale, Hist. C. L. 36. Co. Litt. 11.

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[14] The author takes no notice of what is very material,—that there are in fact two courts, the admiralty court, or more properly the instance court, of which he has hitherto been speaking, and which the statutes of Richard were made to restrain, but which has no jurisdiction in matters of prize, and the prize court. Both courts have, indeed, the same judge; but in the former he sits by virtue of a commission under the great seal, which enumerates the objects of his jurisdiction but specifies nothing relative to prize; while in the latter he sits by virtue of a commission which issues in every war, under the great seal, to the lord high admiral, requiring the court of admiralty and the lieutenant and judge of the same court "to proceed upon all and all manner of captures, seizures, prizes, and reprisals of all ships and goods that are or shall be taken, and to hear and determine according to the course of the admiralty and the law of nations:" and upon this a warrant issues to the judge. The manners of proceeding and the systems of litigation and jurisprudence are different in the two courts. The jurisdiction of this last court is exclusive; for it has been determined solemnly, that though for taking a ship on the high seas an action will lie at common law, yet when it is taken *as prize*, though wrongfully taken and there were no colour for the taking, no action can be maintained. Nor is the jurisdiction confined to captures *at sea*. Captures in port or on land, where the surrender has been to a naval force or a mixed force of the army and navy, are equally and exclusively triable by the prize court. The reasonableness and convenience of these determinations are beautifully enforced, in the judgments of Mr. J. Buller in Le Caux *vs.* Eden, and of lord Mansfield in Lindo *vs.* Rodney and another, Douglas's Rep. 594, 620. Though the prize court proceeds under a commission issuing at the commencement of each war, its jurisdiction is not peremptorily terminated by the peace, but all questions of prize between the two nations will still be tried by this court. Thus, where a vessel, having been captured by an American privateer in time of war, was recaptured after the period prescribed for the cessation of hostilities by the treaty of peace, and the American commander claimed the vessel to be restored to him by suit in the prize court, the jurisdiction of the court was affirmed and a prohibition refused. *Ex parte* Lynch, 1 Maddock's R. 15. The Harmony, S. C. 2 Dodson's R. 78.—Coleridge.

The court of admiralty has now, by stat. 3 & 4 Vict. c. 65, an express jurisdiction to try questions of booty at war; and by 13 & 14 Vict. cc. 26, 27, jurisdiction in questions relating to the attack and capture of pirates is vested in the admiralty court here and in all vice-admiralty courts abroad. Offences committed within the jurisdiction of the admiralty courts may now be tried in the ordinary criminal courts. 7 & 8 Vict. c. 2. 12 & 13 Vict. c. 96.—Stewart.

The text is incorrect in stating that in prizes "between two other nations which are taken at sea and brought into our ports" the courts of admiralty have jurisdiction to determine the same according to the law of nations. The condemnation of property thus taken in war must be pronounced by a prize court of the government of the captor, sitting either in the country of the captor or of his ally. The prize court of an ally cannot condemn. Prize or no prize is a question belonging exclusively to the courts of the country of the captor. The reason of this rule is said to be that the sovereign of the captors has a right to inspect their behaviour, for he is answerable to other states for the acts of the captor. The prize court of the captor may sit in the territory of the ally; but it is not lawful for such a court to act in a neutral territory. Neutral ports are not intended to be auxiliary to the operations of the powers at war; and the law of nations has clearly ordained that a prize court of a belligerent captor cannot exercise jurisdiction in a neutral country. This prohibition rests not merely on the unfitness and danger of making neutral ports the theatre of hostile proceedings, but it stands on the ground of the usage of nations. 1 Kent's Com. 103.—Sharswood.

quently by arrest of the defendant's person;(z) and they also take recognizances or stipulations of certain fidejussors in the nature of bail,(a) and in case of default may *imprison both them and their principal.(b) They may also fine and imprison for a contempt in the face of the court.(c) And all [*109 this is supported by immemorial usage, grounded on the necessity of supporting a jurisdiction so extensive;(d) though opposite to the usual doctrines of the common law: these being no courts of record, because in general their process is much conformed to that of the civil law.(e)

IV. I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are, for that very reason, within the cognizance of the common-law courts of justice. For it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress. The definition and explication of these numerous injuries, and their respective legal remedies, will employ our attention for many subsequent chapters. But before we conclude the present, I shall just mention two species of injuries, which will properly fall now within our immediate consideration: and which are, either when justice is delayed by an inferior court which has proper cognizance of the cause; or, when such inferior court takes upon itself to examine a cause and decide the merits without a legal authority.

1. The first of these injuries, refusal or neglect of justice, is remedied either by writ of *procedendo*, or of *mandamus*. A writ of *procedendo ad judicium* issues out of the court of chancery, where judges of any subordinate court do delay the parties; for that they will not give judgment either on the one side or the other, when they ought so to do. In this case a writ of *procedendo* shall be awarded, commanding them in the king's name to proceed to judgment; but without specifying any particular judgment, for that (if erroneous) may *be set aside in the course of appeal, or by writ of error or false judg- [*110 ment: and upon further neglect or refusal, the judges of the inferior court may be punished for their contempt by writ of attachment returnable in the king's bench of common pleas.(f)

A writ of *mandamus* is, in general, a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some *particular* thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice. It is a high prerogative writ, of a most extensively remedial nature; and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution of an office;[15] but it issues in all cases where the

(a) Clerke *prax. cur. adm.* § 13.
(c) Ibid. § 11. 1 Roll. Abr. 531. Raym. 78. Lord Raym. 1286.
(b) 1 Roll. Abr. 531. Godb. 193, 260.
(e) 1 Ventr. 1.
(d) 1 Keb. 552.
(e) Bro. Abr. tit. *Error*, 177.
(f) F. N. B. 153, 154, 240.

[15] Supposing the injured party to have a complete and specific redress by suit at law, it is conceived that the circumstance of its being a more tedious method will not be sufficient to warrant the court in granting a *mandamus*. But where the remedy is inadequate, the writ may issue. Thus, where a party refuses to do some act which by law he ought to do, and the nonfeasance of which is injurious to the public, though this be an indictable offence, that will not prevent the issuing of a *mandamus*, for the indictment will not directly compel the performance of the act: the offender may be fined or imprisoned, but if he be obstinate, the party injured has no complete remedy. Rex *vs.* Severn and Wye Railroad Company, 2 B. & A. 646. Neither does the instance put of an admission to an office seem to be in point; for though a *mandamus* will undoubtedly lie for such a purpose, yet it does lie specifically, because the party without it would have no legal remedy by action. It is proper also to add another qualification. If the right in dispute be strictly and wholly private, the court will not interfere: a *mandamus* is properly a writ to compel the performance of public, or at least official, duties; and therefore the court, considering the Bank of England as a mere corporation of private traders,

party hath a right to have any thing done, and hath no other specific means of compelling its performance. A *mandamus* therefore lies to compel the admission or restoration of the party applying to any office or franchise of a public nature, whether spiritual or temporal; to academical degrees; to the use of a meeting-house, &c.: it lies for the production, inspection, or delivery of public books and papers; for the surrender of the *regalia* of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an infinite number of other purposes, which it is impossible to recite minutely. But at present we are more particular to remark, that it issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the court of king's bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or legislature have invested them: and this, not only by re-
*111] straining their excesses, but also by quickening *their negligence, and obviating their denial of justice. A *mandamus* may therefore be had to the courts of the city of London, to enter up judgment;(*g*) to the spiritual courts to grant an administration, to swear a church-warden, and the like. This writ is grounded on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below: whereupon, in order more fully to satisfy the court that there is a probable ground for such interposition, a rule is made, (except in some general cases where the probable ground is manifest.) directing the party complained of to show cause why a writ of *mandamus* should not issue: and, if he shows no sufficient cause, the writ itself is issued, at first in the alternative, either to do thus, or signify some reason to the contrary; to which a return, or answer, must be made at a certain day. And, if the inferior judge, or other person to whom the writ is directed, returns or signifies an insufficient reason, then there issues in the second place a *peremptory mandamus*, to do the thing absolutely; to which no other return will be admitted, but a certificate of perfect obedience and due execution of the writ. If the inferior judge or other person makes no return, or fails in his respect and obedience, he is punishable for his contempt by attachment. But if he, at the first, returns a sufficient cause, although it should be false in fact, the court of king's bench will not try the truth of the fact upon affidavits; but will for the present believe him, and proceed no further on the *mandamus*. But then the party injured may have an action against him for his false return, and (if found to be false by the jury) shall recover damages equivalent to the injury sustained; together with a *peremptory mandamus* to the defendant to do his duty.[16] Thus much for the injury of neglect or refusal of justice.

(*g*) Raym. 214.

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so far as regarded its internal management of its own concerns, refused to issue a *mandamus* upon the application of a member to compel the directors to produce their accounts in order to declare a dividend of all their profits. Rex *vs.* The Bank of England, 2 B. & A. 620. Rex *vs.* London Assurance Company, 5 B. & A. 599.

As the writ of *mandamus* is exclusively confined to the court of King's Bench, and has been called one of the flowers of that court, no writ of error will lie to any other jurisdiction, if there should be any thing improper, either in the granting it, or in the proceedings under it.

On the subject of *mandamus* and the traversing the return if false in fact, in certain cases, see *post*, 264.—Coleridge.

[16] However, by stat. 1 W. IV. c. 21, s. 3, the prosecutor may now in all cases of *mandamus* (as he could by stat. 9 Anne, c. 20, in certain special cases) plead to or traverse the matters in any return, and proceed and obtain damages as in an action for a false return, without the necessity of bringing such action as heretofore; and, by s. 6, the costs on all applications for *mandamus* are to be in the discretion of the court. And now, by stat. 6 & 7 Vict. c. 67, on such return being made, the person prosecuting the writ may object to the validity of such return by way of demurrer, and thereupon the writ and return and the demurrer shall be entered upon record, and proceedings shall be taken as upon a demurrer to pleadings; and, by s. 2, upon judgment being given thereon, error may be brought for reversing the same in like manner as in ordinary civil actions.—Stewart.

2. The other injury, which is that of encroachment of jurisdiction, or calling one *coram non judice*, to answer in a court that has no legal cognizance of the cause, is also a grievance for which the common law has provided a remedy by the writ of *prohibition*.

*A prohibition is a writ issuing properly only out of the court of king's bench, being the king's prerogative writ; but, for the furtherance of [*112 justice, it may now also be had in some cases out of the court of chancery,(*h*) common pleas,(*i*) or exchequer;(*k*) directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. This writ may issue either to inferior courts of common law; as, to the courts of the counties palatine or principality of Wales, if they hold plea of land or other matters not lying within their respective franchises;(*l*) to the county-courts or courts-baron, where they attempt to hold plea of any matter of the value of forty shillings:(*m*) or it may be directed to the courts Christian, the university courts, the court of chivalry, or the court of admiralty, where they concern themselves with any matter not within their jurisdiction; as if the first should attempt to try the validity of a custom pleaded, or the latter a contract made or to be executed within this kingdom. Or if, in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England; as where they require two witnesses to prove the payment of a legacy, a release of tithes,(*n*) or the like; in such cases also a prohibition will be awarded. For, as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in those courts because incident or accessory to some original question clearly within their jurisdiction; it ought therefore, where the two laws differ, to be decided not according to the spiritual, but the temporal, law; else the same question might be determined different ways, according to the court in which the suit is depending: an impropriety which no wise government can or ought to endure, *and which is therefore a ground of prohibition. And if either the [*113 judge or the party shall proceed after such prohibition, an attachment may be had against them, to punish them for the contempt, at the discretion of the court that awarded it;(*o*) and an action will lie against them, to repair the party injured in damages.

So long as the idea continued among the clergy, that the ecclesiastical state was wholly independent of the civil, great struggles were constantly maintained between the temporal courts and the spiritual, concerning the writ of prohibition and the proper object of it; even from the time of the constitutions of Clarendon, made in opposition to the claims of archbishop Becket in 10 Hen. II., to the exhibition of certain articles of complaint to the king by archbishop Bancroft in 3 Jac. I., on behalf of the ecclesiastical courts: from which, and from the answers to them signed by all the judges of Westminster hall,(*p*) much may be collected concerning the reasons of granting and methods of proceeding upon prohibitions. A short summary of the latter is as follows: The party aggrieved in the court below applies to the superior court, setting forth in a suggestion upon record the nature and cause of his complaint, in being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom; upon which, if the matter alleged appears to the court to be sufficient, the writ of prohibition immediately issues; commanding the judge not to hold, and the party not to prosecute, the plea.[17] But sometimes the point

(*h*) 1 P. Wms. 476.
(*i*) Hob. 15.
(*k*) Palmer, 523.
(*l*) Lord Raym. 1408.
(*m*) Finch, L. 451.
(*n*) Cro. Eliz. 666. Hob. 188.
(*o*) F. N. B. 40.
(*p*) 2 Inst. 601–618.

The Supreme Court of the United States has power to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States. Act of Congress, Sept. 24, 1789, 1 Story's Laws, 59.—SHARSWOOD.

[17] The general grounds for a prohibition to the ecclesiastical courts are either a defect

may be too nice and doubtful to be decided merely upon a motion; and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to *declare* a prohibition; that is, to prosecute an action, by filing a declaration, against the other, upon a supposition or fiction (which is not traversable)(*q*) that he has proceeded in the suit below, notwithstanding the writ of prohibition. And if, upon demurrer and argument, the court shall finally be of opinion that the matter suggested is a good and sufficient ground of *prohibition in point of law, then judgment with nominal damages shall be given for the party complaining, and the defendant, and also the inferior court, shall be prohibited from proceeding any further. On the other hand, if the superior court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him who applied for the prohibition in the court above, and a writ of *consultation* shall be awarded; so called, because, upon deliberation and consultation had, the judges find the prohibition to be ill founded, and therefore by this writ they return the cause to its original jurisdiction, to be there determined, in the inferior court. And, even in ordinary cases, the writ of prohibition is not absolutely final and conclusive. For though the ground be a proper one in point of *law*, for granting the prohibition, yet if the *fact* that gave rise to it be afterwards falsified, the cause shall be remanded to the prior jurisdiction. If, for instance, a custom be pleaded in the spiritual court; a prohibition ought to go, because that court has no authority to try it: but, if the fact of such a custom be brought to a competent trial, and be there found false, a writ of consultation will be granted. For this purpose the party prohibited may appear to the prohibition, and take a declaration, (which must always pursue the suggestion,) and so plead to issue upon it; denying the contempt, and traversing the custom upon which the prohibition was grounded; and if that issue be found for the defendant, he shall then have a writ of *consultation*. The writ of *consultation* may also be, and is frequently, granted by the court without any action brought; when, after a prohibition issued, upon more mature consideration the court are of opinion that the matter suggested is not a good and sufficient ground to stop the proceedings below. Thus careful has the law been, in compelling the inferior courts to do ample and speedy justice; in preventing them from transgressing their due bounds; and in allowing them the undisturbed cognizance of such causes as by right, founded on the usage of the kingdom or act of parliament, do properly belong to their jurisdiction.[18]

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(*q*) Barn. Not. 4to, 148.

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of jurisdiction, or a defect in the mode of trial. If any fact be pleaded in the court below, and the parties are at issue, that court has no jurisdiction to try it, because it cannot proceed according to the rules of the common law; and in such case a prohibition lies. Or where the spiritual court has no original jurisdiction, a prohibition may be granted even after sentence. But where it has jurisdiction, and gives a wrong judgment, it is the subject-matter of appeal and not of prohibition. Lord Kenyon, 3 T. R. 4. But when a prohibition is granted after sentence, the want of jurisdiction must appear upon the face of the proceedings of the spiritual court. Ibid. Cowp. 422. See also 4 T. R. 382. See also 2 H. Bl. 69, 100. 3 East, 472.—Christian.

[18] The ancient practice as to the writ of prohibition has been much simplified and improved by stat. 1 W. IV. c. 21.—Stewart.

The Supreme Court of the United States hath power to issue writs of prohibition to the federal district courts, when proceeding as courts of admiralty and maritime jurisdiction. Act of Congress, Sept. 24, 1789, 1 Story's Laws, 59.—Sherwood.

CHAPTER VIII.

OF WRONGS, AND THEIR REMEDIES, RESPECTING THE RIGHTS OF PERSONS.

*THE former chapters of this part of our commentaries having been employed in describing the several methods of redressing private wrongs, [*115 either by the mere act of the parties, or the mere operation of law; and in treating of the nature and several species of courts; together with the cognizance of wrongs or injuries by private or special tribunals, and the public ecclesiastical, military, and maritime jurisdictions of this kingdom; I come now to consider at large, and in a more particular manner, the respective remedies, in the public and general courts of common law, for injuries or private wrongs of any denomination whatsoever, not exclusively appropriated to any of the former tribunals. And herein I shall, first, define the several injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury; and shall, secondly, describe the method of pursuing and obtaining these remedies in the several courts.

First, then, as to the several injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury. And, in treating of these, I shall at present confine myself to such wrongs as may be committed in the mutual intercourse between subject and subject; which the king, as the fountain of justice, is officially bound to redress in the ordinary forms of law: reserving such *injuries or encroachments as may occur between the crown and the subject, to be distinctly considered hereafter, as the [*116 remedy in such cases is generally of a peculiar and eccentrical nature.

Now, since all wrongs may be considered as merely a privation of right, the plain natural remedy for every species of wrong is the being put in possession of that right whereof the party injured is deprived. This may either be effected by a specific delivery or restoration of the subject-matter in dispute to the legal owner; as when lands or personal chattels are unjustly withheld or invaded; or, where that is not a possible, or at least not an adequate, remedy, by making the sufferer a pecuniary satisfaction in damages; as in case of assault, breach of contract, &c.: to which damages the party injured has acquired an incomplete or inchoate right the instant he receives the injury,(a) though such right be not fully ascertained till they are assessed by the intervention of the law. The instruments whereby this remedy is obtained (which are sometimes considered in the light of the remedy itself) are a diversity of suits and actions, which are defined by the Mirror(b) to be "the lawful demand of one's right;" or, as Bracton and Fleta express it, in the words of Justinian,(c) *jus prosequendi in judicio quod alicui debetur.*

The Romans introduced, pretty early, set forms for actions and suits in their law, after the example of the Greeks; and made it a rule, that each injury should be redressed by its proper remedy only. "*Actiones,*" say the pandects, "*compositæ sunt, quibus inter se homines disceptarent: quas actiones, ne populus prout vellet institueret, certas solennesque esse voluerunt.*"(d) The forms of these actions were originally preserved in the books of the pontifical college, as choice and inestimable secrets; till one Cneius Flavius, the secretary of Appius Claudius, stole a copy and published them to the people.(e) The *concealment was ridiculous; but the establishment of some standard was undoubtedly necessary, to fix the true state of a question of right; lest in a long and arbitrary process it might be shifted continually, and be at length no longer discernible. Or, as Cicero expresses it,(f) "*sunt jura, sunt formulæ, de omnibus rebus constitutæ, ne quis aut in genere injuriæ, aut in ratione actionis, errare possit. Expressæ enim sunt ex uniuscujusque damno, dolore, incommodo, calamitate, injuria, publicæ a prætore formulæ, ad quas privata lis accommodatur.*" And in the same manner [*117

(a) See book ii. ch. 29.
(b) C. 2, § 1.
(c) Inst. 4, 6, pr.
(d) *Ff.* 1, 2, 2, § 6.
(e) *Cic. pro Muræna,* § 11, *de orat.* l. c. 41.
(f) *Pro Qu. Roscio.* § 8.

our Bracton, speaking of the original writs upon which all our actions are founded, declares them to be fixed and immutable, unless by authority of parliament.(g) And all the modern legislators of Europe have found it expedient, from the same reasons, to fall into the same or a similar method. With us in England the several suits, or remedial instruments of justice, are from the subject of them distinguished into three kinds: actions *personal*, *real*, and *mixed*.

Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof; and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon *torts* or wrongs; and they are the same which the civil law calls "*actiones in personam, quæ adversus eum intenduntur, qui ex contractu vel delicto obligatus est aliquid dare vel concedere.*"(h) Of the former nature are all actions upon debt or promises; of the latter, all actions for trespasses, nuisances, assaults, defamatory words, and the like.

Real actions, (or, as they are called in the Mirror,(i) *feodal* actions,) which concern real property only, are such whereby the plaintiff, here called the demandant, claims title to have any lands or tenements, rents, commons, or other *hereditaments, in fee-simple, fee-tail, or for term of life. By these actions formerly all disputes concerning real estates were decided; but they are now pretty generally laid aside in practice, upon account of the great nicety required in their management, and the inconvenient length of their process: a much more expeditious method of trying titles being since introduced, by other actions personal and mixed. *118]

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained. As for instance an action of waste: which is brought by him who hath the inheritance in remainder or reversion, against the tenant for life who hath committed waste therein, to recover not only the land wasted, which would make it merely a *real* action; but also treble damages, in pursuance of the statute of Gloucester,(k) which is a *personal* recompense; and so both, being joined together, denominate it a *mixed* action.[1]

Under these three heads may every species of remedy by suit or action in the courts of common law be comprised. But in order effectually to apply the remedy it is first necessary to ascertain the complaint. I proceed, therefore, now to enumerate the several kinds, and to inquire into the respective nature, of all private wrongs, or civil injuries, which may be offered to the rights of either a man's person or his property; recounting at the same time the respective remedies which are furnished by the law for every infraction of right. But I must first beg leave to premise that all civil injuries are of two kinds, the one *without force* or violence, as slander or breach of contract; the other coupled *with force* and violence, as batteries or false imprisonment.(l) Which latter species savour something of the criminal kind, being always attended with some violation of the peace; for which in strictness of law a fine ought to be paid to the king, as *well as a private satisfaction to the party injured.(m) And this distinction of private wrongs, into injuries *with* and *without* force, we shall find to run through all the variety of which we are now to treat. In considering of which, I shall follow the same method that was pursued with regard to the distribution of rights: for, as these are nothing else but an infringement or breach of those rights which we have before laid *119]

(g) *Sunt quædam brevia formata super certis casibus de cursu, et de communi consilio totius regni approbata et concessa, quæ quidem nullatenus mutari poterint absque consensu et voluntate eorum. L. 5, de exceptionibus*, c. 17, § 2.
(h) Inst. 4, 6, 15.
(i) C. 2, § 6.
(k) 6 Edw. I. c. 5.
(l) Finch, L. 184.
(m) Finch, L. 198. Jenk. Cent. 185.

[1] Real actions, with the exception of three,—dower, right of dower, and *quare impedit*,—were entirely abolished by stat. 3 & 4 W. IV. c. 27, s. 36. All mixed actions, with one exception,—the action of ejectment,—were abolished by the same statute. The action of ejectment thus preserved has now, by the Common-Law Procedure Act, 1852, been also swept away, and a new procedure or action of ejectment substituted in its place.—Stewart.

down and explained, it will follow that this negative system, of *wrongs*, must correspond and tally with the former positive system, of *rights*. As therefore we divide(*n*) all rights into those of *persons* and those of *things*, so we must make the same general distribution of injuries into such as affect the *rights of persons*, and such as affect the *rights of property*.

The rights of *persons*, we may remember, were distributed into *absolute* and *relative*: *absolute*, which were such as appertained and belonged to private men, considered merely as individuals, or single persons; and *relative*, which were incident to them as members of society and connected to each other by various ties and relations. And the absolute rights of each individual were defined to be the right of personal security, the right of personal liberty, and the right of private property, so that the wrongs or injuries affecting them must consequently be of a corresponding nature.

I. As to injuries which affect the *personal security* of individuals, they are either injuries against their lives, their limbs, their bodies, their health, or their reputations.

1. With regard to the first subdivision, or injuries affecting the life of man, they do not fall under our present contemplation; being one of the most atrocious species of crimes, the subject of the next book of our commentaries.[2]

*2, 3. The two next species of injuries, affecting the limbs or bodies of individuals, I shall consider in one and the same view. And these [*120

(*n*) See book i. ch. 1.

[2] For injury to life, in general, cannot be the subject of a civil action, the civil remedy being merged in the offence to the public. Therefore an action will lie for battery of wife or servant, whereby death ensued. Styles, 347. 1 Lev. 247. Yelv. 89, 90. 1 Lord 339. The remedy is by indictment for murder, or, formerly, by appeal, which the wife might have for killing her husband, provided she married not again before or pending her appeal; or the *heir male* for the death of his ancestor, and which differed principally from an indictment in respect of its not being in the power of the king to pardon the offender without the appellor's consent. See *post*, 4 book, 312, 6. 5 Burr. 2643. But appeals of murder, treason, felony, and other offences were abolished by 59 Geo. III. c. 46, s. 1. In general, all felonies suspend the civil remedies, (Styles, 346, 347;) and before conviction of the offender there is no remedy against him at law or in equity, (id. ibid. 17 Ves. 331;) but after conviction and punishment on an indictment of the party for stealing, the party robbed may support trespass or trover against the offender. Styles, 347. Latch. 144. Sir Wm. Jones, 147. 1 Lev. 247. Bro. Abr. tit. Trespass. And after an acquittal of the defendant upon an indictment for a felonious assault upon a party by stabbing him, the latter may maintain trespass to recover damages for the civil injury, if it be not shown that he colluded in procuring such acquittal. 12 East, 409. In some cases, by express enactment, the civil remedy is not affected by the criminality of the offender. Thus it is provided by 52 Geo. III. c. 63, s. 5, that where bankers, &c. have been guilty of embezzlement, they may be prosecuted, but the civil remedy shall not be affected. The 21 Hen. VIII. c. 11 directs that goods stolen shall be restored to the owner upon certain conditions,—namely, that he shall give or produce evidence against the felons, and that the felon be prosecuted to conviction thereon. Upon performance of these, the right of the owner, which was before suspended, becomes perfect and absolute; but he cannot recover the value from a person who purchased them in market overt and sold them again before the conviction of the felon, notwithstanding the owner gave such person notice of the robbery while they were in his possession; but he must proceed against the original felon, or against the person who has the chattel in his possession at the time of the conviction. 2 T. R. 750. And the above act does not extend to goods obtained by false pretences. 5 T. R. 175. See, further, 1 Chitty's Crim. L. 5.—CHITTY.

By the common law, the wife or husband, parent or child, of the party killed, cannot recover any pecuniary compensation for the injury sustained by the death of the relative, (Baker *vs.* Bolton, 1 Camp. 493:) and this was the law till the stat. 9 & 10 Vict. c. 93 enacted that whenever the death of a person shall be caused by such wrongful act, neglect, or default as would, if death had not ensued, have entitled the party injured to maintain an action for damages, the person who would have been liable to such action may be sued by the executor or administrator for the benefit of the wife, husband, parent, or child of the person deceased. The jury, in any such action, may give damages proportionable to the injury resulting from the death, to be divided among the parties for whose benefit the action is brought, in shares as the jury shall direct. Blake *vs.* Midland Railway Company, 21 L. J. R. 233, Q. B. S. C. 18 Ad. & El. 93.—STEWART.

may be committed, 1. By *threats* and menaces of bodily hurt, through fear of which a man's business is interrupted. A menace alone, without a consequent inconvenience, makes not the injury: but, to complete the wrong, there must be both of them together.(*o*) The remedy for this is in pecuniary damages, to be recovered by action of *trespass vi et armis;*(*p*) this being an inchoate, though not an absolute, violence.[3] 2. By *assault;* which is an attempt or offer to beat another, without touching him: as if one lifts up his cane, or his fist, in a threatening manner at another; or strikes at him but misses him; this is an assault, *insultus*, which Finch(*q*) describes to be "an unlawful setting upon one's person." This also is an inchoate violence, amounting considerably higher than bare threats; and therefore, though no actual suffering is proved, yet the party injured may have redress by action of *trespass vi et armis;* wherein he shall recover damages as a compensation for the injury.[4] 3. By *battery;* which is the unlawful beating of another. The least touching of another's person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner.[5] And therefore upon a similar principle the Cornelian law *de injuriis* prohibited *pulsation* as well as *verberation;* distinguishing verberation, which was accompanied with pain, from pulsation, which was attended with none.(*r*) But battery is, in some cases, justifiable or lawful; as where one who hath authority, a parent, or master, gives moderate correction to his child, his scholar, or his apprentice. So also on the principle of self-defence: for if one strikes me first, or even only assaults me, I may strike in my own defence; and, if sued for it, may plead *son assault demesne*, or that it *121] was the plaintiff's *own original assault that occasioned it. So likewise in defence of my goods or possession, if a man endeavours to deprive me of them I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away.(*s*) Thus too in the exercise

(*o*) Finch, L. 202.
(*p*) Regist. 104. 27 Ass. 11. 7 Edw. IV. 24.
(*q*) Finch, L. 202.
(*r*) *Ff.* 47, 10, 5.
(*s*) 1 Finch, L. 203.

[3] If the menace be not actionable alone, but only in conjunction with the injurious consequence, it seems contrary to principle that the remedy should be by trespass *vi et armis*, and not by trespass on the case. On examination, none of the authorities cited for the position satisfactorily bear it out; and, in the same book of Edw. IV. 21, one of the same judges (Choke) says, *Si home fait a moy manace en ma person come d'emprisoner ou de maimer, jeo avera action sur mon case.*—Coleridge.

[4] See, in general, Com. Dig. Battery, C. Bac. Abr. Assault and Battery, A. An assault is an attempt or offer, accompanied by a degree of violence, to commit some bodily harm, by any means calculated to produce the end if carried into execution. Levelling a gun at another within a distance from which, supposing it to have been loaded, the contents might wound, is an assault. Bac. Abr. Assault, A. Abusive words alone cannot constitute an assault, and indeed may sometimes so explain the aggressor's intent as to prevent an act *prima facie* an assault from amounting to such an injury; as where a man, during assize-time, in a threatening posture, half drew his sword from its scabbard, and said, "If it were not that it is assize-time, I would run you through the body," this was held to be no assault, the words explaining that the party did not mean any immediate injury. 1 Mod. 3. 3 Bul. N. P. 15. Vin. Abr. Trespass, A. 2. The *intention* as well as *the act* constitute an assault. 1 Mod. 3, case 13. Assault for money won at play is particularly punishable by 9 Anne, c. 14. 4 East, 174.—Chitty.

[5] Com. Dig. Battery, A. Bac. Abr. Assault and Battery, B. A battery is any unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him. 1 Saund. 29, b., n. 1. Id. 13 and 14, n. 3. Taking a hat off the head of another is no battery. 1 Saund. 14. It must be either *wilfully* committed, or proceed from want of due care, (Stra. 596. Hob. 134. Plowd. 19.) otherwise it is *damnum absque injuriâ*, and the party aggrieved is without remedy, (3 Wils. 303. Bac. Abr. Assault and Battery, B.;) but the absence of intention to commit the injury constitutes no excuse where there has been a want of due care. Stra. 596. Hob. 134. Plowd. 19. But if a person unintentionally push against a person in the street, or if without any default in the rider a horse runs away and goes against another, no action lies. 4 Mod. 405. Every battery includes an assault, (Co. Litt. 253;) and the plaintiff may recover for the assault only, though he declares for an assault and battery. 4 Mod. 405.—Chitty.

of an office, as that of church-warden or beadle, a man may lay hands upon another to turn him out of church, and prevent his disturbing the congregation.(*t*) And, if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, *molliter manus imposuit*, for this purpose. On account of these causes of justification, battery is defined to be the *unlawful* beating of another; for which the remedy is, as for assault, by action of *trespass vi et armis:* wherein the jury will give adequate damages. 4. By *wounding;* which consists in giving another some dangerous hurt, and is only an aggravated species of battery. 5. By *mayhem;* which is an injury still more atrocious, and consists in violently depriving another of the use of a member proper for his defence in fight. This is a battery attended with this aggravating circumstance, that thereby the party injured is forever disabled from making so good a defence against future external injuries, as he otherwise might have done. Among these defensive members are reckoned not only arms and legs, but a finger, an eye, and a foretooth,(*u*) and also some others.(*v*) But the loss of one of the jaw-teeth, the ear, or the nose, is no mayhem at common law, as they can be of no use in fighting. The same remedial action of *trespass vi et armis* lies also to recover damages for this injury, an injury which (when wilful) no motive can justify but necessary self-preservation.[6] If the ear be cut off, treble damages are given by statute 37 Hen. VIII. c. 6, though this is not mayhem at common law. And here I must observe that for these four last injuries, assault, battery, wounding, and mayhem, an indictment may be brought as well as an action, and frequently both are accordingly prosecuted, the one at the suit of the crown for the crime against the public, the *other at the suit of the party injured, to make him a reparation in damages.[7] [*122

(*t*) 1 Sid. 301. (*u*) Finch, L. 204. (*v*) 1 Hawk. P. C. 111.

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[6] This is expressed with great correctness and caution: it is not intended to convey the notion that no mayhem can be justified under the plea of *son assault demesne*, except where that assault threatened the life of the party, but that no mayhem can be justified except under such circumstances, if it was wilful and deliberate. In the case of Cockroft *vs.* Smith, stated in 1 Lord Raym. 177, and reported in Salkeld, 642, and 11 Mod. 43, the plaintiff had either tilted up the form on which the defendant was sitting, or run his finger towards his eye, and the defendant immediately bit off his finger: *son assault demesne* was held to be a good plea; and lord Holt there laid down the principle thus:—"If A. strike B. and B. strike again, and they close immediately, and in the scuffle B. mayhems A., that is *son assault;* but if, upon a little blow given by A. to B., B. gives him a blow that mayhems him, that is not *son assault demesne.*" To this Powell, J., agreed. It seems that the party must always intend to act in self-defence, which intention is to be collected from the circumstances, in the blow which he gives to the plaintiff.—COLERIDGE.

Son assault demesne is a good defence to an indictment for mayhem; but the defence can only be sustained by proof that the resistance was in proportion to the injury offered. Hayden *vs.* The State, 4 Blackford, 546.

Any thing attached to the person partakes of its inviolability. A blow on the skirt of one's coat, when upon his person, is an assault and battery. So of striking one's cane while in his hand. Respublica *vs.* Longchamps, 1 Dall. 114. State *vs.* Davis, 1 Hill, 46. So to strike the horse which a person is riding or driving is an assault. De Marentille *vs.* Oliver, 1 Pennington, 380. No words of provocation will justify an assault, although they may constitute a ground for the reduction of damages. Cushman *vs.* Ryan, 1 Story, 91.—SHARSWOOD.

One remarkable property is peculiar to the action for a mayhem,—viz., that the court in which the action is brought have a discretionary power to increase the damages, if they think the jury at the trial have not been sufficiently liberal to the plaintiff; but this must be done *super visum vulneris*, and upon proof that it is the same wound concerning which evidence was given to the jury. 1 Wils. 5. Barnes, 106, 153. 3 Salkeld, 115. 1 Ld. Raym. 176, 339.—CHRISTIAN.

[7] The party injured may proceed by indictment and by action at the same time, and the court will not compel him to stay proceedings in either. 1 Bos. & P. 191. But in general the adoption of both proceedings is considered vexatious, and will induce the jury to give smaller damages in the action. The legislature has discouraged actions for trifling injuries of this nature, by enacting that in all actions of trespass for assault and

4. Injuries affecting a man's *health* are where, by any unwholesome practices of another, a man sustains any apparent damage in his vigour or constitution. As by selling him bad provisions, or wine;(*w*) by the exercise of a noisome trade, which infects the air in his neighbourhood;(*x*) or by the neglect or unskilful management of his physician, surgeon, or apothecary. For it hath been solemnly resolved,(*y*) that *mala praxis* is a great misdemeanour and offence at common law, whether it be for curiosity and experiment, or by neglect; because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction.[8] Thus, also, in the civil law,(*z*) neglect or want of skill in

(*w*) 1 Roll. Abr. 90.
(*x*) 9 Rep. 32. Hutt. 135.
(*y*) Lord Raym. 214.
(*z*) Inst. 4, 3, 6, 7.

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battery, in case the jury should find a verdict for damages under forty shillings, the plaintiff shall have no more costs than damages, unless the judge at the trial shall certify that an assault and battery was sufficiently proved. See constructions on the statute, Tidd's Prac. 8 ed. 998.—Chitty.

The injuries affecting the person above mentioned are all in their nature direct. There are others which do not come within any of the above definitions, and which may in contradistinction be termed *consequential*, as resulting occasionally, although not necessarily, from wrongful acts or neglects.

The personal injuries which may be considered *consequential* only are such generally as arise from the neglect or default of others in the performance of the duties they have undertaken to discharge. Thus, if a passenger is injured by the want of care of the driver of a coach, or a person sustains an injury owing to the negligence of a carman, (Lynch *vs.* Hurdin, 1 2 B. 29,) the owner of the coach in the first case, the carman's master in the second, will be liable in an action for damages; for it was the duty of the owner and master in each case to employ careful servants. If, on the other hand, the driver or the carman did the injury *wilfully*, even if in the master's service, he, and not the owner or master, will be liable. Gordon *vs.* Rolt, 4 Exc. 365. Consequential injuries may also be sustained from a bull, ram, monkey, or other animal being left at large or not properly taken care of, (Jackson *vs.* Smithson, 15 M. & W. 563. May *vs.* Burdett, 9 Q. B. 101,) and the owner will in such case be liable to the party injured. The owner must, however, be shown to have been aware of the mischievous propensities of the animal before he can be made liable, (Hudson *vs.* Roberts, 6 Exc. 497;) and if the party injured have imprudently exposed himself, he cannot maintain an action. Cattlin *vs.* Hills, 8 C. B. 115.—Kerr.

[8] The law implies a contract on the part of a medical man, as well as those of other professions, to discharge their duty in a skilful and attentive manner; and the law will grant redress to the party injured by their *neglect* or ignorance, by an action on the case, as for a tortious misconduct. 1 Saund. 312, n. 2. 1 Ld. Raym. 213, 214. Reg. Brevium, 205, 206. 2 Wils. 359. 8 East, 348. And in that case the surgeon could not recover any fees. Peake, C. N. P. 59. See 2 New Rep. 136. But in the case of a physician whose profession is honorary, he is not liable to an action, (Peake, C. N. P. 96, 123. 4 T. R. 317,) though he may be punished by the college of physicians. Com. Dig. tit. Physician. Vin. Abr. tit. Physician. According to Hawkins, P. C., if any person, not duly authorized to practise, undertake to cure, and should kill his patient, he is guilty of felony, though clergyable. And such person so employed cannot recover in an action for the medicines supplied. See 55 Geo. III. c. 194. However, if the party employ a person as surgeon, knowing him not to be one, he has no civil remedy. 1 Hen. B. 161. Bac. Abr. Action on the Case, F. 2 Wils. 359. Reg. Brev. 105. 8 East, 348.

Though the law does not in general imply a warranty as to the goodness and quality of any personal chattel, it is otherwise with regard to food and liquors, in which, especially in the case of a publican, the law implies a warranty. 1 Roll. Abr. 90, pl. 1, 2. 2 East, 314.

With regard to private nuisances, it is particularly observable that the law regards the health of the individual, though it will not afford a remedy for malicious and ill-natured acts tending to destroy the beauty of situation, such as stopping a prospect, &c. 9 Co. 58, b. In complaining of a nuisance in stopping ancient lights, &c., the consequent injury must be stated to have been the deprivation of light and air, which are considered as conducive to health. Peake, 91. Com. Dig. tit. Action on the Case for a Nuisance. As to ancient lights in general, see *ante*.

Public Nuisance.—With respect to the injuries to health, as a consequence of a public nuisance, it seems that if the injury be attributable to the inhabitants of a county, no action is sustainable. 2 T. R. 667. 9 Co. 112, b., 117, a. But if the special injury be occasioned by an individual, an action lies. Bac. Abr. Action on the Case. 1 Salk. 15, 16.—Chitty.

physicians or surgeons, "*culpæ adnumerantur, veluti si medicus curationem dereliquerit, male quempiam secuerit, aut perperam ei medicamentum dederit.*" These are wrongs or injuries unaccompanied by force, for which there is a remedy in damages by a special action of *trespass upon the case.* This action of *trespass*, or transgression, *on the case*, is a universal remedy, given for all personal wrongs and injuries without force; so called because the plaintiff's whole case or cause of complaint is set forth at length in the original writ.(*a*) For though in general there are methods prescribed, and forms of actions previously settled, for redressing those wrongs, which most usually occur, and in which the very act itself is immediately prejudicial or injurious to the plaintiff's person or property, as battery, non-payment of debts, detaining one's goods, or the like; yet where *any special consequential damage arises, which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed, [*123 both by common law and the statute of Westm. 2, c. 24, to bring a special action on his own case, by a writ formed according to the peculiar circumstances of his own particular grievance.(*b*) For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action;(*c*) and, therefore, wherever a new injury is done, a new method of remedy must be pursued.(*d*) And it is a settled distinction,(*e*) that where an act is done which is in itself an *immediate* injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis;* but where there is no act done, but only a culpable omission; or where the act is not immediately injurious, but only by *consequence* and collaterally; there no action of trespass *vi et armis* will lie, but an action on the special case, for the damages consequent on such omission or act.[9]

5. Lastly; injuries affecting a man's *reputation* or good name are, first, by malicious, scandalous, and slanderous *words*, tending to his damage and derogation. As if a man maliciously and falsely utter any slander or false tale of another; which may either endanger him in law, by impeaching him of some heinous crime, as to say that a man hath poisoned another, or is perjured;(*f*) or which may exclude him from society, as to charge him with having an infectious disease; or which may impair or hurt his trade or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave.(*g*) Words spoken in derogation of a peer, a judge, or other great officer of the realm, which are called *scandalum magnatum*, are held to be still more heinous:(*h*) and though they be such as would not be actionable in the case of a common person, yet when spoken in disgrace of such high and respectable characters, they amount to an atrocious injury: *which is redressed by an action on the case [*124 founded on many antient statutes,(*i*) as well on behalf of the crown, to inflict the punishment of imprisonment on the slanderer, as on behalf of the party, to recover damages for the injury sustained.[10] Words also tending to scandalize a magistrate, or person in a public trust, are reputed more highly

(*a*) For example: "*Rex vicecomiti salutem, Si A. fecerit the securum de clamore suo prosequendo, tunc pone per vadium et salvos plegios B. quod sit coram justitiariis nostris apud Westmonasterium in octabis sancti Michaelis, ostensurus quare cum idem B. ad destruendum oculum ipsius A. casualiter lusum bene et competenter curaverit apud N. pro quadam pecuniæ summa præ manibus solutæ assumpsisset, idem B. curam suam circa oculum prædictum tam negligenter et improvide apposuit, quod idem A. defectu ipsius B. visum oculi prædicti totaliter amisit, ad damnum ipsius A. viginti librarum, ut dicit. Et habeas ibi nomina plegiorum et hoc breve. Teste meipso apud Westmonasterium," &c. Registr. Brev.* 105.

(*b*) See page 52.

(*c*) 1 Salk. 20. 6 Mod. 54.

(*d*) Cro. Jac. 478.

(*e*) 11 Mod. 139. Lord Raym. 1402. Stra. 635.

(*f*) Finch, L. 185.

(*g*) Finch, L. 186.

(*h*) 1 Ventr. 60.

(*i*) Westm. 1. 3 Edw. I. c. 34. 2 Ric. II. c. 5. 12 Ric. II. c. 11.

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[9] See the author's celebrated judgment in the case of Scott *vs.* Shepherd, 2 Bl. Rep. 892, the principle of which has been since repeatedly recognised. No distinction arises from the lawfulness or unlawfulness of the act. If one turning round suddenly were to knock another down, whom he did not see, without intending it, no doubt, said Mr. J. Lawrence, the action must be trespass *vi et armis.* Neither will it vary the case that besides the immediate injury there is an ulterior consequential injury; for it is the former on which the action is supported: the latter is merely in aggravation of the damages. Leame *vs.* Bray, 3 East's Rep. 593.—COLERIDGE.

[10] This action or public prosecution (for it partakes of both) for *scandalum magnatum* is totally different from the action of slander in the case of common persons. The *scandalum magnatum* is reduced to no rule or certain definition, but it may be whatever the

injurious than when spoken of a private man.(*k*) It is said, that formerly no actions were brought for words, unless the slander was such as (if true) would endanger the life of the object of it.(*l*) But, too great encouragement being given by this lenity to false and malicious slanderers, it is now held that for scandalous words of the several species before mentioned, (that may endanger a man by subjecting him to the penalties of the law, may exclude him from society, may impair his trade, or may affect a peer of the realm, a magistrate, or one in public trust,) an action on the case may be had, without proving any particular damage to have happened, but merely upon the probability that it might happen. But with regard to words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened; which is called laying his action with a *per quod*. As if I say that such a clergyman is a bastard, he cannot for this bring any action against me, unless he can show some special loss by it; in which case he may bring his action against me for saying he was a bastard, *per quod* he lost the presentation to such a living.(*m*) In like manner, to *slander another man's title*, by spreading such injurious reports as, if true, would deprive him of his estate, (as to call the issue in tail, or one who hath land by descent, a bastard,) is actionable, provided any special damage accrues to the proprietor thereby; as if he loses an opportunity of selling the land.(*n*) But mere scurrility, or opprobrious words, which neither in themselves import, nor are in fact attended with, any injurious effects will not support an action. So scandals, which concern matters merely spiritual, as to call a *125] *man heretic or adulterer, are cognizable only in the ecclesiastical court;(*o*) unless any temporal damage ensues, which may be a foundation for a *per quod*. Words of heat and passion, as to call a man a rogue and rascal, if productive of no ill consequence, and not of any of the dangerous species before mentioned, are not actionable; neither are words spoken in a friendly manner, as by way of advice, admonition, or concern, without any tincture or circumstance of ill will: for, in both these cases, they are not *maliciously* spoken, which is part of the definition of slander.(*p*) Neither (as was formerly hinted)(*q*) are any reflecting words made use of in legal proceedings, and pertinent to the cause in hand, a sufficient cause of action for slander.(*r*)[11] Also, if the defendant be able to justify, and prove the words to be true, no action will lie,(*s*) even though special damage hath ensued: for then it is no slander or false tale. As if I can prove the tradesman a bankrupt, the physician a quack, the lawyer a knave, and the divine a heretic, this will destroy their respective actions; for

(*k*) Lord Raym. 1369.
(*l*) 2 Ventr. 28.
(*m*) 4 Rep. 17. 1 Lev. 248.
(*n*) Cro. Jac. 213. Cro. Eliz. 197.
(*o*) Noy. 64. 1 Freem. 277.
(*p*) Finch, L. 186. 1 Lev. 82. Cro. Jac. 91.
(*q*) Page 29.
(*r*) Dyer, 285. Cro. Jac. 90.
(*s*) 4 Rep. 13.

courts in their discretion shall judge to be derogatory to the high character of the person of whom it was spoken: as it was held to be *scandalum magnatum* to say of a peer, "he was no more to be valued than a dog:" which words would have been perfectly harmless if uttered of any inferior person. Bull. N. P. 4. This action is now seldom resorted to. By the two first statutes upon which it is founded, (3 Edw. I. c. 34 and 2 Ric. II. st. 2, c. 5,) the defendant may be imprisoned till he produces the first author of the scandal. Hence probably is the origin of the vulgar notion that a person who has propagated slander may be compelled to give up his author.—Chitty.

[11] And now, by stat. 6 & 7 Vict. c. 96, (amended by stat. 8 & 9 Vict. c. 75,) in any action for defamation, the offer of an apology is admissible in evidence in mitigation of damages, and in an action against a newspaper for libel the defendant may plead that it was inserted without malice.—Stewart.

It seems that in this country evidence of this nature has been deemed by the courts admissible in mitigation of damages without waiting for the interference of the legislature. See the language of the court in Larned *vs.* Buffinton, 3 Mass. R. 546, as qualified in Alderman *vs.* French, 1 Pick. 19. See, also, what was said by Chief-Justice Savage in Mapes *vs.* Weeks, 4 Wendell, 663, and the intimation of Nelson, C. J., in Hotchkiss *vs.* Oliphant, 2 Hill, 515, that a withdrawal or recantation of the charges by way of atonement would be admissible in evidence in mitigation of damages. See, also, Starkie on Slander, vol. ii. p. 99, n. a. and n. 1, American edition of 1843.—Wendell.

though there may be damage sufficient accruing from it, yet, if the fact be true, it is *damnum absque injuria;* and where there is no injury the law gives no remedy. And this is agreeable to the reasoning of the civil law:(*t*) "*eum qui nocentem infamat, non est æquum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit.*"

A second way of affecting a man's reputation is by printed or written libels, pictures, signs, and the like; which set him in an odious or ridiculous(*u*) light, and thereby diminish his reputation. With regard to libels in general, there are, as in many other cases, two remedies: one by indictment, and the other by action. The former for the *public* offence; for every libel has a tendency to the breach of the peace, by provoking the person libelled to break it: which offence is the same (in point of law) whether *the matter contained be true or false; and therefore the defendant, on an indictment for publishing a libel, is not allowed to allege the truth of it by way of justification.(*w*)[12] But in the remedy by action on the case, which is to repair the *party* in damages for the injury done him, the defendant may, as for words *spoken*, justify the truth of the facts, and show that the plaintiff has received no injury at all.(*x*) What was said with regard to words spoken will also hold in every particular with regard to libels by writing or printing, and the civil actions consequent thereupon; but as to signs or pictures, it seems necessary always to show, by proper *innuendoes* and averments of the defendant's meaning, the import and application of the scandal, and that some special damage has followed; otherwise it cannot appear that such libel by picture was understood to be levelled at the plaintiff, or that it was attended with any actionable consequences.[13] [*126

A third way of destroying or injuring a man's reputation is by preferring malicious indictments or prosecutions against him; which, under the mask of justice and public spirit, are sometimes made the engines of private spite and enmity. For this, however, the law has given a very adequate remedy in damages, either by an action of *conspiracy*,(*y*) which cannot be brought but against two at the least; or, which is the more usual way, by a special action on the case

(*t*) *Ff.* 47, 10, 18.
(*u*) 2 Show. 314. 11 Mod. 99.
(*w*) 5 Rep. 125.
(*x*) Hob. 53. 11 Mod. 99.
(*y*) Finch, L. 305.

[12] But now, by stat. 6 & 7 Vict. c. 96, s. 6, on the trial of any indictment or information for a libel, the defendant having pleaded such plea as therein mentioned, the truth of the matter charged may be inquired into, but shall not amount to a defence unless it was for the public benefit that the matter charged should be published. To entitle the defendant to give evidence of the truth of the matters charged as a defence to such indictment or information, it is necessary for the defendant, in pleading to the indictment or information, to allege the truth of the said matters, and also that it was for the public benefit that the matters charged should be published,—to which plea the prosecutor may reply generally; and if after such plea the defendant is convicted, the court may, in pronouncing sentence, consider whether the guilt of the defendant is aggravated or mitigated by the plea.—STEWART.

In an action of slander, the defendant was not allowed to give in evidence, in mitigation of damages, facts and circumstances which induced him to believe that the charges which he made were true, when such facts and circumstances tended to prove the charges or formed a link in the chain of evidence to establish a justification, though the defendant expressly disavowed a justification and fully admitted the falsity of the charges. Purple *vs.* Horton, 13 Wend. 9. Petrie *vs.* Rose, 5 Watts & Serg. 364. Regnier *vs.* Cabot, 2 Gilman, 34. Watson *vs.* Moore, 2 Cushing, 133. It has been since held, however, that the defendant may prove, in mitigation of damages, circumstances which induced him erroneously to make the charge complained of, and thereby rebut the presumption of malice, provided the evidence do not necessarily imply the truth of the charge or tend to prove it true. Minesinger *vs.* Kerr, 9 Barr. 312.—SHARSWOOD.

[13] The printer or publisher, as well as the writer, is liable in an action for damages. It is no defence that the printer did not know, or had no personal malice against, the party libelled, nor that he did not know of the publication, nor that the libel was accompanied with the name of the author. Rundle *vs.* Meyer, 3 Yeates, 518. Dexter *vs.* Spear, 4 Mason, 115. Andre *vs.* Wells, 7 Johns. 260. Dole *vs.* Lyon, 10 Johns. 447. The publication in a newspaper of rumours is not justified by the fact that such rumours existed; but such fact is admissible in mitigation of damages. Skinner *vs.* Powers, 1 Wend. 451.—SHARSWOOD.

for a false and malicious prosecution.(z) In order to carry on the former, (which gives a recompense for the danger to which the party has been exposed,) it is necessary that the plaintiff should obtain a copy of the record of his indictment and acquittal; but, in prosecutions for felony, it is usual to deny a copy of the indictment, where there is any the least probable cause to found such prosecution upon.(a) For it would be a very great discouragement to the public justice of the kingdom, if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried. *127] *But an action on the case for a malicious prosecution may be founded upon an indictment whereon no acquittal can be had; as if it be rejected by the grand jury, or be *coram non judice*, or be insufficiently drawn. For it is not the danger of the plaintiff, but the scandal, vexation, and expense, upon which this action is founded.(b) However, any probable cause for preferring it is sufficient to justify the defendant.

II. We are next to consider the violation of the right of personal liberty. This is effected by the injury of false imprisonment,[14] for which the law has not only decreed a punishment, as a heinous public crime, but has also given a private reparation to the party; as well by removing the actual confinement for the present, as, after it is over, by subjecting the wrong-doer to a civil action, on account of the damage sustained by the loss of time and liberty.

To constitute the injury of false imprisonment there are two points requisite: 1. The detention of the person; and, 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets.(c)[15] Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority: which authority may arise either from some process from the courts of justice, or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment;(d) or from some other special cause warranted, for the necessity of the thing, either by common law, or act of parliament; such as the arresting of a felon by a private person without warrant, the impressing of mariners for the public service, or the apprehending of wagoners for misbehaviour in the public highways.(e) False imprisonment also may arise *128] by executing a lawful warrant or process at an *unlawful time, as on a Sunday;(f) for the statute hath declared that such service or process shall be void.[16] This is the injury. Let us next see the remedy: which is of two sorts; the one *removing* the injury, the other *making satisfaction* for it.

(z) F. N. B. 116.
(a) Carth. 421. Lord. Raym. 253.
(b) 10 Mod. 219, 220. Stra. 691.
(c) 2 Inst. 589.
(d) Ibid. 46.
(e) Stat. Geo. III. c. 78.
(f) Stat. Car. II. c. 7. Salk. 78. 5 Mod. 95.

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[14] But the merely giving charge of a person to a peace-officer, not followed by any actual apprehension of the person, does not amount to an imprisonment, though the party to avoid it attend at a police-office, (1 Esp. Rep. 431. 2 New Rep. 211;) and in Gardner *vs.* Wedd and others, Easter Term, 1825, on a motion for a new trial, the court of Common Pleas held that the lifting up a person in his chair and carrying him out of the room in which he was sitting with others, and excluding him from the room, was not a false imprisonment so as to entitle the plaintiff to a verdict on a count for false imprisonment. The circumstance of an imprisonment being committed under a mistake constitutes no excuse. 3 Wils. 309. And it has been decided that if A. tell an officer who has a warrant against B. that his (A.'s) name is B., and thereupon the officer arrests A., it is false imprisonment. (Moore, 457. Hardr. 323; but see 3 Camp. 108;) and this doctrine was overruled in a late case on the western circuit, on the principle *volenti non fit injuriam*, and that such a fraud upon legal proceedings cannot give a right of action.—Chitty.

[15] To constitute false imprisonment, it is not necessary that the person should be arrested or assaulted: if he is detained by threats of violence and prevented from going where he wishes by a reasonable apprehension of personal danger, it is sufficient. Johnson *vs.* Tompkins, 1 Baldwin, 571. Pike *vs.* Hanson, 9 New Hamp. 491. Smith *vs.* The State, 7 Humph. 43.—Sharswood.

[16] But the statute has excepted cases of treason, felony, and breach of the peace, in which the execution of a lawful warrant or process is allowed upon a Sunday.—Chitty.

The means of *removing* the actual injury of false imprisonment are fourfold. 1. By writ of *mainprize*. 2. By writ *de odio et atia*.[17] 3. By writ *de homine replegiando*. 4. By writ of *habeas corpus*.

1. The writ of *mainprize, manucaptio*, is a writ directed to the sheriff, (either generally, when any man is imprisoned for a bailable offence and bail has been refused; or specially, when the offence or cause of commitment is not properly bailable below,) commanding him to take sureties for the prisoner's appearance, usually called *mainpernors*, and to set him at large.(*g*) Mainpernors differ from bail, in that a man's bail may imprison or surrender him up before the stipulated day of appearance; mainpernors can do neither, but are barely sureties for his appearance at the day: bail are only sureties that the party be answerable for the special matter for which they stipulate; mainpernors are bound to produce him to answer all charges whatsoever.(*h*)

2. The writ *de odio et atia* was antiently used to be directed to the sheriff, commanding him to inquire whether a prisoner charged with murder was committed upon just cause of suspicion, or merely *propter odium et atiam*, for hatred and ill will; and if upon the inquisition due cause of suspicion did not appear, then there issued another writ for the sheriff to admit him to bail. This writ, according to Bracton,(*i*) ought not to be denied to any man, it being expressly ordered to be made out *gratis*, without any denial, by *magna carta*, c. 26, and statute Westm. 2, 13 Edw. I. c. 29. But the statute *of Gloucester, 6 Edw. I. c. 9, restrained it in the case of killing by misadventure or self-defence, [*129 and the statute 28 Edw. III. c. 9 abolished it in all cases whatsoever: but as the statute 42 Edw. III. c. 1 repealed all statutes then in being, contrary to the great charter, Sir Edward Coke is of opinion(*k*) that the writ *de odio et atia* was thereby revived.

3. The writ *de homine replegiando*(*l*) lies to replevy a man out of prison, or out of the custody of any private person, (in the same manner that chattels taken in distress may be replevied, of which in the next chapter,) upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. And if the person be conveyed out of the sheriff's jurisdiction, the sheriff may return that he is eloigned, *elongatus;* upon which a process issues (called a *capias in withernam*) to imprison the defendant himself, without bail or mainprize,(*m*) till he produces the party. But this writ is guarded with so many exceptions,(*n*) that it is not an effectual remedy in numerous instances, especially where the crown is concerned. The incapacity therefore of these three remedies to give complete relief in every case hath almost entirely antiquated them, and hath caused a general recourse to be had, in behalf of persons aggrieved by illegal imprisonment, to

4. The writ of *habeas corpus*, the most celebrated writ in the English law. Of this there are various kinds made use of by the courts at Westminster, for removing prisoners from one court into another for the more easy administration of justice. Such is the *habeas corpus ad respondendum*, when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with this new action in the court above.(*o*) Such is that *ad satisfaciendum*, when a prisoner hath [*130 *had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution.(*p*) Such also are those *ad prosequendum, testificandum, deliberandum*, &c.; which issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was

(*g*) F. N. B. 250. 1 Hal. P. C. 141. Coke on Bail and Mainp. ch. 10.
(*h*) Coke on Bail and Mainp. ch. 3. 4 Inst. 197.
(*i*) *L.* 3, *tr.* 2, c. 8.
(*k*) 2 Inst. 43, 55, 315.
(*l*) F. N. B. 66.
(*m*) Raym. 474.
(*n*) *Nisi captus est per speciale præceptum nostrum, vel capitalis justitiarii nostri, vel pro morte hominis, vel pro foresta nostra, vel pro aliquo alio retto, quare secundum consuetudinem Angliæ non sit replegiabilis. Registr.* 77.
(*o*) 2 Mod. 198.
(*p*) 2 Lilly Prac. Reg. 4.

[17] Of the two first-mentioned writs nothing is now known in practice, their use and application being entirely superseded by summary resort to magistrates, or, upon their refusal, to a judge of the court, as the case may require.—CHITTY.

committed.[18] Such is, lastly, the common writ *ad faciendum et recipiendum*, which issues out of any of the courts of Westminster hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer, (whence the writ is frequently denominated an *habeas corpus cum causa*,) to *do and receive* whatsoever the king's court shall consider in that behalf. This is a writ grantable of common right, without any motion in court,(*q*) and it instantly supersedes all proceedings in the court below. But in order to prevent the surreptitious discharge of prisoners, it is ordered by statute 1 & 2 P. and M. c. 13 that no *habeas corpus* shall issue to remove any prisoner out of any gaol, unless signed by some judge of the court out of which it is awarded. And to avoid vexatious delays by removal of frivolous causes, it is enacted by statute 21 Jac. I. c. 23 that, where the judge of an inferior court of record is a barrister of three years' standing, no cause shall be removed from thence by *habeas corpus* or other writ, after issue or demurrer deliberately joined; that no cause, if once remanded to the inferior court by writ of *procedendo* or otherwise, shall ever afterwards be again removed; and that no cause shall be removed at all, if the debt or damages laid in the declaration do not amount to the sum of five pounds. But an *expedient*(*r*) having been found out to elude the latter branch of the statute, by procuring a nominal plaintiff to bring another action for five pounds or upwards, (and then, by the course of the court, the *habeas corpus* removed both actions together,) it *131] is therefore enacted by statute 12 Geo. I. c. 29, that the inferior *court may proceed in such actions as are under the value of five pounds, notwithstanding other actions may be brought against the same defendant to a greater amount. And by statute 19 Geo. III. c. 70, no cause under the value of ten pounds[19] shall be removed by *habeas corpus*, or otherwise, into any superior court, unless the defendant so removing the same shall give special bail for payment of the debt and costs.

But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum;* directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf.(*s*) This is a high prerogative writ, and therefore by the common law issuing out of the court of king's bench not only in term-time, but also during the vacation,(*t*) by a *fiat* from the chief justice or any other of the judges, and running into all parts of the king's dominions; for the king is at all times entitled to have an account why the liberty of any of his subjects is restrained,(*u*) wherever that restraint may be inflicted. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon;(*v*) unless the term shall intervene, and then it may be returned in court.(*w*) Indeed, if the party were privileged in the courts of common pleas and exchequer, as being (or supposed to be) an officer or suitor of the court, an *habeas corpus ad subjiciendum* might also by common law have been awarded from thence;(*x*) and, if the cause of imprisonment were palpably illegal, they might have discharged him:(*y*) but, if he were committed for any criminal matter, they could only have remanded him, or taken bail for his ap-

(*q*) 2 Mod. 306.
(*r*) Bohun. *Instit. Legal.* 85, edit. 1708.
(*s*) St. Trials, viii. 142.
(*t*) The *pluries habeas corpus* directed to Berwick in 43 Eliz. (cited 4 Burr. 856) was *teste'd die Joris prox' post quinden' Sancti Martini.* It appears, by referring to the dominical letter of that year, that this *quindena* (Nov. 25) happened that year on a Saturday. The Thursday after was therefore the 30th of November,—two days after the expiration of the term.
(*u*) Cro. Jac. 543.
(*v*) 4 Burr. 856.
(*w*) Ibid. 460, 542, 606.
(*x*) 2 Inst. 55. 4 Inst. 290. 2 Hal. P. C. 141. 2 Ventr. 24.
(*y*) Vaugh. 155.

[18] By 44 Geo. III. c. 102, any of the judges of England or Ireland may award a writ of *habeas corpus ad testificandum* to bring a prisoner detained in any gaol to be examined as a witness in any court of record or sitting at nisi prius.—Chitty.

[19] By statute 57 Geo. III. c. 124, extended to 15*l.*, and by statute 7 & 8 Geo. IV. c. 71, § 6, extended to 20*l.*—Chitty.

pearance in the court of king's bench,(z) which *occasioned the common pleas for some time to discountenance such applications. But since [*132 the mention of the king's bench and common pleas, as co-ordinate in this jurisdiction, by statute 16 Car. I. c. 10, it hath been holden, that every subject of the kingdom is equally entitled to the benefit of the common-law writ, in either of those courts, at his option.(a) It hath also been said, and by very respectable authorities,(b) that the like *habeas corpus* may issue out of the court of chancery in vacation; but upon the famous application to lord Nottingham by Jenks, notwithstanding the most diligent searches, no precedent could be found where the chancellor had issued such a writ in vacation;(c) and therefore his lordship refused it.[20]

(z) Carter, 221. 2 Jon. 13.
(a) 2 Mod. 198. Wood's Case, C. B. Hill. 11 Geo. III.
(b) 4 Inst. 182. 2 Hal. P. C. 147.
(c) Lord Nott. MSS. Rep. July, 1676.

[20] It was determined, after a very elaborate investigation of all the authorities by lord Eldon in Crowley's case, that the lord chancellor can issue the writ of habeas corpus at common law in vacation, overruling the decision in Jenks's case. See 2 Swanst. I.

By two modern statutes, the 43 Geo. III. c. 140 and 44 Geo. III. c. 102, the habeas corpus *ad testificandum* has been rendered more efficient. By the first, a judge may award the writ for the purpose of bringing any prisoner from any gaol in England or Ireland as a witness, before any court-martial, commissioners of bankrupt or for auditing public accounts, or other commissioners, under any commission or warrant from his majesty: (the statute has the same application to the habeas corpus *ad deliberandum.*) By the other statute, a similar power is given for bringing up any prisoner as a witness before any of the courts, or any justice of oyer and terminer, or gaol-delivery, or sitting at nisi prius, in England or Ireland.

The benefit of the writ of habeas corpus, which was limited by the former acts to cases of commitment or detainer for criminal, or supposed criminal, matter, has been still further extended by the 59 Geo. III. c. 100, which enacts that any one of the judges may issue a writ of habeas corpus in vacation, returnable immediately, before himself or any other judge of the same court, in cases other than for criminal matter or for debt; and the non-observance of such writ is to be deemed a contempt of court. But if the writ be awarded so late in the vacation that the return cannot be conveniently made before term, then it is to be made returnable in court at a day certain. And if the writ be awarded late in term, it may be made returnable in vacation in like manner. The act applies to Ireland as well as England, and the writ may run into counties palatine, cinque ports, and privileged places, &c., Berwick-upon-Tweed, and the isles of Guernsey, Jersey, or Man.

The writ of habeas corpus is the privilege of the British subject only, and therefore cannot be obtained by an alien enemy or a prisoner of war. See the case of the three Spanish sailors, 2 Blk. 1324. 2 Burr. 765. The relief in such cases is by application to the secretary at war. On a commitment by either house of parliament for contempt or breach of privilege, the courts at Westminster cannot discharge on a habeas corpus, although, on the return of the writ, such commitment should appear illegal; for they have no power to control the privileges of parliament. 2 Hawk. c. 15. s. 73. 8 T. R. 314.

The writ of habeas corpus, whether at common law or under 31 Car. II. c. 2, does not issue, as a matter of course, upon application in the first instance, but must be grounded on an affidavit, upon which the court are to exercise their discretion whether the writ shall issue or not. 3 B. & A. 420. 2 Chitty R. 207. A habeas corpus *cum causa* does not lie to remove proceedings from an inferior jurisdiction into the court of King's Bench, unless it appears that the defendant is actually or virtually in the custody of the court below. 1 B. & C. 513. 2 Dowl. & R. 722. The court of King's Bench will grant a habeas corpus to the warden of the Fleet, to take a prisoner confined there for debt before a magistrate, to be examined from day to day respecting a charge of felony or misdemeanour. 5 B. & A. 730. The court of exchequer will not grant a habeas corpus to enable the defendant in an information, who is confined in a county gaol for a libel under the sentence of another court, to attend at Westminster to conduct his defence in person: the application should be made to the court by whom the defendant was sentenced. 9 Price, 147. Nor will the court of King's Bench grant a writ of habeas corpus to bring up a defendant under sentence of imprisonment for a misdemeanour, to enable him to show cause in person against a rule for a criminal information. 3 B. & A. 679. n. Where there are articles of separation between the husband and wife, if the husband afterwards confine her, she may have a habeas corpus and be set at liberty. 13 East, 173, n. A habeas corpus will be granted in the first instance, to bring up an infant who had absconded from his father and was detained by a third person without his consent. 4 Moore, 366. The court will not grant a habeas corpus to bring up the body of a feme-covert on an

In the king's bench and common pleas it is necessary to apply for it by motion to the court,(*d*) as in the case of all other prerogative writs, (*certiorari*, prohibition, *mandamus*, &c.,) which do not issue as of mere course, without showing some probable cause why the extraordinary power of the crown is called in to the party's assistance. For, as was argued by lord chief justice Vaughan,(*e*) "it is granted on motion, because it cannot be had of course, and there is therefore no *necessity* to grant it; for the court ought to be satisfied that the party hath a probable cause to be delivered." And this seems the more reasonable because (when once granted) the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner.(*f*) So that if it issued of mere course, without showing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the king's service, a wife, a child, a relation, or a domestic confined for insanity or other prudential reasons, might obtain *133] a temporary *enlargement by suing out a *habeas corpus*, though sure to be remanded as soon as brought up to the court. And therefore Sir Edward Coke, when chief justice, did not scruple in 13 Jac. I. to deny a *habeas corpus* to one confined by the court of admiralty for piracy; there appearing, upon his own showing, sufficient grounds to confine him.(*g*) On the other hand, if a probable ground be shown that the party is imprisoned without just

(*d*) 2 Mod. 306. 1 Lev. 1.
(*e*) Bushel's case, 2 Jon. 13.
(*f*) Cro. Jac. 543.
(*g*) 3 Bulstr. 27. See also 2 Roll. Rep. 138.

affidavit that she is desirous of disposing of her separate property, and that her husband will not admit the necessary parties, and that she is confined by illness and not likely to live long; nor will they, under such circumstances, grant a rule to show cause why the necessary parties should not be admitted to see her; for if there be no restraint of personal liberty, the matter is only cognizable in a court of equity. 1 Chitty R. 654. Where application had been made for the discharge of an impressed seaman, before the two years of his protection by the stat. 13 Geo. II. c. 17 were expired, which was then ineffectual, because the facts were not verified with sufficient certainty, yet, the doubt being removed by another affidavit, the court granted a writ of habeas corpus for the purpose of liberating him, though the two years were expired. 8 East, 27. The court on affidavit, suggesting probable cause to believe that a helpless and ignorant female foreigner was exhibited for money without her consent, granted a rule on her keepers to show cause why a writ of habeas corpus should not issue to bring her before the court, and directed an examination before the coroner and attorney of the court, in the presence of the parties applying and applied against. *Ex parte* Hottentot Venus, 13 East, 495. The writ will be granted to a military officer under arrest for charges of misconduct, if he be not brought to trial pursuant to the articles of war, as soon as a court-martial can be conveniently assembled, unless the delay is satisfactorily explained. 2 M. & S. 428. The court will grant a habeas corpus to bring up the body of a bastard child within the age of nurture, for the purpose of restoring it to its mother, from whom it had been taken, first by fraud, and then by force, without prejudice to the question of guardianship, which belongs to the lord chancellor. 7 East, 579. Where a prisoner is brought up under a habeas corpus issued at common law, he may controvert the truth of the return by virtue of the 56 Geo. III. c. 100, s. 4. 4 B. & C. 136. Prisoner committed for manslaughter, upon the return of the habeas corpus, was allowed to give bail in the country, by reason of his poverty, which rendered him unable to appear with bail in court. 6 M. & S. 108. 1 B. & A. 209. 2. Chit. Rep. 110.

With respect to the *Return*. A return in the following words, "I had not, at the time of receiving this writ, nor have I since, had the body of A. B. *detained* in my custody, so that I *could not* have her, &c." was holden bad, and an attachment was granted against the party who made it. 5 T. R. 89. It seems sufficient to set forth that the defendant is in custody under the sentence of a court of competent jurisdiction to inquire of the offence and pass such sentence, without setting forth the particular circumstances necessary to warrant such a sentence. 1 East, 306. 5 Dowl. 199, 200. The court will not extend matter dehors the return, in support of the sentence or proceeding against the defendant, (2 M. & S. 226.) nor go into the merits, but decide upon the return of a regular conviction *prima facie*. 7 East, 376. Where a defendant was committed by an ecclesiastical judge of appeal for contumacy in not paying costs, and the significavit only described the suit to be "a certain cause of appeal and complaint of nullity," without showing that the defendant was committed for a cause within the jurisdiction of the spiritual judge, it was held that the defendant was entitled to be discharged on habeas corpus. 5 B. & A. 791. 1 Dowl. & Ry. 460.—CHITTY.

cause,(*h*) and therefore hath a right to be delivered, the writ of *habeas corpus* is then a writ of right, which "may not be denied, but ought to be granted to every man that is committed or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other."(*i*)

In a former part of these commentaries(*k*) we expatiated at large on the personal liberty of the subject. This was shown to be a natural inherent right, which could not be surrendered or forfeited unless by the commission of some great and atrocious crime, and which ought not to be abridged in any case without the special permission of law. A doctrine coeval with the first rudiments of the English constitution, and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes and the violence of the Norman conquest; asserted afterwards and confirmed by the Conqueror himself and his descendants; and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of *magna carta*, and a long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty by rendering its protection impossible: but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the *imprisonment of the subject may be lawful. [*134 This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made: that the court upon a *habeas corpus* may examine into its validity, and, according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner.[21]

And yet, early in the reign of Charles I., the court of king's bench, relying on some arbitrary precedents, (and those perhaps misunderstood,) determined(*l*) that they could not upon a *habeas corpus* either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council. This drew on a parliamentary inquiry, and produced the *petition of right*, 3 Car. I. which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable. And when at length they agreed that it was, they, however, annexed a condition of finding sureties for the good behaviour, which still protracted their imprisonment, the chief justice, Sir Nicholas Hyde, at the same time declaring(*m*) that "if they were again

(*h*) 2 Inst. 615.
(*i*) Com. Jour. 1 Apr. 1628.
(*k*) Book i. ch. 1.
(*l*) State Tr. vii. 136.
(*m*) Ibid. 240.

[21] It has been decided by the Supreme Court of the United States that that tribunal has authority to issue a habeas corpus where a person is imprisoned under the warrant or order of any other court. It is in the nature of a writ of error to examine the legality of the commitment. As it is the exercise of the appellate power of the court to award the writ, it is within its jurisdiction to do so. It is revising the effect of the process of the inferior court under which the prisoner is detained, and is not the exercise of original jurisdiction. But the Supreme Court has no appellate jurisdiction in criminal cases confided to it by the laws of the United States, and hence will not grant a habeas corpus where a party has been committed for a contempt adjudged by a court of competent jurisdiction, nor inquire into the sufficiency of the cause of commitment. *Ex parte* Kearney, 7 Wheat, 38. *Ex parte* Tobias Watkins, 3 Peters, 193. S. C. 7 Peters, 568. But neither the Supreme Court nor any other court, of the United States, nor judge thereof, can issue a *habeas corpus* to bring up a prisoner who is in custody under a sentence or execution of a State court for any other purpose than to be used as a witness. *Ex parte* Dorr, 3 Howard, 103. The court on a *habeas corpus* cannot look behind the sentence where the court had jurisdiction. Johnson *vs.* The United States, 3 McLean, 89.—SHARSWOOD.

remanded for that cause perhaps the court would not afterwards grant a *habeas corpus*, being already made acquainted with the cause of the imprisonment." But this was heard with indignation and astonishment by every lawyer present: according to Mr. Selden's own(*n*) account of the matter, whose *resentment was not cooled at the distance of four-and-twenty years. *135]

These pitiful evasions gave rise to the statute 16 Car. I. c. 10, § 8, whereby it is enacted that if any person be committed by the king himself in person, or by his privy council, or by any of the members thereof, he shall have granted unto him, without any delay upon any pretence whatsoever, a writ of *habeas corpus*, upon demand or motion made to the court of king's bench *or common pleas;* who shall thereupon, within three court-days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering, bailing, or remanding such prisoner. Yet still, in the case of Jenks, before alluded to,(*o*) who in 1676 was committed by the king in council for a turbulent speech at Guildhall,(*p*) new shifts and devices were made use of to prevent his enlargement by law, the chief justice (as well as the chancellor) declining to award a writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to award the usual writs *ad deliberandum*, &c., whereby the prisoner was discharged at the Old Bailey. Other abuses had also crept into daily practice which had in some measure defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party, and many other vexatious shifts were practised to detain state-prisoners in custody. But whoever will attentively consider the English history may observe that the flagrant abuse of any power by the crown or its ministers has always been productive of a struggle, which either discovers the exercise of that power to be contrary to law, or (if legal) restrains it for the future. This was the case in the present instance. The oppression of an obscure individual gave birth to the famous *habeas corpus* act, 31 Car. II. c. 2, which is frequently *considered as another *magna carta*(*q*) of the kingdom; and by consequence and analogy has also in subsequent times reduced the general method of proceedings on these writs (though not within the reach of that statute, but issuing merely at the common law) to the true standard of law and liberty. *136]

The statute itself enacts, 1. That on complaint and request in writing by or on behalf of any person committed and charged with any *crime*, (unless committed for treason or felony expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact, to any petit-treason or felony; or upon suspicion of such petit-treason or felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process,) the lord chancellor or any of the twelve judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. 2. That such writs shall be endorsed as granted in pursuance of this act, and signed by the person awarding them. 3. That the writ shall be returned and the prisoner brought up within a limited time, according to the distance, not exceeding in any case twenty days. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another without sufficient reason or authority, (specified in the act,) shall for the first offence forfeit 100*l.*, and for the second offence 200*l.*, to the party grieved, and be dis-

(*n*) "*Etiam judicum tunc pr*[illegible]*dant, nisi illud faceremus, rescripti illius forensis, qui la*[illegible]*ersonalis omnimodæ vindex legitimus est fere solus,* [illegible]*omnimodum palam pronuntiavit (sui semper similis)* [illegible]*petuo in posterum denegandum. Quod, ut odiosissimum juris prodigium, scientioribus hic universis censitum.*" *Vindic. Mar. claus cdit.* A.D. 1653.

(*o*) Page 132.

(*p*) State Tr. vii. 471.

(*q*) See book i. ch. 1.

abled to hold his office. 5. That no person once delivered by *habeas corpus* shall be recommitted for the same offence, on penalty of 500*l.* 6. That every person committed for treason or felony shall, if he requires it the first week of the next term, or the first day of the next session of **oyer and terminer*, be indicted in that term or session, or else admitted to bail: [*137 unless the king's witnesses cannot be produced at that time: and if acquitted, or if not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence: but that no person, after the assizes shall be open for the county in which he is detained, shall be removed by *habeas corpus*, till after the assizes are ended, but shall be left to the justice of the judges of assize. 7. That any such prisoner may move for and obtain his *habeas corpus* as well out of the chancery or exchequer as out of the king's bench or common pleas; and the lord chancellor or judges denying the same, on sight of the warrant or oath that the same is refused, forfeit severally to the party grieved the sum of 500*l.* 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting, or convicts praying, to be transported, or having committed some capital offence in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions, on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved a sum not less than 500*l.*, to be recovered with treble costs; shall be disabled to bear any office of trust or profit; shall incur the penalties of *præmunire;* and shall be incapable of the king's pardon.

This is the substance of that great and important statute: which extends (we may observe) only to the case of commitments for such criminal charge, as can produce no inconvenience to public justice by a temporary enlargement of the prisoner: all other cases of unjust imprisonment being left to the *habeas corpus* at common law. But even upon writs at the common law it is now expected by the court, agreeable to antient precedents(*r*) and the spirit of the act of parliament, that the writ should be immediately obeyed, without waiting for any **alias* or *pluries;* otherwise an attachment will issue. By which admirable [*138 regulations, judicial as well as parliamentary, the remedy is now complete for *removing* the injury of unjust and illegal confinement. A remedy the more necessary, because the oppression does not always arise from the ill nature, but sometimes from the mere inattention, of government. For it frequently happens in foreign countries (and has happened in England during temporary suspensions(*s*) of the statute) that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.[22]

The *satisfactory* remedy for this injury of false imprisonment, is by an action

(*r*) 4 Burr. 856. (*s*) See book i. page 136.

[22] Besides the efficacy of the writ of *habeas corpus* in liberating the subject from illegal confinement in a public prison, it also extends its influence to remove every unjust restraint of personal freedom in private life, though imposed by a husband or a father; but when women or infants are brought before the court by a *habeas corpus*, the court will only set them free from an unmerited or unreasonable confinement, and will not determine the validity of a marriage, or the right to the guardianship, but will leave them at liberty to choose where they will go; and if there be any reason to apprehend that they will be seized in returning from the court, they will be sent home under the protection of an officer. But if a child is too young to have any discretion of its own, then the court will deliver it into the custody of its parent or the person who appears to be its legal guardian. See 3 Burr. 1434, where all the prior cases are considered by lord Mansfield. In a late case (Moore and Fitzgibbon) the court refused to permit an inquiry whether a child born during wedlock was the offspring of the former or the latter, but on a writ of *habeas corpus* directed that the child, an infant under three years of age, should be restored to the former, who was the husband of the child's mother. M. T. 1825, K. B.

If an equivocal return is made to a *habeas corpus*, the court will immediately grant an attachment. 5 T. R. 89.—CHRISTIAN.

of trespass *vi et armis*, usually called an action of false imprisonment; which is generally, and almost unavoidably, accompanied with a charge of assault and battery also; and therein the party shall recover damages for the injury he has received; and also the defendant is, as for all other injuries committed with force, or *vi et armis*, liable to pay a fine to the king for the violation of the public peace.[23]

III. With regard to the third absolute right of individuals, or that of private property, though the enjoyment of it, when acquired, is strictly a personal right; yet as its nature and original, and the means of its acquisition or loss, fell more directly under our second general division, of the *rights of things;* and as, of course, the wrongs that affect these rights must be referred to the corresponding division in the present book of our commentaries; I conceive it will be more commodious and easy to consider together, rather than in a separate view, the injuries that may be offered to the *enjoyment*, as well as to the *rights*, of property. And therefore I shall here conclude the head of injuries affecting the *absolute* rights of individuals.

We are next to contemplate those which affect their *relative* rights; or such as are incident to persons considered as members of society, and connected to each other by various *ties and relations; and, in particular, such injuries as *139] may be done to persons under the four following relations: husband and wife, parent and child, guardian and ward, master and servant.

I. Injuries that may be offered to a person, considered as a *husband*, are principally three: *abduction*, or taking away a man's wife; *adultery*, or criminal conversation with her; and *beating* or otherwise abusing her. 1. As to the first sort, *abduction*, or taking her away, this may either be by fraud and persuasion, or open violence: though the law in both cases supposes force and constraint, the wife having no power to consent; and therefore gives a remedy by writ of *ravishment*, or action of *trespass vi et armis, de uxore rapta et abducta*.(*t*) This action lay at the common law; and thereby the husband shall recover, not the possession(*u*) of his wife, but damages for taking her away: and by statute Westm. 1, 3 Edw. I. c. 13, the offender shall also be imprisoned two years, and be fined at the pleasure of the king. Both the king and the husband may therefore have this action;(*w*) and the husband is also entitled to recover damages in an action on the case against such as persuade and entice the wife to live separate from him without a sufficient cause.(*x*) The old law was so strict in this point, that if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted and in danger of being lost or drowned;(*y*) but a stranger might carry her behind him on horseback to market to a justice of the peace for a warrant against her husband, or to the spiritual court to sue for a divorce.(*z*) 2. *Adultery*, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury, (and surely there can be no greater,) the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages reco- *140] vered are usually *very large and exemplary. But these are properly increased and diminished by circumstances;(*a*) as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the seduction or otherwise of the wife, founded on her previous behaviour and character; and the husband's obligation, by settlement or otherwise, to provide for those children, which he cannot but suspect to be spurious. In this case, and upon indictments for polygamy, a marriage *in fact* must be proved; though generally, in other cases, reputation and cohabitation are sufficient evidence of

(*t*) F. N. B. 89.
(*u*) 2 Inst. 434.
(*w*) Ibid.
(*x*) Law of *Nisi Prius*, 74.
(*y*) Bro. Abr. tit. *Trespass*, 213.
(*z*) Bro. Abr. 207, 440.
(*a*) Law of *Nisi Prius*, 26.

[23] Since the Common-Law Procedure Act, 1852, this fine to the king (for which formerly judgment was awarded by the court as a matter of form) no longer appears in the judgment.—Stewart.

marriage.(*b*) The third injury is that of *beating* a man's wife, or otherwise ill using her; for which, if it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass *vi et armis*, which must be brought in the names of the husband and wife *jointly;* but if the beating or other mal-treatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a *separate* remedy by an action of trespass, in nature of an action upon the case, for this ill usage, *per quod consortium amisit;* in which he shall recover a satisfaction in damages.(*c*)

II. Injuries that may be offered to a person considered in the relation of a *parent*[24] were likewise of two kinds: 1. *Abduction*, or taking his children away; and, 2. *Marrying* his son and heir without the father's consent, whereby during the continuance of the military tenures he lost the value of his marriage. But this last injury is now ceased, together with the right upon which it was grounded; for, the father being no longer entitled to the value of the marriage, the marrying his heir does him no sort of injury for which a civil action will lie. As to the other, of abduction, or taking away the children from the father, that is also a matter of doubt whether it be a civil injury or no; for, before the abolition of the tenure in chivalry, it was equally a doubt whether an action would lie for taking and carrying away *any other child besides the heir; some holding that it would not, upon the supposition that the only ground or [*141 cause of action was losing the value of the heir's marriage; and others holding that an action would lie for taking away *any* of the children, for that the parent hath an interest in them all, to provide for their education.(*d*) If, therefore, before the abolition of these tenures, it was an injury to the father to take away the rest of his children, as well as his heir, (as I am inclined to think it was,) it still remains an injury, and is remediable by writ of *ravishment* or action of *tres-*

(*b*) Burr. 2057. (*c*) Cro. Jac. 501, 538. (*d*) Cro. Eliz. 770.

[24] See in general, Bac. Abr. Master & Servant, O. Selw. N. P. Master & Servant. It has been disputed, but the better opinion is, that the father has an interest in his legitimate child, sufficient to enable him to support an action in that character, for taking the child away, he being entitled to the custody of it. Cro. Eliz. 770. 23 Vin. 451. 2 P. Wms. 116. 3 Co. 38. 5 East. 221. No modern instance, however, of such action can be adduced; and it is now usual for the father to bring his action for any injury done to his child, as for debauching her, or beating him or her, in the character of master, *per quod servitium amisit*, in which case some evidence must be adduced of service. 5 T. R. 360, 361.

In an action for debauching plaintiff's daughter, as his servant, it is necessary to prove her residence with him; and some acts of service, though the most trifling, are sufficient. See 2 T. R. 167. 2 N. R. 476. 6 East, 387. It is unnecessary to prove any contract of service. Peake's R. 253. But if the seduction take place while she is residing elsewhere, and she in consequence return to her father, he cannot maintain the action, (5 East, 45,) unless she be absent with his consent, and with the intention of returning, although she be of age, (ib. 47, n;) or if the defendant engaged her as his servant, and induced her to live in his house as such, with intent to seduce her. 2 Starkie Rep. 493. If she live in another family, the person with whom she resides may maintain the action, (11 East, 24. 5 East, 45. 2 T. R. 4;) and the jury are not limited in their verdict to the mere loss of service. 11 East, 24. The daughter is a competent witness, (2 Stra. 1064,) and, though not essential, the omission to call her would be open to observation. Holt's R. 451. Expenses actually incurred should be proved, and a physician's fee, unless actually paid, cannot be recovered. 1 Starkie R. 287. The state and situation of the family at the time should be proved in aggravation of damages, (3 Esp. R. 119;) and, if so, that the defendant professed to visit the family and was received as the suitor of the daughter. 5 Price, 641. It has been said that evidence to prove that defendant prevailed by a promise of marriage is inadmissible. 3 Camp. 519. Peake L. E. 355. See 5 Price, 641. And no evidence of the daughter's general character for chastity is admissible, unless it is impugned. 1 Camp. 460. 3 Camp. 519. The defendant may, in mitigation of damages, adduce any evidence of the improper, negligent, and imprudent conduct of the plaintiff himself; as where he knew that defendant was a married man, and allowed his visits in the probability of a divorce, lord Kenyon held the action could not be maintained. Peake R. 240. And evidence may be given, on an inquisition of damages in an action for seduction, that the defendant visited at the plaintiff's house for the purpose of paying his addresses to the daughter, with an intention of marriage. 5 Price, 641.—

pass vi et armis, de filio, vel filia, rapto vel abducto;(e) in the same manner as the husband may have it on account of the abduction of his wife.

III. Of a similar nature to the last is the relation of *guardian* and *ward;* and the like actions *mutatis mutandis,* as are given to fathers, the guardian also has for recovery of damages, when his ward is stolen or ravished away from him.(f) And though guardianship in chivalry is now totally abolished, which was the only beneficial kind of guardianship to the guardian, yet the guardian in socage was always(g) and is still entitled to an action of *ravishment,* if his ward or pupil be taken from him; but then he must account to his pupil for the damages which he so recovers.(h) And, as a guardian in socage was also entitled at common law to a writ of *right of ward, de custodia terræ et hæredis,* in order to recover the possession and custody of the infant,(i) so I apprehend that he is still entitled to sue out this antiquated right. But a more speedy and summary method of redressing all complaints relative to wards and guardians hath of late obtained by an application to the court of chancery; which is the supreme guardian, and has the superintendent jurisdiction, of all the infants in the kingdom. And it is expressly provided by statute 12 Car. II. c. 24 that testamentary guardians may maintain an action of ravishment or trespass, for recovery of *any of their wards, and also for damages to be applied to the use and benefit of the infants.(k)

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IV. To the relation between *master* and *servant,* and the rights accruing therefrom, there are two species of injuries incident. The one is, retaining a man's hired servant before his time is expired; the other is, beating or confining him in such a manner that he is not able to perform his work. As to the first, the retaining another person's servant during the time he has agreed to serve his present master; this, as it is an ungentlemanlike, so it is also an illegal, act. For every master has by his contract purchased for a valuable consideration the service of his domestics for a limited time: the inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master; and for that injury the law has given him a remedy by a special action on the case; and he may also have an action against the servant for the non-performance of his agreement.(l) But, if the new master was not apprized of the former contract, no action lies against *him,*(m) unless he refuses to restore the servant, upon demand. The other point of injury is that of beating, confining, or disabling a man's servant, which depends upon the same principle as the last; viz., the property which the master has by his contract acquired in the labour of the servant. In this case, besides the remedy of an action of battery or imprisonment, which the servant himself as an individual may have against the aggressor, the master also, as a recompense for *his* immediate loss, may maintain an action of trespass *vi et armis;* in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit;*(n) and then the jury will make him a proportionable pecuniary satisfaction.[25] A similar practice to which we find also to have obtained among

(e) F. N. B. 90.
(f) F. N. B. 139.
(g) Ibid.
(h) Hale on F. N. B. 139.
(i) F. N. B. 139.
(k) 2 P. Wms. 108.
(l) F. N. B. 167.
(m) Ibid. Winch. 51.
(n) 9 Rep. 113. 10 Rep. 330.

[25] Even in case of debauching, beating, or injuring a child, the father cannot sue without alleging and proving that he sustained some loss of service, or at least that he was obliged to incur expense in endeavouring to cure his child. 5 East, 45. 6 East, 391. 11 East, 23. Sir T. Raym. 259. And if it appear in evidence that the child was of such tender years as to be incapable of affording any assistance, then he cannot sustain any action. The rules and principles in support of this doctrine were elucidated in the recent case of Hall *vs.* Hollander, decided 14th November, 1825, M. T., and in which the plaintiff declared in trespass for driving a chaise on the highway against plaintiff's son and servant, by means whereof he was thrown down and his skull fractured.

The lord chief-justice was of opinion that the action could not be maintained in this form, inasmuch as the declaration was founded upon the loss of the services of a child who, from his tender years, (being only two years of age,) was incapable of performing any acts of service, and therefore directed a nonsuit; which was confirmed by the court.—Chitty.

the Athenians; where masters were entitled to an action against such as beat or ill treated their servants.(o)[26]

*We may observe that in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach [*143 and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in any thing during her coverture. The child hath no property in his father or guardian; as they have in him, for the sake of giving him education and nurture. Yet the wife or the child, if the husband or parent be slain, have a peculiar species of criminal prosecution allowed them, in the nature of a civil satisfaction; which is called an *appeal*,[27] and which will be considered in the next book. And so the servant, whose master is disabled, does not thereby lose his maintenance or wages. He had no property in his master; and if he receives his part of the stipulated contract, he suffers no injury, and is therefore entitled to no action, for any battery or imprisonment which such master may happen to endure.[28]

(o) Pott. Antiq. b. i. c. 26.

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[26] It appears to be a remarkable omission in the law of England, which with such scrupulous solicitude guards the rights of individuals and secures the morals and good order of the community, that it should have afforded so little protection to female chastity. It is true that it has defended it by the punishment of death, from force and violence, but has left it exposed to perhaps greater danger from the artifices and solicitations of seduction. In no case whatever, unless she has had a promise of marriage, can a woman herself obtain any reparation for the injury she has sustained from the seducer of her virtue. And even where her weakness and credulity have been imposed upon by the most solemn promises of marriage, unless they have been overheard or made in writing, she cannot recover any compensation, being incapable of giving evidence in her own cause. Nor can a parent maintain any action in the temporal courts against the person who has done this wrong to his family, and to his honour and happiness, but by stating and proving that from the consequences of the seduction his daughter is less able to assist him as a servant, or that the seducer, in the pursuit of his daughter, was a trespasser upon his premises. Hence no action can be maintained for the seduction of a daughter, which is not attended with a loss of service or an injury to property. Therefore, in that action for seduction which is in most general use, viz., a *per quod servitium amisit*, the father must prove that his daughter, when seduced, actually assisted in some degree, however inconsiderable, in the housewifery of his family; and that she has been rendered less serviceable to him by her pregnancy; or the action would probably be sustained upon the evidence of a consumption, or any other disorder, contracted by the daughter, in consequence of her seduction, or of her shame and sorrow for the violation of her honour. It is immaterial what is the age of the daughter: but it is necessary that at the time of the seduction she should be living in, or be considered part of, her father's family. 4 Burr. 1878. 3 Wils. 18. It should seem that this action may be brought by a grandfather, brother, uncle, aunt, or any relation under the protection of whom, *in loco parentis*, a woman resides, especially if the case be such that she can bring no action herself; but the courts would not permit a person to be punished twice by exemplary damages for the same injury. 2 T. R. 4.

Another action for seduction is a common action for trespass, which may be brought when the seducer has illegally entered the father's house; in which action the debauching his daughter may be stated and proved as an aggravation of the trespass. 2 T. R. 166. Or where the seducer carries off the daughter from the father's house, an action might be brought for enticing away his servant,—though I have never known an instance of an action of this nature.

In the two last-mentioned actions the seduction may be proved, though it may not have been followed by the consequences of pregnancy.

These are the only actions which have been extended by the modern ingenuity of the courts to enable an unhappy parent to recover a recompense, under certain circumstances, for the injury he has sustained by the seduction of his daughter.—CHRISTIAN.

[27] Now abolished, by statute 59 Geo. III. c. 46.—CHITTY.

[28] The wife or the child, if the husband or parent were slain, had, indeed, until lately,

CHAPTER IX.

OF INJURIES TO PERSONAL PROPERTY.

*144] *In the preceding chapter we considered the wrongs or injuries that affected the rights of persons, either considered as individuals, or as related to each other; and are at present to enter upon the discussion of such injuries as affect the rights of property, together with the remedies which the law has given to repair or redress them.

And here again we must follow our former division(*a*) of property into personal and real: *personal*, which consists in goods, money, and all other movable chattels, and things thereunto incident; a property which may attend a man's person wherever he goes, and from thence receives its denomination: and *real* property, which consists of such things as are permanent, fixed, and immovable; as lands, tenements, and hereditaments of all kinds, which are annexed to the person, nor can be moved from the place in which they subsist.

*145] *First, then, we are to consider the injuries that may be offered to the rights of *personal* property; and, of these, first the rights of personal property in *possession*, and then those that are in *action* only.(*b*)

I. The rights of personal property in *possession* are liable to two species of injuries: the amotion or deprivation of that possession; and the abuse or damage of the chattels while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible into two branches; the unjust and unlawful *taking* them away; and the unjust *detaining* them, though the original taking might be lawful.

1. And first of an unlawful *taking*. The right of property in all external things being solely acquired by occupancy, as has been formerly stated, and preserved and transferred by grants, deeds, and wills, which are a continuation of that occupancy; it follows, as a necessary consequence, that when I have once gained a rightful possession of any goods or chattels, either by a just occupancy or by a legal transfer, whoever either by fraud or force dispossesses me of them, is guilty of a transgression against the law of society, which is a kind of secondary law of nature. For there must be an end of all social commerce between man and man, unless private possessions be secured from unjust invasions: and, if an acquisition of goods by either force or fraud were allowed to be a sufficient title, all property would soon be confined to the most strong, or the most cunning; and the weak and simple-minded part of mankind (which is by far the most numerous division) could never be secure of their possessions.

The wrongful taking of goods being thus most clearly an injury, the next consideration is, what remedy the law of England has given for it. And this is, in the first place, the restitution of the goods themselves so wrongfully taken, with *146] *damages for the loss sustained by such unjust invasion; which is effected by action of *replevin;* an institution which the Mirror(*c*) ascribes to Glanvil, chief justice to king Henry the Second. This obtains only in one instance of an unlawful taking, that of a wrongful distress:[1] and this and

(*a*) See book ii. ch. 2. (*b*) Book ii. ch. 25. (*c*) C. 2, § 6.

a peculiar species of criminal prosecution allowed them, in the nature of a civil satisfaction, which was called an *appeal*. See Public Wrongs, vol. iv. c. 27. Ashford *vs.* Thornton, 1 B. & A. 405.

This is now abolished, (59 Geo. III. c. 46;) but they can recover damages for the injury sustained by the death of the husband or parent, under the 9 & 10 Vict. c. 93.—Stewart.

[1] While the general rule in the United States accords with the law as established in England, that replevin, though not confined to cases of distress for rent, only lies where there has been an unlawful taking, (Pangburn *vs.* Patridge, 7 Johns. 140. Byrd *vs.* O'Hanlin, 1 Rep. Con. Ct. 401. Daggett *vs.* Robbins, 2 Blackf. 415. Wright *vs.* Armstrong, Brun. 130. Rector *vs.* Chevalier, 1 Missouri, 345,) yet in some of the States it is allowed and used as a remedy wherever one man claims goods in the possession of an-

the action of *detinue* (of which I shall presently say more) are almost the only actions in which the actual specific possession of the identical personal chattel is restored to the proper owner. For things personal are looked upon by the law as of a nature so transitory and perishable, that it is for the most part impossible either to ascertain their identity, or to restore them in the same condition as when they came to the hands of the wrongful possessor. And, since it is a maxim that "*lex neminem cogit ad vana, seu impossibilia*," it therefore contents itself in general with restoring, not the thing itself, but a pecuniary equivalent, to the party injured; by giving him a satisfaction in damages. But in the case of a *distress*, the goods are from the first taking in the custody of the law, and not merely in that of the distrainor; and therefore they may not only be identified, but also restored to their first possessor, without any material change in their condition. And, being thus in the custody of the law, the taking them back by force is looked upon as an atrocious injury, and denominated a *rescous*, for which the distrainor has a remedy in damages, either by writ of *rescous*,(*d*) in case they were going to the pound, or by writ *de parco fracto*, or *pound-breach*,(*e*) in case they were actually impounded. He may also at his option bring an action on the case for this injury; and shall therein, if the distress were taken for rent, recover treble damages.(*f*) The term *rescous* is likewise applied to the forcible delivery of a defendant, when arrested, from the officer who is carrying him to prison. In which circumstances the plaintiff has a similar remedy by action on the case, or of *rescous*:(*g*) or, if the sheriff makes a return of such *rescous* to the court out of which the process issued, the rescuer will be punished by attachment.(*h*) [*147

An action of replevin, the regular way of contesting the validity of the transaction, is founded, I said, upon a distress taken wrongfully and without sufficient cause; being a re-delivery of the pledge,(*i*) or thing taken in distress, to the owner, upon his giving security to try the right of the distress, and to restore it if the right be adjudged against him:(*j*) after which the distrainor may keep it till tender made of sufficient amends; but must then re-deliver it to the owner.(*k*) And formerly, when the party distrained upon intended to dispute the right of the distress, he had no other process by the old common law than by a writ of replevin, *replegiari facias*;(*l*) which issued out of chancery, commanding the sheriff to deliver the distress to the owner, and afterwards to do justice in respect of the matter in dispute in his own county-court. But this being a tedious method of proceeding, the beasts or other goods were long detained from the owner, to his great loss and damage.(*m*) For which reason the statute of Marlbridge(*n*) directs that (without suing a writ out of the chancery) the sheriff immediately upon plaint to him made shall proceed to replevy the goods. And, for the greater ease of the parties, it is further provided, by statute 1 P. & M. c. 12, that the sheriff shall make at least four deputies in each county, for the sole purpose of making replevins. Upon application therefore, either to the sheriff or one of his said

(*d*) F. N. B. 101.
(*e*) Ibid. 100.
(*f*) Stat. 2 W. and M. Sess. 1, c. 5.
(*g*) 6 Mod. 211.
(*h*) Cro. Jac. 419. Salk. 586.
(*i*) See page 13.
(*j*) Co. Litt. 145.
(*k*) 8 Rep. 147.
(*l*) F. N. B. 68.
(*m*) 2 Inst. 139.
(*n*) 52 Hen. III. c. 21.

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other and seeks to recover them specifically. Weaver *vs.* Lawrence, 1 Dall. 156. Cullum *vs.* Bevans, 6 Har. & J. 469.

It is either in the *detinet* or *detinuit*. Where the sheriff delivers the goods to the plaintiff the declaration is in the *detinuit*, and the plaintiff recovers only damages for the detention. In such case, if the defendant recover, there is a general verdict for the defendant and damages for the detention, on which there is a judgment *pro retorno habendo* and for the damages. Easton *vs.* Worthington, 5 Serg. & R. 130. Where the goods are not delivered to the plaintiff, but are allowed to remain in the defendant's possession upon his claim of property and giving a bond for their forthcoming, or where the goods have been eloigned, the declaration is in the *detinet*. The plaintiff recovers the value of the goods in damages; or, if the defendant recovers, it is by a general verdict in his favour. Bower *vs.* Tallman, 5 Watts & Serg. 556.—SHARSWOOD.

deputies, security is to be given, in pursuance of the statute of Westm. 2, 13 Edw. I. c. 2: 1. That the party replevying will pursue his action against the distrainor, for which purpose he puts in *plegios de prosequendo*, or pledges to prosecute; and, 2. That if the right be determined against him he will return the distress again; for which purpose he is also bound to find *plegios de retorno* *148] **habendo*. Besides these pledges, the sufficiency of which is discretionary and at the peril of the sheriff, the statute 11 Geo. II. c. 19 requires that the officer granting a replevin on a distress for rent shall take a bond with two sureties in a sum of double the value of the goods distrained, conditioned to prosecute the suit with effect and without delay, and for the return of the goods; which bond shall be assigned to the avowant or person making cognizance, on request made to the officer; and if forfeited may be sued in the name of the assignee.[2] And certainly, as the end of all distresses is only to compel the party distrained upon to satisfy the debt or duty owing from him, this end is as well answered by such sufficient sureties as by retaining the very distress, which might frequently occasion great inconvenience to the owner; and that the law never wantonly inflicts. The sheriff on receiving such security is immediately, by his officers, to cause the chattels taken in distress to be restored into the possession of the party distrained upon; unless the distrainor claims a property in the goods so taken. For if by this method of distress the distrainor happens to come again into possession of his own property in goods which before he had lost, the law allows him to keep them, without any reference to the manner by which he thus has gained possession, being a kind of personal *remitter*.(*o*) If therefore the distrainor claims any such property, the party replevying must sue out a writ *de proprietate probanda*, in which the sheriff is to try, by an inquest, in whom the property previous to the distress subsisted.(*p*) And if it be found to be in the distrainor, the sheriff can proceed no further, but must return the claim of property to the court of king's bench or common pleas, to be there further prosecuted, if thought advisable, and there finally determined.(*q*)

But if no claim of property be put in, or if (upon trial) the sheriff's inquest determines it against the distrainor; then the sheriff is to replevy the goods (making *149] use of even force, *if the distrainor makes resistance)(*r*) in case the goods be found within his county. But if the distress be carried out of the county, or concealed, then the sheriff may return that the goods, or beasts, are *eloigned*, *elongata*, carried to a distance, to places to him unknown; and thereupon the party replevying shall have a writ of *capias in withernam, in vetito* (or more properly *repetito*) *namio;* a term which signifies a second or reciprocal distress,(*s*) in lieu of the first which was eloigned. It is therefore a command to the sheriff to take other goods of the distrainor in lieu of the distress for-

(*o*) See page 19.
(*p*) Finch, L. 316.
(*q*) Co. Litt. 145. Finch, L. 450.
(*r*) 2 Inst. 193.
(*s*) Smith's Commonw. b. iii. c. 10. 2 Inst. 141. Hickes's *Thesaur.* 164.

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[2] But for the greater ease of the parties it is now provided, by stat. 19 & 20 Vict. c. 108, §§ 63–66, that the registrar of the county court of the district in which the distress is taken shall grant replevins. Upon application therefore to the registrar, security is to be given by the replevisor for such an amount as the registrar shall deem sufficient to cover the rent or damage, in respect of which the distress was made and the costs of the action which is to follow, that he will pursue his action against the distrainor either in one of the superior courts of law or in the county court.

If the replevisor elects to sue in a superior court, the bond must be conditioned,—1, that the party replevying shall commence an action of replevin within one week, and prosecute the same with effect and without delay; 2, that, unless judgment be obtained by default, he shall prove *either* that he had good ground for believing that the *title* to some corporeal or incorporeal hereditament, or to some toll-market, fair, or franchise, was in question, *or* that the rent or damage in respect of which the distress was made exceeded twenty pounds; and, 3, that he shall make a return of the goods, if a return thereof shall be adjudged.

If the replevisor elects to sue in the county court, the bond shall be conditioned,—1, to commence the action within one month and to prosecute the same without delay; and, 2, to make a return of the goods, if a return be ordered.—Kerr.

merly taken, and eloigned, or withheld from the owner.(*t*) So that here is now distress against distress: one being taken to answer the other by way of reprisal,(*u*) and as a punishment for the illegal behaviour of the original distrainor. For which reason goods taken in *withernam* cannot be replevied till the original distress is forthcoming.(*v*)

But in common cases the goods are delivered back to the party replevying, who is then bound to bring his action of replevin, which may be prosecuted in the county-court, be the distress of what value it may.(*w*) But either party may remove it to the superior courts of king's bench or common pleas, by writ of *recordari* or *pone*;(*x*) the plaintiff at pleasure, the defendant upon reasonable cause;(*y*) and also, if in the course of proceeding any right of freehold comes in question, the sheriff can proceed no further,(*z*) so that it is usual to carry it up in the first instance to the courts of Westminster hall.[3] *Upon this action brought, and declaration delivered, the distrainor, who is now the defendant, makes *avowry;* that is, he *avows* taking the distress in his own right, or the right of his wife;(*a*) and sets forth the reason of it, as for rent-arrere, damage done, or other cause: or else, if he justifies in another's right as his bailiff or servant, he is said to make *cognizance;* that is, he *acknowledges* the taking, but insists that such taking was legal, as he acted by the command of one who had a right to distrain; and on the truth and legal merits of this avowry or cognizance the cause is determined. If it be determined for the plaintiff; viz., that the distress was wrongfully taken; he has already got his goods back into his own possession, and shall keep them, and moreover recover damages.(*b*) But if the defendant prevails, by the default or nonsuit of the plaintiff, then he shall have a writ *de retorno habendo*, whereby the goods or chattels (which were distrained and then replevied) are returned again into his custody, to be sold, or otherwise disposed of, as if no replevin hath been made. And at the common law, the plaintiff might have brought another replevin, and so *in infinitum*, to the intolerable vexation of the defendant. Wherefore the statute of Westm. 2, c. 2 restrains the plaintiff, when nonsuited, from suing out any fresh replevin, but allows him a *judicial* writ issuing out of the original record, and called a writ of *second deliverance*, in order to have the same distress again delivered to him, on giving the like security as before. And, if the plaintiff be a second time nonsuit, or if the defendant has judgment upon verdict or demurrer in the first replevin, he shall have a writ of *return irreplevisable;* after which no writ of second deliverance shall be allowed.(*c*) But in case of a distress for rent-arrere, the writ of second deliverance is, in effect,(*d*) taken away by statute 17 Car. II. c. 7, which directs that if the plaintiff be nonsuit before issue joined, then upon suggestion made on the record in nature of an avowry or cognizance; or if judgment be given against him on [*150

(*t*) F. N. B. 69, 73.

(*u*) In the old northern languages the word *withernam* is used as equivalent to *reprisals*. Stiernhook, *de jure Sueon.* l. 1, c. 10.

(*v*) Raym. 475. The substance of this rule composed the terms of that famous question with which Sir Thomas More (when a student on his travels) is said to have puzzled a pragmatical professor in the University of Bruges, in Flanders, who gave a universal challenge to dispute with any person in any science; *in omni scibili, et de quolibet ente.* Upon which Mr. More sent him this question,—"*utrum averia carucæ, capta in vetito namio, sint irreplegibilia,*" whether beasts of the plough, taken in *withernam*, are incapable of being replevied. Hoddesd. c. 5.

(*w*) 2 Inst. 139.

(*x*) Ibid. 23.

(*y*) F. N. B. 69, 70.

(*z*) Finch. L. 317.

(*a*) 2 Saund. 195.

(*b*) F. N. B. 69.

(*c*) 2 Inst. 340.

(*d*) 1 Ventr. 64.

[3] Now, however, by stat. 9 & 10 Vict. c. 95, s. 119, all actions of replevin in cases of distress for rent in arrear or damage-feasant shall be brought without writ in the New County Court and (s. 120) in the court holden for the district wherein the distress was taken. But (s. 121) in case either party declare to the court that the title to any hereditament or to any toll-market, fair, or franchise is in question, or that the rent or damage in respect of which the distress was taken exceeds 20*l.*, and becomes bound with two sureties to prosecute the suit without delay and to prove that such title was in dispute, or that there was ground for believing the rent or damage to exceed 20*l.*,—then the action may be removed before any court competent to try the same, which is done not by *recordari*, but by writ of *certiorari*, the new county courts being courts of record, which the schiremotes were not.—STEWART.

*151] demurrer, then, without any such suggestion, the defendant may have *a writ to inquire into the value of the distress by a jury, and shall recover the amount of it in damages, if less than the arrear of rent; or, if more, then so much as shall be equal to such arrear, with costs; or, if the nonsuit be after issue joined, or if a verdict be against the plaintiff, then the jury impanelled to try the cause shall assess such arrears for the defendant: and if (in any of these cases) the distress be insufficient to answer the arrears distrained for, the defendant may take a further distress or distresses.(*e*) But otherwise, if pending a replevin for a former distress, a man distrains again for the same rent or service, then the party is not driven to his action of replevin, but shall have a writ of *recaption*,(*f*) and recover damages for the defendant the re-distrainor's contempt of the process of the law.

In like manner, other remedies for other unlawful takings of a man's goods consist only in recovering a satisfaction in damages. And if a man takes the goods of another out of his actual or virtual possession, without having a lawful title so to do, it is an injury, which though it doth not amount to felony unless it be done *animo furandi*, is nevertheless a transgression for which an action of *trespass vi et armis* will lie; wherein the plaintiff shall not recover the thing itself, but only damages for the loss of it.[4] Or, if committed without force, the party may, at his choice, have another remedy in damages by action of *trover* and *conversion*, of which I shall presently say more.[5]

2. Deprivation of possession may also be an unjust *detainer* of another's goods, though the original *taking* was lawful.[6] As if I distrain another's cattle damage-feasant, and before they are impounded he tenders me sufficient amends; now, though the original taking was lawful, my subsequent detainment of them after tender of amends is wrongful, and he shall have an action of *replevin* against me to recover them:(*g*) in which he shall recover damages only for the *detention* and *152] not *for the *caption*, because the original taking was lawful. Or, if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining and not in the original taking, and the regular method for me to recover possession is by action of *detinue*.(*h*) In this action of *detinue* it is necessary to ascertain the thing detained, in such manner as that it may be specifically known and recovered. Therefore it cannot be brought for money, corn, or the like, for that cannot be known from other money or corn, unless it be in a bag or a sack, for then it may be distinguishably marked. In order therefore to ground an action of detinue, which is only for the *detaining*, these points are necessary:(*i*) 1. That the defendant came lawfully into possession of the goods as either by delivery to him, or finding them; 2. That the plain-

(*e*) Stat. 17 Car. II. c. 7.
(*f*) F. N. B. 71.
(*g*) F. N. B. 69. 3 Red. 147.
(*h*) F. N. B. 138.
(*i*) Co. Litt. 286.

[4] In order to sustain trespass for taking goods, the actual or constructive possession must be vested in the plaintiff at the time the act complained of was done. For instance, the lord before seizure may bring the action against a stranger who should carry off an estray or wreck; for the *right* of possession, and thence the constructive possession, is in him. So the executor has the right immediately on the death of the testator, and the right draws after it a constructive possession. 1 T. R. 480. 2 Saund. 47, in notes. See 1 Chitty on Pl. 4th ed. 151 to 159.—Chitty.

[5] The general owner of a chattel, who has leased it for a time certain, cannot maintain trespass. He must sue in an action on the case for the injury to his reversionary interest. Soper *vs.* Sumner, 5 Vermont 274. Putnam *vs.* Wyley, 8 Johns. 432. Fitler *vs.* Shotwell, 7 Watts & Serg. 14. In the case of personal chattels, he who has the *general* property need not prove possession in the first instance, because the law draws the possession to the property; but one who claims only a special property must prove that the one had *actual* possession, without which no special property is complete. Mather *vs.* Trinity Church, 3 Serg. & R. 512.—Sharswood.

[6] As to the action of detinue in general, see Com. Dig. Detinue. 1 Chitty on Pl. 4th ed. 110 to 114. It has been supposed that detinue is not sustainable where the goods have been *taken tortiously* by the defendant; but that doctrine is erroneous, and it is the proper specific remedy for the recovery of the identical chattels personal, when they have not been taken as a distress. See cases and observations, 1 Chitty on Pl. 4th ed 112, 113.—Chitty.

tiff have a property; 3. That the goods themselves be of some value; and 4. That they be ascertained in point of identity. Upon this the jury, if they find for the plaintiff, assess the respective values of the several parcels detained, and also damages for the detention. And the judgment is conditional; that the plaintiff recover the said goods, or (if they cannot be had) their respective values, and also the damages for detaining them.(*j*)[7] But there is one disadvantage which attends this action, viz., that the defendant is herein permitted to wage his law, that is, to exculpate himself by oath,(*k*) and thereby defeat the plaintiff of his remedy: which privilege is grounded on the confidence originally reposed in the bailee by the bailor, in the borrower by the lender, and the like; from whence arose a strong presumptive evidence that in the plaintiff's own opinion the defendant was worthy of credit. But, for this reason, the action itself is of late much disused, and has given place to the action of trover.[8]

This action of *trover* and *conversion* was in its original an action of trespass upon the case, for the recovery of damages against such person as had *found* another's goods and refused to deliver them on demand, but *converted* them to his own *use; from which finding and converting it is called an action of *trover* and *conversion*. The freedom of this action from wager of law, and the [*153 less degree of certainty requisite in describing the goods,(*l*) gave it so considerable an advantage over the action of *detinue*, that by a fiction of law actions of *trover* were at length permitted to be brought against any man who had in his possession by any means whatsoever the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded. The injury lies in the conversion; for any man may take the goods of another into possession, if he finds them; but no finder is allowed to acquire a property therein, unless the owner be forever unknown:(*m*) and therefore he must not convert them to his own use, which the law presumes him to do if he refuses them to the owner: for which reason such refusal also is, *prima facie*, sufficient evidence of a conversion.(*n*) The fact of the finding or *trover* is therefore now totally immaterial; for the plaintiff needs only to suggest (as words of form) that he lost such goods, and that the defendant found them; and if he proves that the goods are *his* property and that the defendant had them in his possession, it is sufficient. But a conversion must be fully proved; and then in this action the plaintiff shall recover damages, equal to the value of the thing converted, but not the thing itself; which nothing will recover but an action of *detinue* or *replevin*.

As to the damage that may be offered to things personal while in the possession of the owner, as hunting a man's deer, shooting his dogs, poisoning his cattle, or in any wise taking from the value of any of his chattels or making them in a worse condition than before, these are injuries too obvious to need explication. I have only therefore to mention the remedies given by the law to redress

(*j*) Co. Entr. 170. Cro. Jac. 681.
(*k*) Co. Litt. 295.
(*l*) Salk. 654.
(*m*) See book i. ch. 8; book ii. ch. 1 and 26.
(*n*) 10 Rep. 56.

[7] Formerly the defendant in an action of detinue always had it in his power to retain the chattels upon payment of the value as assessed by the jury. The remedy at law was in this respect incomplete, and it became usual to apply to the court of chancery, which from a very early period interfered to compel the return of the chattels themselves. This jurisdiction seems originally to have been confined in its exercise to cases where the chattels were of peculiar value to the owner, as, for instance, heirlooms, jewelry, articles of curiosity or antiquity, family pictures, &c. But latterly it has been decided that the right to be protected in the use or beneficial enjoyment of property in *specie* is not confined to articles possessing any peculiar or intrinsic value. The damages recovered in an action, although equal to the intrinsic value of the article detained, may be infinitely less than that at which it is estimated by the owner, so that damages may not be any thing like adequate compensation to him for the loss. And accordingly the courts of common law have now (by a peculiar process of execution) the same powers as the court of chancery to compel the return of the chattel itself. Com. Law Proc. Act, 1854, s. 79. *Regulæ Generales*, Michaelmas Vacation, 1854.—KERR.

[8] Wager of law was abolished by stat. 3 & 4 W. IV. c. 42, s. 13.—STEWART.

chem, which are in two shapes; by action of *trespass vi et armis*, where the act is in itself *immediately* *injurious to another's property, and therefore necessarily accompanied with some degree of force; and by special action *on the case*, where the act is in itself indifferent, and the injury only *consequential*, and therefore arising without any breach of the peace. In both of which suits the plaintiff shall recover damages, in proportion to the injury which he proves that his property has sustained. And it is not material whether the damage be done by the defendant himself, or his servants by his direction; for the action will lie against the master as well as the servant.(*q*) And, if a man keeps a dog or other brute animal, used to do mischief, as by worrying sheep, or the like, the owner must answer for the consequences, if he knows of such evil habit.[9]

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II. Hitherto of injuries affecting the right of things personal in *possession*. We are next to consider those which regard things in *action* only: or such rights as are founded on, and arise from, *contracts;* the nature and several divisions of which were explained in the preceding volume.(*q*) The violation, or non-performance, of these contracts might be extended into as great a variety of wrongs, as the rights which we then considered: but I shall now consider them in a more comprehensive view, by her, making only a twofold division of contracts; viz., contracts *express*, and contracts *implied;* and pointing out the injuries that arise from the violation of each, with their respective remedies.

Express contracts include three distinct species; debts, covenants, and promises.

1. The legal acceptation of *debt* is, a sum of money due by certain and express agreement: as, by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it. The non-payment of these is an injury, for which the proper remedy *is by action of *debt*,(*r*) to compel the performance of the contract and recover the specifical sum due.(*s*) This is the shortest and surest remedy; particularly where the debt arises upon a specialty, that is, upon a deed or instrument under seal. So also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies against me; for this is also a *determinate* contract: but if I agree for no settled price, I am not liable to an action of debt, but a special action on the case, according to the nature of my contract. And indeed actions of debt are now seldom brought but upon special contracts under seal; wherein the sum due is clearly and precisely expressed: for, in case of such an action upon a simple contract, the plaintiff labours under two difficulties. First, the defendant has here the same advantage as in an action of *detinue*, that of waging his law, or purging himself of the debt by oath, if he thinks proper.(*t*) Secondly, in an action of debt the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single cause of action, fixed and determined; and which therefore, if the proof varies from the claim, cannot be looked upon as the same contract whereof the performance is sued for. If therefore I bring an action of debt for 30*l.*, I

*155]

(*o*) Noy's Max. c. 44.
(*p*) Cro. Car. 254, 487.
(*q*) See book ii. ch. 30.
(*r*) F. N. B. 119.
(*s*) See Appendix, No. III. § 1.
(*t*) 4 Rep. 94.

[9] As to what is evidence of knowledge, see 4 Camp. 198. 2 Stra. 1264. 2 Esp. 482. But the owner is not answerable for the first mischief done by a dog, a bull, or other tame animal. Bull. N. P. 77. 12 Mod. 333. Ld. Raym. 608. Yet if he should carry his dog into a field where he himself is a trespasser, and the dog should kill sheep, this, though the first offence, might be stated and proved as an aggravation of the trespass. Burr. 2092. 2 Lev. 172. But where a fierce and vicious dog is kept chained for the defence of the premises, and any one incautiously, or not knowing of it, should go so near as to be injured by it, no action can be maintained by the person injured, though he was seeking the owner, with whom he had business. Bates *vs.* Crosbie, M. T. 1798, in the King's Bench. If a man sets traps in his own grounds, but baited with such strong-scented articles as allure the neighbouring dogs from the premises of the owners or from the highways, the owner of a dog injured may maintain an action upon the case. 9 East, 227; but see Ilot *vs.* Wilkes, 3 Bar. & Ald. 304.—Chitty.

am not at liberty to prove a debt of 20*l.* and recover a verdict thereon:(*u*) any more than if I bring an action of *detinue* for a horse I can thereby recover an ox. For I fail in the proof of that contract, which my action or complaint has alleged to be specific, express, and determinate.[10] But in an action on the case, on what is called an *indebitatus assumpsit*, which is not brought to compel a specific performance of the contract, but to recover damages for its non-performance, the implied *assumpsit*, and consequently the damages for the breach of it, are in their nature indeterminate; and will therefore adapt and proportion themselves to the truth of the case which shall be proved, without being confined to the precise demand stated in the declaration. *For if *any* debt be proved, however less than the sum demanded, the law will raise a promise [*156 *pro tanto*, and the damages will of course be proportioned to the actual debt. So that I may declare that the defendant, *being indebted* to me in 30*l.*, *undertook* or promised to pay it, but failed; and lay my damages arising from such failure at what sum I please: and the jury will, according to the nature of my proof, allow me either the whole in damages, or any inferior sum. And, even in actions of *debt*, where the contract is proved or admitted, if the defendant can show that he has discharged any part of it, the plaintiff shall recover the residue.(*v*)

The form of the writ of *debt* is sometimes in the *debet* and *detinet*, and sometimes in the *detinet* only: that is, the writ states, either that the defendant *owes* and unjustly *detains* the debt or thing in question, or only that he unjustly *detains* it. It is brought in the *debet* as well as *detinet*, when sued by one of the original contracting parties who personally gave the credit, against the other who personally incurred the debt, or against his heirs, if they are bound to the payment; as by the obligee against the obligor, the landlord against the tenant, &c. But, if it be brought by or against an executor for a debt due to or from the testator, this, not being his own debt, shall be sued for in the *detinet* only.(*w*) So also if the action be for goods, or corn, or a horse, the writ shall be in the *detinet* only; for nothing but a sum of money, for which I (or my ancestors in my name) have personally contracted, is properly considered as my *debt*. And indeed a writ of *debt* in the *detinet* only, for goods and chattels, is neither more nor less than a mere writ of *detinue*; and is followed by the very same judgment.(*x*)

2. A covenant also, contained in a deed, to do a direct act or to omit one, is another species of express contract, the violation or breach of which is a civil injury. As if a man covenants to be at York by such a day, or not to exercise a trade in a particular place, and is not at York at the time appointed, or *carries on his trade in the place forbidden, these are direct breaches [*157 of his covenant; and may be perhaps greatly to the disadvantage and loss of the covenantee.[11] The remedy for this is by a writ of *covenant*:(*y*) which directs

(*u*) Bro. *Ley gager*, 93. Dyer, 219. 2 Roll. Abr. 706. 1 Show. 215.
(*v*) 1 Roll. Rep. 257. Salk. 664.
(*w*) F. N. B. 119.
(*x*) Rast. Entr. 174.
(*y*) F. N. B. 145.

[10] This is no longer the case; for it is now completely settled that the plaintiff in an action of debt may prove and recover less than the sum demanded in the writ. See Bla. R. 1221. 1 Hen. Bla. 249. 11 East, 62.—ARCHBOLD.

The judgment being final in the first instance (suing a writ of injury and wager of law having become almost obsolete) renders debt on simple contract, as well as specialty, a favourite form of action, and it is of daily occurrence.—CHITTY.

[11] By an express covenant a man is bound to perform what he covenants at all events. Thus, where in a lease there is an express unqualified covenant on the part of the tenant to pay rent, he is obliged to pay it during the term, although the house be burned down and he do not enjoy the use of it. Shudbrick *vs.* Salmond, 3 Burr. 1637. Belfour *vs.* Weston, 1 T. R. 310. This is certainly a great hardship to lessees where they are not by the provisions of their lease obliged to rebuild; and in such cases we accordingly find that recourse has been had to a court of equity to obtain an injunction against the lessor proceeding at law for the recovery of the rent,—which has generally been granted, on condition of the lessee's surrendering the lease. Cambden *vs.* Morton, in Canc. E. 4 Geo. III. MS. Selw. N. P. 472. Brown *vs.* Quilter, Ambl. 619.

The covenantor is also answerable for even the act of God, as damage by lightning, &c., if he have not excepted it in his covenant. Brecknock and Abergavenny Canal Navigation *vs.* Pritchard, 6 T. R. 750.

It may not be unnecessary to point out a distinction between covenants in general

the sheriff to command the defendant generally to keep his covenant with the plaintiff, (without specifying the nature of the covenant,) or show good cause to the contrary: and if he continues refractory, or the covenant is already so broken that it cannot now be specifically performed, then the subsequent proceedings set forth with precision the covenant, the breach, and the loss which has happened thereby; whereupon the jury will give damages in proportion to the injury sustained by the plaintiff, and occasioned by such breach of the defendant's contract.

There is one species of covenant of a different nature from the rest; and that s a covenant *real*, to convey or dispose of lands, which seems to be partly of a personal and partly of a real nature.(*z*) For this the remedy is by a special writ of covenant, for a specific performance of the contract concerning certain lands particularly described in the writ. It therefore directs the sheriff to command the defendant, here called the deforciant, to keep the covenant made between the plaintiff and him concerning the identical lands in question: and upon this process it is that fines of land are usually levied at common law,(*a*) the plaintiff, or person to whom the fine is levied, bringing a writ of covenant, in which he suggests some agreement to have been made between him and the deforciant, touching those particular lands, for the completion of which he brings this action. And, for the end of this supposed difference, the fine or *finalis concordia* is made, whereby the deforciant (now called the cognizor) acknowledges the tenements to be the right of the plaintiff, now called the cognizee. And moreover, as leases for years were formerly considered only as contracts(*b*) or covenants for the enjoyment of the rents and profits, and not as the conveyance of any real interest in the land, *the antient remedy for the lessee, if ejected, was by a writ of covenant against the lessor, to recover the term (if in being) and damages, in case the ouster was committed by the lessor himself: or if the term was expired, or the ouster was committed by a stranger claiming by an elder title, then to recover damages only.(*c*)[12]

*158]

No person could at common law take advantage of any covenant or condition, except such as were parties or privies thereto; and, of course, no grantee or assignee of any reversion or rent. To remedy which, and more effectually to secure to the king's grantees the spoils of the monasteries then newly dissolved, the statute 32 Hen. VIII. c. 34 gives the assignee of a reversion (after notice of such assignment)(*d*) the same remedies against the particular tenant, by entry or action, for waste or other forfeitures, non-payment of rent, and non-performance of conditions, covenants, and agreements, as the assignor himself might have had; and makes him equally liable, on the other hand, for acts agreed to be performed by the assignor, except in the case of warranty.

3. A promise is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. If therefore it be to do any explicit act, it is an express contract, as much as any covenant; and the breach of it is an equal injury. The remedy indeed is not exactly the same: since, instead of an action of covenant, there only lies an action upon the case for what is called the *assumpsit* or undertaking of the defendant; the failure of performing which is the wrong or injury done to the plaintiff, the damages whereof a jury are to estimate and settle. As if a builder promises, undertakes, or assumes to Caius that he will build and cover his house within a time limited, and fails to do it; Caius has an action on the case against the builder, for this breach of his express promise, undertaking, or

(*z*) Hob. on F. N. B. 146.
(*a*) See book ii. ch. 21.
(*b*) See book ii. ch. 9.
(*c*) Bro. Abr. tit. *covenant*, 33. F. N. B. 476.
(*d*) Co. Litt. 215. Moor. 876. Cro. Jac. 145.

and those secured by a penalty or forfeiture. In the latter case the obligee has his election either to bring an action of debt for the penalty, or to proceed upon the covenant and recover in damages more or less than the penalty *totics quoties;* but he cannot have recourse to both. Lowe *vs.* Peers, 4 Burr. 2228. See, further, on covenants, in Harg. & Butler's Notes on Co. Litt.—Archbold.

[12] The writ of covenant real (together with almost all other real actions) is now abolished by the stat. 3 & 4 W. IV. c. 27, s. 36.—Stewart.

assumpsit; and shall recover a pecuniary satisfaction for the injury sustained by such delay.[13] So also in the case before mentioned, of *a debt by simple contract, if the debtor promises to pay it and does not, this breach of [*159 promise entitles the creditor to his action on the case, instead of being driven to an action of debt. (*e*) Thus, likewise, a promissory note, or note of hand not under seal, to pay money at a day certain, is an express *assumpsit;* and the payee at common law, or by custom and act of parliament the endorsee, (*f*) may recover the value of the note in damages, if it remains unpaid. Some agreements indeed, though never so expressly made, are deemed of so important a nature that they ought not to rest in verbal promise only, which cannot be proved but by the memory (which sometimes will induce the perjury) of witnesses. To prevent which, the statute of frauds and perjuries, 29 Car. II. c. 3, enacts, that in the five following cases no verbal promise shall be sufficient to ground an action upon, but at the least some note or *memorandum* of it shall be made in writing, and signed by the party to be charged therewith: 1. Where an executor or administrator promises to answer damages out of his own estate. 2. Where a man undertakes to answer for the debt, default, or miscarriage of another. 3. Where any agreement is made upon consideration of marriage. 4. Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein. 5. And lastly, where there is any agreement that is not to be performed within a year from the making thereof. In all these cases a mere verbal *assumpsit* is void.[14]

(*e*) 4 Rep. 99. (*f*) See book ii. ch. 30.

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[13] It is worthy of remark that the learned commentator has not either named, described, or even alluded to the consideration requisite to support an assumpsit; and, what is more remarkable, the example put by him in the text in order to illustrate the nature of the action is, in the terms in which it is there stated, a case of *nudum pactum.* (See 1 Roll. Abr. 9, 1, 41. Doct. & Stud. ii. ch. 24, and 5 T. R. 143 that the action will not lie for a mere non-feasance unless the promise is founded on a consideration.) This remark ought not—neither was it intended—to derogate from the merit of a justly-celebrated writer, who for comprehensive design, luminous arrangement, and elegance of diction is unrivalled. Selw. N. P. 45.—CHITTY.

[14] These provisions in the statute have produced many decisions, both in the courts of law and equity. See 3 Chitty's Com. L. *per tot.* It is now settled that if two persons go to a shop, and one order goods, and the other say, "If he does not pay, I will," or, "I will see you paid," he is not bound unless his engagement is reduced into writing. In all such cases the question is who is the buyer, or to whom the credit is given, and who is the surety; and that question, from all the circumstances, must be ascertained by the jury; for if the person for whose use the goods are furnished be liable at all, any promise by a third person to discharge the debt must be in writing, otherwise it is void. 2 T. R. 80. H. Bl. Rep. 120. 1 Bos. & Pul. 158. Mutual promises to marry need not be in writing: the statute relates only to agreements made in consideration of the marriage. A lease not exceeding three years from the making thereof, and in which the rent reserved amounts to two-thirds of the improved value, is good without writing; but all other parol leases or agreements for any interest in lands have the effect of estates at will only. Bull. N. P. 279. All declarations of trusts, except such as result by implication of law, must be made in writing. 29 Car. II. c. 3, ss. 7. 8. If a promise depends upon a contingency which may or may not fall within a year, it is not within the statute, as a promise to pay a sum of money upon a death or marriage, or upon the return of a ship, or to leave a legacy by will, is good by parol; for such a promise may by possibility be performed within the year. 3 Burr. 1278. 1 Salk. 280. 3 Salk. 9, &c. Partial performance within the year, where the original understanding is that the whole is to extend to a longer period, does not take the case out of the statute. 11 East, 142. But even a written undertaking to pay the debt of another is void, unless a good consideration appears in the writing; and the consideration, if any, cannot be proved by parol evidence. 5 East, 10. If a growing crop is purchased without writing, the agreement, before part execution, may be put an end to by parol notice. 6 East, 602. But a court of equity will decree a specific performance of a verbal contract when it is confessed by a defendant in his answer, or when there has been a part performance of it, as by payment of part of the consideration-money, or by entering and expending money upon the estate; for such acts preclude the party from denying the existence of the contract, and prove that there can be no fraud or perjury in obtaining the execution of it. 3 Ves. Jr. 39, 378, 712. But lord Eldon seems to think that a specific performance cannot be

From these *express* contracts the transition is easy to those that are only *implied* by law; which are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform, and upon this presumption makes him answerable to such persons as suffer by his non-performance.

Of this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person *is bound and hath virtually agreed to pay *160] such particular sums of money as are charged on him by the sentence, or assessed by the interpretation, of the law. For it is a part of the original contract, entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state of which each individual is a member. Whatever therefore the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge. And this implied agreement it is that gives the plaintiff a right to institute a second action, founded merely on the general contract, in order to recover such damages, or sum of money, as are assessed by the jury and adjudged by the court to be due from the defendant to the plaintiff in any former action. So that if he hath once obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, he may afterwards bring an action of debt upon this judgment,(*g*) and shall not be put upon the proof of the original cause of action; but upon showing the judgment once obtained still in full force and yet unsatisfied, the law immediately implies, that by the original contract of society the defendant hath contracted a debt, and is bound to pay it. This method seems to have been invented when *real* actions were more in use than at present, and damages were permitted to be recovered thereon; in order to have the benefit of a writ of *capias* to take the defendant's body in execution for those damages, which process was allowable in an action of debt, (in consequence of the statute 25 Edw. III. c. 17,) but not in an action real. Wherefore, since the disuse of those real actions, actions of debt upon judgment in personal suits have been pretty much discountenanced by the courts, as being generally vexatious and oppressive, by harassing the defendant with the costs of two actions instead of one.

On the same principle it is (of an implied original contract to submit to the rules of the community whereof we are members) *that a forfeiture im- *161] posed by the by-laws and private ordinances of a corporation upon any that belong to the body, or an amercement set in a court-leet or court-baron upon any of the suitors to the court, (for otherwise it will not be binding,)(*h*) immediately creates a debt in the eye of the law; and such forfeiture or amercement, if unpaid, works an injury to the party or parties entitled to receive it: for which the remedy is by action of debt.(*i*)

The same reason may with equal justice be applied to all penal statutes, that is, such acts of parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party offending is here bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires. The usual application of this forfeiture is either to the party aggrieved, or else to any of the king's subjects in general. Of the former sort is the forfeiture inflicted by the statute of Winchester(*k*) (explained and enforced by several subsequent statutes)(*l*) upon the hundred wherein a man is robbed, which is meant to oblige the hundredors to make hue and cry after the felon; for if they take him

(*g*) Roll. Abr. 600, 601.
(*h*) Law of Nisi Prius, 155.
(*i*) 5 Rep. 64. Hob. 279.
(*k*) 13 Edw. I. c. 1.
(*l*) 27 Eliz. c. 13. 29 Car. II. c. 7. 8 Geo. II. c. 16. 22 Geo. II. c. 24.

decreed if the defendant in his answer admits a parol agreement, and at the same time insists upon the benefit of the statute. 6 Ves. Jr. 37. If one party only signs an agreement, he is bound by it; and if an agreement is by parol, but it is agreed it shall be reduced into writing, and this is prevented by the fraud of one of the parties, performance of it will be decreed. 2 Bro. 564, 565, 566. See 3 Woodd. Lect. lvii. and Fonblanque Tr. of. Eq. b. i. c. 3, ss. 8, 9, where this subject is fully and learnedly discussed.—Chitty.

they stand excused. But otherwise the party robbed is entitled to prosecute them by a special action on the case, for damages equivalent to his loss. And of the same nature is the action given by statute 9 Geo. I. c. 22, commonly called the black act, against the inhabitants of any hundred, in order to make satisfaction in damages to all persons who have suffered by the offences enumerated and made felony by that act. But more usually these forfeitures created by statute are given at large to any common informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called *popular* actions, because they are given to the people in general.(*m*) Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the *informer or prosecutor: and then the suit is called a *qui tam* action, because it is brought by a person "*qui tam pro domino rege, &c., quam pro se ipso in hac parte sequitur.*" If the king therefore himself commences this suit, he shall have the whole forfeiture.(*n*) But if any one hath begun a *qui tam*, or *popular* action, no other person can pursue it: and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even to the king himself. This has frequently occasioned offenders to procure their own friends to begin a suit, in order to forestall and prevent other actions: which practice is in some measure prevented by a statute made in the reign of a very sharp-sighted prince in penal laws, 4 Hen. VII. c. 20, which enacts that no recovery, otherwise than by verdict, obtained by collusion in an action popular, shall be a bar to any other action prosecuted *bona fide*. A provision that seems borrowed from the rule of the Roman law, that if a person was acquitted of any accusation merely by the prevarication of the accuser, a new prosecution might be commenced against him.(*o*) [*162

A second class of implied contracts are such as do not arise from the express determination of any court, or the positive direction of any statute; but from natural reason, and the just construction of law. Which class extends to all presumptive undertakings or *assumpsits;* which though never perhaps actually made, yet constantly arise from the general implication and intendment of the courts of judicature, that every man hath engaged to perform what his duty or justice requires. Thus,

1. If I employ a person to transact any business for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury by bringing his action on the case upon this implied *assumpsit;* wherein he is at liberty to suggest that I promised to pay him as *much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merited. This is called an *assumpsit* on a *quantum meruit.* [*163

2. There is also an implied *assumpsit* on a *quantum valebat*, which is very similar to the former, being only where one takes up goods or wares of a tradesman, without expressly agreeing for the price. There the law concludes, that both parties did intentionally agree that the real value of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value.

3. A third species of implied *assumpsits* is when one has had and received money belonging to another, without any valuable consideration given on the receiver's part; for the law construes this to be money had and received for the use of the owner only; and implies that the person so receiving promised, and undertook, to account for it to the true proprietor. And, if he unjustly detains it, an action on the case lies against him for the breach of such implied promise and undertaking; and he will be made to repay the owner in damages, equivalent to what he has detained in violation of such his promise. This is a very extensive and beneficial remedy, applicable to almost every case

(*m*) See book ii. ch. 29.
(*n*) 2 Hawk. P. C. 268.
(*o*) *Ff.* 47, 15, 3.

where the defendant has received money which *ex æquo et bono* he ought to refund. It lies for money paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where any undue advantage is taken of the plaintiff's situation.(*p*)

4. Where a person has laid out and expended his own money for the use of another, at his request, the law implies a promise of repayment, and an action will lie on this *assumpsit*.(*q*)[15]

*164] 5. *Likewise, fifthly, upon a stated account between two merchants, or other persons, the law implies that he, against whom the balance appears, has engaged to pay it to the other; though there be not any actual promise. And from this implication it is frequent for actions on the case to be brought, declaring that the plaintiff and defendant had settled their accounts together, *insimul computassent*, (which gives name to this species of *assumpsit*,) and that the defendant engaged to pay the plaintiff the balance, but has since neglected to do it. But if no account has been made up, then the legal remedy is by bringing a writ of *account de computo*;(*r*) commanding the defendant to render a just account to the plaintiff, or show the court good cause to the contrary. In this action, if the plaintiff succeeds, there are two judgments: the first is, that the defendant do account (*quod computet*) before auditors appointed by the court; and, when such account is finished, then the second judgment is, that he do pay the plaintiff so much as he is found in arrear. This action, by the old common law,(*s*) lay only against the parties themselves, and not their executors; because matters of account rested solely on their own knowledge. But this defect, after many fruitless attempts in parliament, was at last remedied by statute 4 Anne, c. 16, which gives an action of account against the executors and administrators. But, however, it is found by experience, that the most ready and effectual way to settle these matters of account is by bill in a court of equity, where a discovery may be had on the defendant's oath, without relying merely on the evidence which the plaintiff may be able to produce. Wherefore actions of account, to compel a man to bring in and settle his accounts, are now very seldom used; though, when an account is once stated, nothing is more common than an action upon the implied *assumpsit* to pay the balance.

*165] 6. *The last class of contracts, implied by reason and construction of law, arises upon this supposition, that every one who undertakes any office, employment, trust, or duty, contracts with those who employ or intrust him, to perform it with integrity, diligence, and skill. And, if by his want of either of those qualities any injury accrues to individuals, they have therefore their remedy in damages by a special action on the case. A few instances will fully illustrate this matter. If an officer of the public is guilty of neglect of duty, or a palpable breach of it, of non-feasance or of mis-feasance; as, if the sheriff does not execute a writ sent to him, or if he wilfully makes a false return thereof; in both these cases the party aggrieved shall have an action *on the case* for damages to be assessed by a jury.(*t*) If a sheriff or gaoler suffers a prisoner, who is taken upon mesne process, (that is, during the pendency of a suit,) to escape, he is liable to an action *on the case*.(*u*) But if, after judgment, a gaoler or a sheriff permits a debtor to escape, who is charged in execution for a certain sum, the debt immediately becomes his own, and he is compellable by action of *debt*, being for a sum liquidated and ascertained, to satisfy the creditor his whole demand; which doctrine is grounded(*w*) on the equity of the statute of Westm. 2, 13 Edw. I. c. 11, and 1 Ric. II. c. 12. An advocate or attorney

(*p*) 4 Burr. 1012.
(*q*) Carth. 446. 2 Keb. 99.
(*r*) F. N. B. 116.
(*s*) Co. Litt. 90.
(*t*) Moor. 431. 11 Rep. 99.
(*u*) Cro. Eliz. 625. Comb. 69.
(*w*) Bro. Abr. tit. *Parliament*, 19. 2 Inst. 382.

[15] If a surety in a bond pays the debt of the principal, he may recover it back from the principal in an action of *assumpsit* for so much money paid and advanced to his use. Yet in ancient times this action could not be maintained; and it is said that the first case of the kind in which the plaintiff succeeded was tried before the late Mr. J. Gould, at Dorchester. But this is perfectly consistent with the equitable principles of an *assumpsit*. 2 T. R. 105.—Chitty.

that betray the cause of their client, or, being retained, neglect to appear at the trial, by which the cause miscarries, are liable to an action on the case for a reparation to their injured client.(x)[16] There is also in law always an implied contract with a common inn-keeper to secure his guest's goods in his inn; with a common carrier, or bargemaster, to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common tailor, or other workman, that he performs his business in a workman-like manner; in which, if they fail, an action on the case lies to recover damages for *such breach of their general undertaking.(y) But if I employ a person to transact any of these concerns, whose common profession and [*166 business it is not, the law implies no such *general* undertaking; but, in order to charge him with damages, a *special* agreement is required. Also, if an inn-keeper, or other victualler, hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages if he, without good reason, refuses to admit a traveller.(z) If any one cheats me with false cards or dice, or by false weights and measures, or by selling me one commodity for another, an action on the case also lies against him for damages, upon the contract which the law always implies, that every transaction is fair and honest.(a)

In contracts, likewise, for sales, it is constantly understood that the seller undertakes that the commodity he sells is his own;[17] and if it proves otherwise, an action on the case lies against him, to exact damages for this deceit. In

(x) Finch, L. 183.
(y) 11 Rep. 54. 1 Saund. 324.
(z) 1 Ventr. 333.
(a) 10 Rep. 56.

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[16] The authority cited for this position falls short of maintaining it to its full extent. Finch merely lays down the law in the case of an attorney for the tenant in a real action making default: and F. N. B. 96, which is *his* authority, goes no further. As the advocate can maintain no action for his fees, (see *ante*, p. 28,) there would be some hardship in exposing him to an action for what his client might consider want of proper zeal, industry, or knowledge in the conduct of his cause. In two cases (Fell *vs.* Brown and Turner *vs.* Phillips, Peake's N. P. C. 131, 166) lord Kenyon, at Nisi Prius, held such actions not to be maintainable.—COLERIDGE.

In the United States there is no distinction between attorneys and advocates. The same persons fulfil the duties of both. Hence no difference is made between their right to recover compensation for services in the one capacity or the other. The attorney is liable for want of ordinary care and skill. When he disobeys the lawful instructions of his client, and a loss ensues, for that loss he is responsible. But a client has no right to control his attorney in the due and orderly conduct of a suit; and it is his duty to do what the court would order to be done, though his client instruct him otherwise. Gilbert *vs.* Williams, 8 Mass. 57. Holmes *vs.* Peck, 1 Rhode Island, 245. Cox *vs.* Sullivan, 7 Georgia, 144. Cox *vs.* Livingston, 2 W. & S. 103. Wilcox *vs.* Plummer, 4 Peters, 172. Anon., 1 Wendell, 108.—SHARSWOOD.

[17] As to warranties in general, see Bac. Abr. Actions on the Case, E. A warranty on the sale of a personal chattel, as to the right thereto, is generally implied, (*ante*, 2 book, 451. 3 id. 166. 3 T. R. 57. Peake C. N. P. 94. Cro. Jac. 474. 1 Roll. Abr. 90. 1 Salk. 210. Doug. 18:) but not as to the right of real property, (Doug. 654. 2 B. & P. 13. 3 B. & P. 166,) if a regular conveyance has been executed. 6 T. R. 606. Nor is a warranty of soundness, goodness, or value of a horse, or other personalty, implied, (3 Camp. 351. 2 East, 314, 448. *Ante*, 2 book, 451; and see further, 2 Roll. Rep. 5. F. N. B. 94, acc. Woodes. 415. 3 Id. 199, *cont.*:) and if a ship be sold with all faults, the vendor will not be liable to an action in respect to latent defects which he knows of, unless he used some artifice to conceal them from the purchaser. 3 Camp. 154, 506. But if it is the usage of the trade to specify defects, (as in case of sales of drugs if they are sea-damaged,) and none are specified, an implied warranty arises, (4 Taunt. 847:) and a warranty may be implied from the production of a sample, in a parol sale by sample, (4 Camp. 22, 144, 169. 4 B. & A. 387. 3 Stark. 32; and see notes;) and if the bulk of the goods do not correspond with the sample, it would be a breach of the warranty. If the contract describe the goods as of a particular denomination, there is an implied warranty that they shall be of a merchantable quality of the denomination mentioned in the contract. 4 Camp. 144. 3 Chit. Com. Law, 303. 1 Stark. 504. 4 Taunt. 853. 5 B. & A. 240. In all contracts for the sale of provisions there is an implied contract that they shall be wholesome. 1 Stark. 384. 2 Camp. 391. 3 Camp. 286

contracts for provisions, it is always implied that they are wholesome; and if they be not, the same remedy may be had. Also if he, that selleth any thing, doth upon the sale warrant it to be good, the law annexes a tacit contract to his warranty, that if it be not so, he shall make compensation to the buyer; else it is an injury to good faith, for which an action on the case will lie to recover damages.(*b*) The warranty must be *upon the sale;* for if it be made *after*, and not *at*, the time of the sale, it is a void warranty:(*c*) for it is then made without any consideration; neither does the buyer then take the goods upon the credit of the vendor. Also, the warranty can only reach to things in being at the time of the warranty made, and not to things *in futuro;* as, that a horse *is* sound at the buying of him, not that he *will be* sound two years hence.[18] But if the vendor knew the goods **to be unsound, and hath used any art [**165 to disguise them,(*d*) or if they are in any shape different from what he represents them to be to the buyer, this artifice shall be equivalent to an express warranty, and the vendor is answerable for their goodness. A general warranty will not extend to guard against defects that are plainly and obviously the object of one's senses, as if a horse be warranted perfect, and wants either a tail or an ear, unless the buyer in this case be blind. But if cloth is warranted to be of such a length, when it is not, there an action on the case lies for damages; for that cannot be discerned by sight, but only by a collateral proof, the measuring it.(*e*) Also, if a horse is warranted sound, and he wants the sight of an eye, though this seems to be the object of one's senses, yet, as the discernment of such defects is frequently matter of skill, it hath been held that an action on the case lieth to recover damages for this imposition.(*f*)

Besides the special action on the case, there is also a peculiar remedy, entitled an action of *deceit;*(*g*) to give damages in some particular cases of fraud; and principally where one man does any thing in the name of another, by which he is deceived or injured;(*h*) as if one brings an action in another's

(*b*) F. N. B. 94.
(*c*) Finch, L. 189.
(*d*) 2 Roll. Rep. 5.
(*e*) Finch, L. 189.
(*f*) Salk. 611.
(*g*) F. N. B. 95.
(*h*) Law of Nisi Prius, 30.

An implied warranty arises in the sale of goods where no opportunity of an inspection is given, (4 Camp. 144, 169. 6 Taunt. 108;) and if goods are ordered to be manufactured, a stipulation that they shall be proper is implied, (4 Camp. 144. 6 Taunt. 108,) especially if for a foreign market. 4 Camp. 169. 5 Taunt. 108. As to what is an express warranty, see 3 Chit. Com. Law, 305. Where a horse has been warranted sound, any infirmity rendering it unfit for immediate use is an unsoundness. 1 Stark. 127. The question of unsoundness is for the opinion of a jury. 7 Taunt. 153. It is not necessary for the purchasor to return the horse, unless it be expressly stipulated that he should do so. 2 Hen. Bla. 573. 2 T. R. 745. If not so stipulated, an action for the *breach of warranty* may be supported without returning the horse, or even giving notice of the unsoundness, and although the purchasor have re-sold the horse. 1 Hen. Bla. 17. 1 T. R. 136. 2 T. R. 745. But unless the horse be returned as soon as the defect is discovered, or if the horse has been long worked, the purchasor cannot recover back the purchase-money on the count for money had and received, (1 T. R. 136. 5 East. 449. 1 East, 274. 2 Camp. 410. 1 New Rep. 260;) and in all cases the vendee should object within a reasonable time, (1 J. B. Moore, 166;) and in these cases, or when the purchasor has doctored the horse, he has no defence to an action by the vendor for the price, but must proceed in a cross-action on the warranty, (1 T. R. 136. 5 East, 449. 7 id. 274. 2 Camp. 410. 1 N. R. 260. 3 Esp. Rep. 82. 4 Esp. Rep. 95;) and in these cases, if the vendee has accepted a bill or given any other security, it should seem that the breach of warranty is no defence to an action thereon, but he must proceed by cross-action. 2 Taunt. 2. 1 Stark. 51. 3 Camp. 38. S. C., 14 East, 486. 3 Stark. 175. But it would be otherwise if the vendee entirely repudiated the contract, (2 Taunt. 2,) as if he in the first instance, on discovery of the breach of warranty, returned or tendered back the horse. 2 Taunt. 2; and see 14 East, 484. 3 Camp. 38. Peake's C. N. P. 38. For what damage defendant is liable in this action, see 2 J. B. Moore, 106.—Chitty.

[18] There seems to be no reason or principle why, upon a sufficient consideration, an express warranty that a horse should continue sound for two years should not be valid. Lord Mansfield declared, in a case in which the sentence in the text was cited, "There is no doubt but you may warrant a future event." Doug. 735.—Christian.

name, and then suffers a nonsuit, whereby the plaintiff becomes liable to costs; or where one obtains or suffers a fraudulent recovery of lands, tenements, or chattels, to the prejudice of him that hath right. As when, by collusion, the attorney of the tenant makes default in a real action, or where the sheriff returns that the tenant was summoned when he was not so, and in either case he loses the land, the writ of *deceit* lies against the demandant, and also the attorney or the sheriff and his officers; to annul the former proceedings, and recover back the land.(*i*) It also lies in the cases of warranty before mentioned, and other personal injuries committed contrary to good faith and honesty.(*k*)[19] But an action *on the case*, for damages, in nature of a writ of *deceit*, is more usually brought upon these occasions.(*l*) And indeed it is the only(*m*) **remedy for a lord of a manor, in or out of antient demesne, to reverse a fine or recovery had in the king's courts of lands lying within his jurisdiction; which would otherwise be thereby turned into frank-fee. And this may be brought by the lord against the parties and *cestuy que use* of such fine or recovery; and thereby he shall obtain judgment not only for damages, (which are usually remitted,) but also to recover his court, and jurisdiction over the lands, and to annul the former proceedings.(*n*) [**166

Thus much for the non-performance of contracts, express or implied; which includes every possible injury to what is by far the most considerable species of personal property, viz., that which consists in action merely, and not in possession. Which finishes our inquiries into such wrongs as may be offered to *personal* property, with their several remedies by suit or action.

CHAPTER X.

OF INJURIES TO REAL PROPERTY; AND FIRST OF DISPOSSESSION, OR OUSTER OF THE FREEHOLD.

*I COME now to consider such *injuries* as affect that species of property which the laws of England have denominated *real;* as being of a more substantial and permanent nature than those transitory rights of which personal chattels are the object[1] [*167

(*i*) Booth, Real Actions, 251. Rast. Entr. 221, 222. See page 405.
(*k*) F. N. B. 98.
(*l*) Booth, 253. Co. Entr. 8.
(*m*) 3 Lev. 419.
(*n*) Rast. Entr. 100, b. 3 Lev. 415. Lutw. 711, 749.

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[19] The writ of *deceit* was abolished by the statute 3 & 4 Will. IV. c. 27.—KERR.

[1] "The different degrees of title which a person dispossessing another of his lands acquires in them in the eye of the law, (independently of any anterior right,) according to the length of time and other circumstances which intervene from the time such dispossession is made, form different degrees of presumption in favour of the title of the dispossessor; and in proportion as that presumption increases, his title is strengthened. The modes by which the possession may be recovered vary; and more, or rather different, proof is required from the person dispossessed to establish his title to recover. Thus, if A. is disseised by B., while the possession continues in B. it is a *mere naked possession*, unsupported by any right, and A. may restore his own possession, and put a total end to the possession of B. by an *entry* on the lands, without any previous action. But if B. dies, the possession descends on the heir by act of law. In this case the heir comes to the land by a lawful title, and acquires in the eye of the law an apparent *right of possession*, which is so far good against the person disseised that he has lost his right to recover the possession by entry, and can only recover it by *an action at law*. The actions used in these cases are called *possessory actions*, and the original writs by which the proceedings upon them are instituted are called writs of entry. But if A. permits the possession to be withheld from him beyond a certain period of time without claiming it, or suffers judgment in a possessory action to be given against him, by default or upon the merits,—in all these cases B.'s title, in the eye of the law, is strengthened, and A. can no longer recover by a possessory action, and his only remedy then is by an action on the right. These last actions are called *droiturel actions*, in contradistinction to *possessory actions*. They are the ultimate resort of the person disseised, so that if he fails to bring his writ of right

Real injuries, then, or injuries affecting real rights, are principally six:—1. Ouster; 2. Trespass; 3. Nuisance; 4. Waste; 5. Subtraction; 6. Disturbance.

Ouster, or dispossession, is a wrong or injury that carries with it the amotion of possession; for thereby the wrong-doer gets into the actual occupation of the land or hereditament, and obliges him that hath a right, to seek his legal remedy in order to gain possession and damages for the injury sustained. And such ouster, or dispossession, may either be of the *freehold*, or of *chattels real*. Ouster of the *freehold* is effected by one of the following methods:—1. Abatement; 2. Intrusion; 3. Disseisin; 4. Discontinuance; 5. Deforcement. All of which, in their order, and afterwards their respective remedies, will be considered in the present chapter.

1. And first, an *abatement* is where a person dies seised of an inheritance, *168] and before the heir or devisee enters, a stranger *who has no right makes entry and gets possession of the freehold. This entry of him is called an abatement, and he himself is denominated an abator.(*a*) It is to be observed that this expression of *abating*, which is derived from the French, and signifies to quash, beat down, or destroy, is used by our law in three senses. The first, which seems to be the primitive sense, is that of abating or beating down a nuisance, of which we spoke in the beginning of this book;(*b*) and in a like sense it is used in statute Westm. 1, 3 Edw. I. c. 17, where mention is made of abating a castle or fortress; in which case it clearly signifies to pull it down and level it with the ground. The second signification of abatement is that of abating a writ or action, of which we shall say more hereafter; here it is taken figuratively, and signifies the overthrow or defeating of such writ by some fatal exception to it. The last species of abatement is that we have now before us; which is also a figurative expression, to denote that the rightful possession or freehold of the heir or devisee is overthrown by the rude intervention of a stranger.

This abatement of a freehold is somewhat similar to an immediate occupancy

(*a*) Finch, L. 195. (*b*) Page 5.

within the time limited for the bringing of such writ, he is remediless, and the title of the dispossessor is complete. The original writs by which droiturel actions are instituted are called writs of right. The dilatoriness and niceties in these processes introduced the writ of assize. The invention of this proceeding is attributed to Glanville, chief justice to Henry II. See Mr. Reeves's History of the English Law, part 1, ch. 3. It was found so convenient a remedy that persons, to avail themselves of it, frequently supposed or admitted themselves to be disseised by acts which did not, in strictness, amount to a disseisin. This disseisin, being such only by the will of the party, is called a *disseisin by election*, in opposition to an *actual disseisin*: it is only a disseisin as between the disseisor and disseisee, the disseisee still continuing the freeholder as to all persons but the disseisor. The old books, particularly the reports of assize, when they mention disseisins, generally relate to those cases where the owner admits himself disseised. See 1 Burr. 111; and see Bract. 1, b. 4, cap. 3. As the processes upon writs of entry were superseded by the assize, so the assize and all other real actions have been since superseded by the modern process of ejectment. This was introduced as a mode of trying titles to lands in the reign of Henry VII. From the ease and expedition with which the proceedings in it are conducted, it is now become the general remedy in these cases. Booth, who wrote about the end of the last century, mentions real actions as *then* worn out of use. It is rather singular that this should be the fact, as many cases must frequently have occurred in which a writ of ejectment was not a sufficient remedy. Within these few years past, some attempts have been made to revive real actions: and the most remarkable of these are the case of Tissen *vs.* Clarke, reported in 3 Wils. 419, 541, and that of Carlos & Shuttleworth *vs.* Lord Dormer. The writ of summons in this last case is dated the 1st day of December, 1775. The summons to the four knights to proceed to the election of the grand assize is dated the 22d day of May, 1780. To this summons the sheriff made his return; and there the matter rested. The last instance in which a real action was used is the case of Sidney *vs.* Perry. All these were actions on the right. The part of Sir William Blackstone's Commentary which treats upon real actions is not the least valuable part of that most excellent work." See Co. Litt. 239, a., note 1. In M. T. 1825, a writ of right stood for trial in the court of Common Pleas; but, the four knights summoned for the purpose not appearing, the case was adjourned to the next term.—Chitty.

in a state of nature, which is effected by taking possession of the land the same instant that the prior occupant by his death relinquishes it. But this, however agreeable to natural justice, considering man merely as an individual, is diametrically opposite to the law of society, and particularly the law of England; which, for the preservation of public peace, hath prohibited as far as possible all acquisitions by mere occupancy, and hath directed that lands on the death of the present possessor should immediately vest either in some person expressly named and appointed by the deceased as his devisee, or, on default of such appointment, in such of his next relations as the law hath selected and pointed out as his natural representative or heir. Every entry, therefore, of a mere stranger by way of intervention between the ancestor and heir or person next entitled, which keeps the heir or devisee out of possession, is one of the highest injuries to the right of real property.

*2. The second species of injury by ouster, or amotion of possession from the freehold, is by *intrusion*; which is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. And it happens where a tenant for term of life dieth seised of certain lands and tenements, and a stranger entereth thereon, after such death of the tenant, and before any entry of him in remainder or reversion.(*c*) This entry and interposition of the stranger differ from an abatement in this; that an abatement is always to the prejudice of the heir or immediate devisee; an intrusion is always to the prejudice of him in remainder or reversion. For example; if A. dies seised of lands in fee-simple, and before the entry of B. his heir C. enters thereon, this is an abatement; but if A. be tenant for life, with remainder to B. in fee-simple, and after the death of A., C. enters, this is an intrusion. Also if A. be tenant for life on lease from B., or his ancestors, or be tenant by the curtesy, or in dower, the reversion being vested in B., and after the death of A., C. enters and keeps B. out of possession, this is likewise an intrusion. So that an intrusion is always immediately consequent upon the determination of a particular estate; an abatement is always consequent upon the descent or devise of an estate in fee-simple. And in either case the injury is equally great to him whose possession is defeated by this unlawful occupancy. [*169

3. The third species of injury by ouster, or privation of the freehold, is by *disseisin*. Disseisin is a wrongful putting out of him that is seised of the freehold.(*d*) The two former species of injury were by a wrongful entry where the possession was vacant; but this is an attack upon him who is in actual possession, and turning him out of it. Those were an ouster from a freehold in law; this is an ouster from a freehold in deed. Disseisin may be effected either in corporeal inheritances, *or incorporeal. Disseisin of things corporeal, as of houses, lands, &c., must be by entry and actual dispossession of the freehold;(*e*) as if a man enters either by force or fraud into the house of another, and turns, or at least keeps, him or his servants out of possession. Disseisin of incorporeal hereditaments cannot be an actual dispossession: for the subject itself is neither capable of actual bodily possession, or dispossession; but it depends on their respective natures, and various kinds; being in general nothing more than a disturbance of the owner in the means of coming at or enjoying them. With regard to freehold rent in particular, our antient law-books(*f*) mentioned five methods of working a disseisin thereof: 1. By *enclosure;* where the tenant so encloseth the house or land, that the lord cannot come to distrain thereon, or demand it: 2. By *forestaller*, or lying in wait; when the tenant besetteth the way with force and arms, or by menaces of bodily hurt affrights the lessor from coming: 3. By *rescous;* that is, either by violently retaking a distress taken, or by preventing the lord with force and arms from taking any at all: 4. By *replevin;* when the tenant replevies the distress at such time when his rent is really due: 5. By *denial;* which is when the rent being lawfully demanded is not paid. All or any of these circumstances amount to a disseisin of rent; that is, they wrongfully put the owner out of the only possession, of [*170

(*c*) Co. Litt. 277. F. N. B. 203, 204.
(*d*) Co. Litt. 277.
(*e*) Ibid. 181.
(*f*) Finch, L. 165, 166. Litt. § 237, &c.

which the subject-matter is capable, namely, the receipt of it. But all these disseisins, of hereditaments, incorporeal, are only so at the election and choice of the party injured; if, for the sake of more easily trying the right, he is pleased to suppose himself disseised.(*g*) Otherwise, as there can be no actual dispossession, he cannot be compulsively disseised of any incorporeal hereditament.

And so, too, even in corporeal hereditaments, a man may frequently suppose himself to be disseised, when he is not so in fact, for the sake of entitling himself to the more easy and commodious remedy of an assize of *novel disseisin*, *171] (which will be explained in the sequel of this chapter,) instead of being *driven to the more tedious process of a writ of entry.(*h*) The true injury of compulsive disseisin seems to be that of dispossessing the tenant, and substituting oneself to be the tenant of the lord in his stead; in order to which in the times of pure feodal tenure the consent or connivance of the lord, who upon every descent or alienation personally gave, and who therefore alone could change, the seisin or investiture, seems to have been considered as necessary. But when in process of time the feodal form of alienations wore off, and the lord was no longer the instrument of giving actual seisin, it is probable that the lord's acceptance of rent or service, from him who had dispossessed another, might constitute a complete disseisin. Afterwards, no regard was had to the lord's concurrence, but the dispossessor himself was considered as the sole disseisor: and this wrong was then allowed to be remedied by entry only, without any form of law, as against the disseisor himself; but required a legal process against his heir or alienee. And when the remedy by assize was introduced under Henry II. to redress such disseisins as had been committed within a few years next preceding, the facility of that remedy induced others, who were wrongfully kept out of the freehold, to feign or allow themselves to be disseised, merely for the sake of the remedy.

These three species of injury, *abatement*, *intrusion*, and *disseisin*, are such wherein the entry of the tenant *ab initio*, as well as the continuance of his possession afterwards, is unlawful. But the two remaining species are where the entry of the tenant was at first lawful, but the wrong consists in the detaining of possession afterwards.

4. Such is, fourthly, the injury of *discontinuance*;[2] which happens when he who hath an estate-tail maketh a larger estate of the land than by law he is entitled to do:(*i*) in which case the estate is good, so far as his power extends who made it, but no further. As if tenant in tail makes a feoffment in fee-*172] simple, or for the life of the feoffee, or in tail; all *which are beyond his power to make, for that by the common law extends no further than to make a lease for his own life; in such case the entry of the feoffee is lawful

(*g*) Litt. §§ 588, 589. (*h*) *Hengh. parv.* c. 7. 4 Burr. 110. (*i*) Finch, L. 190.

[2] See, in general, Adams on Ejectment, 35 to 41. Com. Dig. Discontinuance. Bac. Abr. Discontinuance. Vin. Abr. Discontinuance. Cru. Dig. Index, Discontinuance. Co. Litt. 325. 2 Saund. Index, tit. Discontinuance. The term "discontinuance" is used to distinguish those cases where the party whose freehold is ousted can restore it by action only from those in which he may restore it by entry. Now, things which lie in grant cannot either be devested or restored by entry. The owner therefore of any thing which lies in grant has in no stage, and under no circumstances, any other remedy but by action. The books often mention both disseisins and discontinuances of incorporeal hereditaments; but these disseisins and discontinuances are only at the election of the party, for the purpose of availing himself of the remedy by action. Co. Litt, 330, b., n. But a disseisin or discontinuance of corporeal hereditaments necessarily operates as a disseisin or discontinuance of all the incorporeal rights or incidents which the disseisee or discontinuee has himself in, upon, or out of the land affected by the disseisin or discontinuance. Ib. 332, a., n. 1. Conveyances by feoffment and livery, or by fine or recovery by tenant in tail in possession, work a discontinuance; but if by covenants to stand seised to uses, under the statute, lease and release, bargain and sale, they do not, (Co. Litt. 330, a., n. 1,) unless accompanied with a fine, as one and the same assurance in the two latter instances, (10 Co. 95;) but if the fine be a *distinct* assurance it is otherwise. 2 Burr. 704. See *ante*, 2 book, 301. See, further, Adams on Ejectment, 35, &c. 2 Saund. Index, Discontinuance. See 2 D. & R. 373. 1 B. & C. 238.—Chitty.

during the life of the feoffor; but if he retains the possession after the death of the feoffor, it is an injury, which is termed a discontinuance: the antient legal estate, which ought to have survived to the heir in tail, being gone, or at least suspended, and for a while discontinued.[3] For, in this case, on the death of the alienors, neither the heir in tail, nor they in remainder or reversion expectant on the determination of the estate-tail, can enter on and possess the lands so alienated. Also, by the common law, the alienation of a husband who was seised in the right of his wife, worked a discontinuance of the wife's estate, till the statute 32 Hen. VIII. c. 28 provided, that no act by the husband alone shall work a discontinuance of, or prejudice, the inheritance or freehold of the wife; but that, after his death, she or her heirs may enter on the lands in question. Formerly, also, if an alienation was made by a sole corporation, as a bishop or dean, without consent of the chapter, this was a discontinuance.(*j*) But this is now quite antiquated by the disabling statutes of 1 Eliz. c. 19 and 13 Eliz. c. 10, which declare all such alienations absolutely void *ab initio*, and therefore at present no discontinuance can be thereby occasioned.[4]

5. The fifth and last species of injuries by ouster or privation of the freehold, where the entry of the present tenant or possessor was originally lawful, but his detainer is now become unlawful, is that by *deforcement*. This, in its most extensive sense, is *nomen generalissimum;* a much larger and more comprehensive expression than any of the former: it then signifying the holding of any lands or tenements to which another person hath a right.(*k*) So that this includes as well an abatement, an intrusion, a disseisin, or a discontinuance, as any other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of possession. But, as contradistinguished from the former, it is only such a detainer of the *freehold from him that hath the right of property, but never had any possession under that right, as falls [*173 within none of the injuries which we have before explained. As in case where a lord has a seignory, and lands escheat to him *propter defectum sanguinis*, but the seisin of the lands is withheld from him; here the injury is not *abatement*, for the right vests not in the lord as heir or devisee; nor is it *intrusion*, for it vests not in him who hath the remainder or reversion; nor is it *disseisin*, for the lord was never seised; nor does it at all bear the nature of any species of *discontinuance;* but, being neither of these four, it is therefore a *deforcement*.(*l*) If a man marries a woman, and during the coverture is seised of lands, and alienes, and dies; is disseised, and dies; or dies in possession; and the alienee, disseisor, or heir enters on the tenements and doth not assign the widow her dower; this is also a deforcement to the widow, by withholding lands to which

(*j*) F. N. B. 194. (*k*) Co. Litt. 277. (*l*) F. N. B. 143.

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[3] Bacon (New Abr. tit. Discontinuance) defines it to be "such an alienation of the possession whereby he who has a right to the inheritance cannot enter, but is driven to his action." The question whether any particular act has this effect depends not so much on the quantity of estate which the wrong-doer has, as upon the mode of conveyance by which he has done it. For example, by the old law the disseisor, who has but a naked possession, might, by feoffment and livery of seisin to a third person, discontinue the lawful estate of the disseisee,—that is, take from him his right to revest it by mere entry; on the other hand, the tenant in tail, who has all but the fee-simple, may by lease and release profess to convey the inheritance in fee to one and his heirs, and yet discontinue no estate, the form of the instrument operating to pass only whatever he lawfully can grant.

In order to effect a *general* discontinuance, the alienation must be made with livery of seisin, or what is equivalent to it,—though the estates of particular persons may be discontinued by other modes, in order to avoid circuity, as lease and release by tenant in tail with *warranty* will displace the estate of the issue on whom the warranty descends. See *ante*, vol. ii. p. 301. Litt. s. 592. Co. Litt. 325, a., n. 278, &c.—COLERIDGE.

[4] But now, by stat. 3 & 4 W. IV. c. 27, s. 39, no discontinuance shall defeat any right of entry or action for the recovery of land: and, by stat. 8 & 9 Vict. c. 106, s. 4, a feoffment made after October 1, 1845, shall not have a tortious operation, so as to create an estate *by wrong;* and therefore a *discontinuance* would seem now to be impossible.—STEWART.

she hath a right.(*m*) In like manner, if a man lease lands to another for term of years, or for the life of a third person, and the term expires by surrender, efflux of time, or death of the *cestuy que vie;* and the lessee or any stranger, who was at the expiration of the term in possession, holds over, and refuses to deliver the possession to him in remainder or reversion, this is likewise a deforcement.(*n*) Deforcements may also arise upon the breach of a condition in law: as if a woman gives lands to a man by deed, to the intent that he marry her, and he will not when thereunto required, but continues to hold the lands: this is such a fraud on the man's part, that the law will not allow it to devest the woman's right of possession; though, his entry being lawful, it does devest the actual possession, and thereby becomes a deforcement.(*o*) Deforcements may also be grounded on the disability of the party deforced: as if an infant do make an alienation of his lands, and the alienee enters and keeps possession: now, as the alienation is voidable, this possession as against the infant (or, in case of his decease, as against his heir) is after avoidance wrongful, and therefore a deforcement.(*p*) The same happens *when one of non-sane memory alienes his lands or tenements, and the alienee enters and holds possession; this may also be a deforcement.(*q*) Another species of deforcement is, where two persons have the same title to land, and one of them enters and keeps possession against the other: as where the ancestor dies seised of an estate in fee-simple, which descends to two sisters as coparceners, and one of them enters before the other, and will not suffer her sister to enter and enjoy her moiety; this is also a deforcement.(*r*) Deforcement may also be grounded on the non-performance of a covenant real: as if a man, seised of lands, covenants to convey them to another, and neglects or refuses so to do, but continues possession against him; this possession, being wrongful, is a deforcement:(*s*) whence, in levying a fine of lands, the person against whom the fictitious action is brought upon a supposed breach of covenant is called the *deforciant*. And, lastly, by way of analogy, keeping a man by any means out of a freehold office is construed to be a deforcement; though, being an incorporeal hereditament, the deforciant has no corporeal possession. So that whatever injury (withholding the possession of a freehold) is not included under one of the four former heads, is comprised under this of deforcement.

*174]

The several species and degrees of injury by *ouster* being thus ascertained and defined, the next consideration is the remedy; which is, universally, the *restitution* or *delivery of possession* to the right owner; and, in some cases, *damages* also for the unjust amotion. The methods, whereby these remedies, or either of them, may be obtained, are various.

1. The first is that extrajudicial and summary one, which we slightly touched in the first chapter of the present book,(*t*) of *entry* by the legal owner, when another person, who hath no right, hath previously taken possession of lands or tenements. In this case the party entitled may make a formal, but peaceable, entry thereon, declaring that thereby he takes possession; which notorious act of ownership is equivalent to a feodal investiture by the lord;(*u*) or he may enter on any *part of it in the same county, declaring it to be in the name of the whole;(*v*) but if it lies in different counties he must make different entries; for the notoriety of such entry or claim to the *pares* or freeholders of Westmoreland is not any notoriety to the *pares* or freeholders of Sussex. Also if there be *two* disseisors, the party disseised must make his entry on *both;* or if *one* disseisor has conveyed the lands with livery to *two* distinct feoffees, entry must be made on *both:*(*w*) for as their seisin is distinct, so also must be the act which devests that seisin. If the claimant be deterred from entering by menaces or bodily fear, he may make *claim* as near to the estate as he can, with the like forms and solemnities; which claim is in force for only a year and a day.(*x*) And this claim, if it be repeated once in the space of

*175]

(*m*) F. N. B. 8, 147.
(*n*) Finch, L. 263. F. N. B. 201, 205, 206, 207. See book ii. ch. 9, p. 151.
(*o*) F. N. B. 205.
(*p*) Finch, L. 264. F. N. B. 192.
(*q*) Finch, ibid. F. N. B. 202.
(*r*) Finch, L. 293, 294. F. N. B. 197.
(*s*) F. N. B. 146.
(*t*) See page 5.
(*u*) See book ii. ch 14, p. 209.
(*v*) Litt. § 417.
(*w*) Co. Litt. 252.
(*x*) Litt. § 422.

every year and a day, (which is called *continual claim*,) has the same effect with, and in all respects amounts to, a legal entry.(*y*) Such an entry gives a man seisin,(*z*) or puts into immediate possession him that hath right of entry on the estate, and thereby makes him complete owner, and capable of conveying it from himself by either descent or purchase.[5]

This remedy by entry takes place in three only of the five species of ouster, viz., abatement, intrusion, and disseisin;(*a*) for as in these the original entry of the wrong-doer was unlawful, they may therefore be remedied by the mere entry of him who hath right. But, upon a discontinuance or deforcement, the owner of the estate cannot enter, but is driven to his action; for herein, the original entry being lawful, and thereby an apparent right of possession being gained, the law will not suffer that right to be overthrown by the mere act or entry of the claimant. Yet a man may enter(*b*) on his tenant by sufferance: for such tenant hath no freehold, but only a bare possession; which may be defeated, like a tenancy at will, by the mere entry of the owner. But if the owner thinks it more expedient to suppose or admit(*c*) such tenant to have *gained a tortious freehold, he is then remediable by writ of entry, [*176
ad terminum qui præterit.

On the other hand, in case of abatement, intrusion, or disseisin, where entries are generally lawful, this right of entry may be *tolled*, that is, taken away by descent.[6] Descents which take away entries(*d*) are when any one, seised by any means whatsoever of the inheritance of a corporeal hereditament, dies;[7] whereby the same descends to his heir:[8] in this case, however feeble the right of the ancestor might be, the entry of any other person who claims title to the

(*y*) Litt. §§ 419, 423.
(*z*) Co. Litt. 15.
(*a*) Ibid. 237, 238.
(*b*) See book ii. page 150.
(*c*) Co. Litt. 57.
(*d*) Litt. § 385–413.

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[5] But now, by statute 3 & 4 W. IV. c. 27, s. 10, no person shall be deemed to have been in possession of any land within the meaning of that act, merely by reason of having made an entry thereon; and, by s. 11, no continual or other claim upon or near any land shall preserve any right of making an entry. The distinction between the law as laid down by Blackstone and the present law as to an entry is, that by the former a bare entry on land was attended with a certain effect in keeping a right alive, whereas by the latter it has no effect whatever unless there be a change of possession. When this takes place, the remedy by entry is still in operation; when not, an entry is of no avail, and this remedy no longer exists.—STEWART.

[6] See the doctrine as to *descents cast* clearly explained in Adams on Ejectment, 41 to 45; and see H. Chitty on Descents, 25, 43, 56. Taylor *vs.* Horde, 1 Burr. 60. 12 East, 141. Watkins on Descents. Com. Dig. Descents. Bac. Abr. Descents. It is scarcely possible to suggest a case in which the doctrine of descent cast can be now so applied as to prevent a claimant from maintaining ejectment. Adams, 41, note e. We have before seen that where the entry of the party or his ancestor was originally lawful, and the continuance in possession only unlawful, the entry is not tolled. See Dowl. & R. 41. "If a disseisor make a lease for term of his own life, and dieth, this descent shall not take away the entry of the disseisee; for though the fee and franktenement descend to the heir of the disseisor, yet the disseisor died not seised of the fee and franktenement; and Littleton saith, unless he hath the fee and franktenement at the time of his decease, such descent shall not take away the entry." Co. Litt. 239, b., c. It was laid down in Carter *vs.* Tash, by Holt, C. J., that if a feme-covert is disseisee, and after her husband dies she takes a second husband, and then the descent happens, this descent shall take away the entry of the feme, for she might have entered before the second marriage and prevented the descent. 1 Salk. 241. See also 4 T. R. 300.—CHITTY.

[7] He must die seised of the *freehold;* for if disseisor make a lease for *life* of the premises, retaining a reversion, and die, this descent does not take away the entry of the disseisee; because the disseisor died not possessed of the *freehold*, but merely of the reversion. Co. Litt. 239, b.—ARCHBOLD.

[8] This descent must be *immediate;* for if any other estate intervene between the death of the disseisor and the descent to the heir, it will not be a descent capable of tolling entry. Thus, if a woman be seised of an estate upon which another has a right of entry, and she marry, have issue, and die, her husband remaining tenant by the curtesy,—if upon the husband's death the issue enter, this descent does not toll entry, because it is not *immediate* from the mother, the estate by the curtesy intervening. See Litt. s. 394. —ARCHBOLD.

freehold is taken away, and he cannot recover possession against the heir by this summary method, but is driven to his action to gain a legal seisin of the estate. And this, first, because the heir comes to the estate by act of law, and not by his own act; the law therefore protects his title, and will not suffer his possession to be devested till the claimant hath proved a better right. Secondly, because the heir may not suddenly know the true state of his title; and therefore the law, which is ever indulgent to heirs, takes away the entry of such claimant as neglected to enter on the ancestor, who was well able to defend his title; and leaves the claimant only the remedy of an action against the heir.(*e*) Thirdly, this was admirably adapted to the military spirit of the feodal tenures, and tended to make the feudatory bold in war, since his children could not by any mere entry of another be dispossessed of the lands whereof he died seised. And, lastly, it is agreeable to the dictates of reason and the general principles of law.

For, in every complete title(*f*) to lands, there are two things necessary: the possession or seisin, and the right of property therein;(*g*) or, as it is expressed in Fleta, *juris et seisinæ conjunctio.*(*h*) Now, if the possession be severed from the property, if A. has the *jus proprietatis*, and B. by some unlawful means has gained possession of the lands, this is an injury to A., for which the law gives a remedy by putting *him in possession, but does it by different means according to the circumstances of the case. Thus, as B., who was himself the wrong-doer, and hath obtained the possession by either fraud or force, hath only a *bare* or *naked possession*, without any shadow of right, A., therefore, who hath both the *right* of property and the *right* of possession, may put an end to his title at once by the summary method of *entry*. But if B. the wrong-doer dies seised of the lands, then B.'s heir advances one step further towards a good title; he hath not only a *bare* possession, but also an apparent *jus possessionis*, or *right* of possession. For the law presumes that the possession which is transmitted from the ancestor to the heir is a rightful possession until the contrary be shown; and therefore the mere entry of A. is not allowed to evict the heir of B.; but A. is driven to his action at law to remove the possession of the heir, though his entry alone would have dispossessed the ancestor.[9]

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So that, in general, it appears that no man can recover possession by mere entry on lands which another hath by descent. Yet this rule hath some exceptions(*i*) wherein those reasons cease upon which the general doctrine is grounded; especially if the claimant were under any legal disabilities during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm: in all which cases there is no neglect or *laches* in the claimant, and therefore no descent shall bar or take away his entry.(*k*) And this title of taking away entries by descent is still further narrowed by the statute 32 Hen. VIII. c. 33, which enacts that, if any person disseises or turns another out of possession, no descent to the heir of the disseisor shall take away the entry of him that has a right to the land, unless the disseisor had peaceable possession five years next after the disseisin. But the statute extendeth not to any feoffee or donee of the disseisor, mediate or immediate;(*l*) because such a one by the genuine feodal constitutions always came into the tenure solemnly *and with the lord's concurrence, by actual delivery of seisin, that is, open and public investiture. On the other hand, it is enacted by the statute of limitations, 21 Jac. I. c. 16, that no entry shall be made by any man upon lands, unless within twenty years after his right shall

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(*e*) Co. Litt. 237.
(*f*) See book ii. ch. 13.
(*g*) Mirror, c. 2, § 27.
(*h*) L. 3, c. 15, § 5.
(*i*) See the particular cases mentioned by Littleton, b. iii. ch. 6, the principles of which are well explained in Gilbert's Law of Tenures.
(*k*) Co. Litt. 246.
(*l*) Ibid. 256.

[9] But this distinction is now entirely abolished, having been found to lead to many useless subtleties in practice, it being enacted, by stat. 3 & 4 W. IV. c. 27, s. 39, that no descent which may happen to be made after the 31st of December, 1833, shall toll or defeat any right of entry for the recovery of land.—Stewart.

accrue.[10] And by statute 4 & 5 Anne, c. 16, no entry shall be of force to satisfy the said statute of limitations, or to avoid a fine levied of lands, unless an action be thereupon commenced within one year after, and prosecuted with effect.[11]

Upon an ouster by the discontinuance of tenant in tail, we have said that no remedy by mere entry is allowed; but that, when tenant in tail alienes the lands entailed, this takes away the entry of the issue in tail, and drives him to his action at law to recover the possession.(*m*) For, as in the former cases, the law will not suppose, without proof, that the ancestor of him in possession acquired the estate by wrong, and therefore, after five years' peaceable possession, and a descent cast, will not suffer the possession of the heir to be disturbed by mere entry without action; so here the law will not suppose the discontinuor to have aliened the estate without power so to do, and therefore leaves the heir in tail to his action at law, and permits not his entry to be lawful. Besides, the alienee, who came into possession by a lawful conveyance, which was at least good for the life of the alienor, hath not only a *bare* possession, but also an *apparent right* of possession; which is not allowed to be devested by the mere entry of the claimant, but continues in force till a better right be shown, and recognised by a legal determination. And something also perhaps, in framing this rule of law, may be allowed to the inclination of the courts of justice, to go as far as they could in making estates-tail alienable, by declaring such alienations to be voidable only, and not absolutely void.

In case of deforcement also, where the deforciant had originally a lawful possession of the land, but now detains it wrongfully, he still continues to have the presumptive *prima *facie* evidence of right; that is, possession lawfully gained. Which possession shall not be overturned by the mere entry of another; but only by the demandant's showing a better right in a course of law. [*179

This remedy by entry must be pursued, according to statute 5 Ric. II. st. 1, c. 8, in a peaceable and easy manner; and not with force or strong hand. For, if one turns or keeps another out of possession forcibly, this is an injury of both a civil and a criminal nature. The civil is remedied by immediate restitution; which puts the antient possessor *in statu quo:* the criminal injury, or public wrong, by breach of the king's peace, is punished by fine to the king. For by the statute 8 Hen. VI. c. 9, upon complaint made to any justice of the peace, of a forcible entry, with strong hand, on lands or tenements; or a forcible detainer after a peaceable entry; he shall try the truth of the complaint by jury, and, upon force found, shall restore the possession to the party so put out: and in such case, or if any alienation be made to defraud the possessor of his right, (which is likewise declared to be absolutely void,) the offender shall forfeit, for

(*m*) Co. Litt. 325.

[10] But by the second section, the same exceptions as are enumerated above, of infancy, coverture, imprisonment, insanity, and absence beyond seas, are made, in which case the party entitled may enter within ten years after the disability ceases, notwithstanding the twenty years should have elapsed after his title first accrued; and to *his heir* the statute gives ten years after the death of such party dying under the disability. It gives the heir ten years and no more, whatever disability he may labour under during all that time. 6 East, 85. And in 4 T. R. 300, it was agreed by the court that in every statute of limitations, if a disability be once removed, the time must continue to run notwithstanding any subsequent disability, either voluntary or involuntary. And in 5 B & A., Abbott, C. J., said, the several statutes of limitation, being all in *pari materia*, ought to receive a uniform construction notwithstanding any slight variations of phrase, the object and intention being the same.—CHITTY.

[11] However, by stat. 3 & 4 W. IV. c. 27, one period of limitation is established for all lands and rents; and it is enacted by s. 2, that after the 31st of December, 1833, no person shall make an entry or bring an action to recover any land but within twenty years next after the time at which the right to make such entry or bring such action shall have first accrued to some person through whom he claims, or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or bring such action shall have first accrued to the person making or bringing the same.—STEWART.

the force found, treble damages to the party grieved, and make fine and ransom to the king. But this does not extend to such as endeavour to keep possession *manu forti*, after three years' peaceable enjoyment of either themselves, their ancestors, or those under whom they claim; by a subsequent clause of the same statute, enforced by statute 31 Eliz. c. 11.[12]

II. Thus far of remedies, when tenant or occupier of the land hath gained only a *mere* possession, and no apparent shadow of right. Next follow another class, which are in use where the title of the tenant or occupier is advanced one step nearer to perfection; so that he hath in him not only a bare possession, which may be destroyed by a bare entry, but also an *apparent right of possession*, which cannot be removed but by orderly course of law; in the process of which it must be shown, that though he hath at present possession, and therefore hath *180] *the presumptive right, yet there is a right of possession, superior to his, residing in him who brings the action.

These remedies are either by a *writ of entry*, or an *assize;* which are actions merely *possessory;* serving only to regain that possession, whereof the demandant (that is, he who sues for the land) or his ancestors have been unjustly deprived by the tenant or possessor of the freehold, or those under whom he claims. They decide nothing with respect to the *right of property;* only restoring the demandant to that state or situation, in which he was (or by law ought to have been) before the dispossession committed. But this without any prejudice to the right of ownership: for, if the dispossessor has any legal claim, he may afterwards exert it, notwithstanding a recovery against him in these possessory actions. Only the law will not suffer him to be his own judge, and either take or maintain possession of the lands, until he hath recovered them by legal means:(*n*) rather presuming the right to have accompanied the antient seisin, than to reside in one who had no such evidence in his favour.

1. The first of these possessory remedies is by *writ of entry;* which is that which disproves the title of the tenant or possessor, by showing the unlawful means by which he entered or continues possession.(*o*) The writ is directed to the sheriff, requiring him to "command the tenant of the land that he render (in Latin, *præcipe quod reddat*) to the demandant the land in question, which he claims to be his right and inheritance; and into which, as he saith, the said tenant had not entry but by (or after) a disseisin, intrusion, or the like, made to the said demandant, within the time limited by law for such actions; or that upon refusal he do appear in court on such a day, to show wherefore he hath not done it."(*p*) This is the original process, the *præcipe* upon which all the rest of

(*n*) Mir. c. 4, § 24. (*o*) Finch, L. 261. (*p*) See book ii. Append. No. V. § 1.

[12] It was doubted whether, under the statutes mentioned in the text, any but a freeholder could have restitution; and therefore the 21 Jac. I. c. 25 applied the power conferred by them to the restitution of possession of which tenants for terms of years, tenants by copy of court-roll, guardian by knight-service, and tenants by eligit, statute-merchant, or statute-staple, had been forcibly deprived. The justices of the peace are bound to grant a writ of restitution; but when the indictment is found at the assizes the judge may exercise his discretion. The Queen *vs.* Harland, 8 Add. & Ell. 326. 2 Moo. & Rob. 141. In an indictment made under the statutes, the prosecutor's interest in the premises must be stated, (Rex *vs.* Wilson, 8 T. R. 360, 362;) whence it seems to follow that where a tenant, wrongfully holding over after the expiration of his term, is forcibly dispossessed by the landlord, the case is not within them: otherwise the justices would be compellable to award restitution to the tenant, although his previous possession would not have supported an action of trespass *quare clausum fregit* against the landlord. Turner *vs.* Meymott, 1 Bing. 158; Taunton *vs.* Costar, 7 T. R. 431. Perhaps, however, the landlord may be indicted for a forcible entry at common law. It is laid down, indeed, by Hawkins that no indictment for a forcible entry lay at common law where the party had lawful right of entry. But in The King *vs.* Bathurst, Sayer's Rep. 225, a forcible entry into a dwelling-house was held indictable at common law; and the correctness of what Hawkins said may be doubted. See per lord Kenyon, Rex *vs.* Wilson, *supra*, 364. The landlord is undoubtedly liable to an action for a trespass to the person of the tenant, or to an indictment, if the entry be attended with circumstances that of themselves amount to a breach of the peace. Rex *vs.* Storr, 3 Burr. 1678. Rex *vs.* Bake, id., 1731. Newton *vs.* Harland, 1 M. & G. 644.—Couch.

the suit is grounded: wherein it appears, that the tenant is required, either to deliver *seisin of the lands, or to show cause why he will not. This cause may be either a denial of the fact of having entered by or under such means as are suggested, or a justification of his entry by reason of title in himself or in those under whom he makes claim: whereupon the possession of the land is awarded to him who produces the clearest right to possess it. [*181

In our antient books we find frequent mention of the *degrees* within which writs of entry are brought. If they be brought against the party himself that did the wrong, then they only charge the tenant himself with the injury; "*non habuit ingressum nisi per intrusionem quam ipse fecit.*" But if the intruder, disseisor, or the like has made any alienation of the land to a third person, or it has descended to his heir, that circumstance must be alleged in the writ, for the action must always be brought against the tenant of the land; and the defect of his possessory title, whether arising from his own wrong or that of those under whom he claims, must be set forth. One such alienation or descent makes the first(*q*) degree, which is called the *per*, because then the form of a writ of entry is this; that the tenant had not entry but by the original wrong-doer, who alienated the land, or from whom it descended to him: "*non habuit ingressum, nisi* per *Gulielmum, qui se in illud intrusit, et illud tenenti dimisit.*"(*r*) A second alienation or descent makes another degree, called the *per* and *cui;* because the form of a writ of entry, in that case, is, that the tenant had not entry but *by* or *under* a prior alienee, *to* whom the intruder demised it; "*non habuit ingressum nisi* per *Ricardum*, cui *Gulielmus illud dimisit, qui se in illud intrusit.*"(*s*) These degrees thus state the original wrong, and the title of the tenant who claims under such wrong. If more than two degrees (that is, two alienations or descents) were past, there lay no writ of entry at the common law. For as it was provided, for the *quietness of men's inheritances, that no one, even though he had the true right of possession, should enter upon him who had the apparent right by descent or otherwise, but he was driven to his *writ of entry* to gain possession; so, after more than two descents or two conveyances were passed, the demandant, even though he had the right both of possession and property, was not allowed this *possessory* action; but was driven to his *writ of right*, a long and final remedy, to punish his neglect in not sooner putting in his claim, while the degree subsisted, and for the ending of suits and quieting of all controversies.(*t*) But by the statute of Marlberge, 52 Hen. III. c. 30, it was provided, that when the number of alienations or descents exceeded the usual degrees, a new writ should be allowed without any mention of degrees at all. And accordingly a new writ has been framed, called a writ of entry in the *post*, which only alleges the injury of the wrong-doer, without deducing all the intermediate title from him to the tenant: stating it in this manner; that the tenant had not entry unless *after*, or subsequent to, the ouster or injury done by the original dispossessor; "*non habuit ingressum nisi* post *intrusionem quam Gulielmus in illud fecit;*" and rightly concluding, that if the original title was wrongful, all claims derived from thence must participate of the same wrong. Upon the latter of these writs it is (the writ of entry *sur disseisin* in the *post*) that the form of our common recoveries of landed estates(*u*) is usually grounded; which, we may remember, were observed in the preceding volume(*v*) to be fictitious actions brought against the tenant of the freehold, (usually called the tenant to the *præcipe*, or writ of entry,) in which by collusion the demandant recovers the land. [*182

This remedial instrument, or writ of entry, is applicable to all the cases of ouster before mentioned, except that of discontinuance by tenant in tail, and some peculiar species of deforcements. Such is that of deforcement of dower, by not assigning *any* dower to the widow within the time limited by *law; for which she has her remedy by writ of *dower, unde nihil habet.*(*w*) [*183

(*q*) Finch, L. 262. Booth indeed (of Real Actions. 172) makes the first degree to consist in the original wrong done, the second in the *per*, and the third in the *per* and *cui*. But the difference is immaterial.

(*r*) Booth, 181.

(*s*) Finch, L. 263. F. N. B. 203, 204.

(*t*) 2 Inst. 153.

(*u*) See book ii. Append. No. V.

(*v*) Book ii. ch. 21.

(*w*) F. N. B. 147.

But if she be deforced of part only of her dower, she cannot then say that *nihil habet;* and therefore she may have recourse to another action, by writ of *right of dower;* which is a more general remedy, extending either to part or the whole; and is (with regard to her claim) of the same nature as the grand writ of right, whereof we shall presently speak, is with regard to claims in fee-simple.(*x*) On the other hand, if the heir (being within age) or his guardian assign her more than she ought to have, they may be remedied by a writ of *admeasurement of dower.*(*y*) But in general the writ of entry is the universal remedy to recover possession, when wrongfully withheld from the owner. It were therefore endless to recount all the several divisions of writs of entry, which the different circumstances of the respective demandants may require, and which are furnished by the laws of England:(*z*) being plainly and clearly chalked out in that most antient and highly venerable collection of legal forms, the *registrum omnium brevium*, or register of such writs as are suable out of the king's court, upon which Fitzherbert's *natura brevium* is a comment; and in which every man who *is injured will be sure to find a method of relief, exactly adapted to his own case, described in the compass of a few lines, and yet without the omission of any material circumstance. So that the wise and equitable provision of the statute Westm. 2, 13 Edw. I. c. 24, for framing new writs when wanted, is almost rendered useless by the very great perfection of the antient forms. And indeed I know not whether it is a greater credit to our laws, to have such a provision contained in them, or not to have occasion, or at least very rarely, to use it.

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In the times of our Saxon ancestors the right of possession seems only to have been recoverable by writ of entry,(*a*) which was then usually brought in the county-court. And it is to be observed that the proceedings in these actions were not then so tedious when the courts were held and process issued from and was returnable therein at the end of every three weeks, as they became after the conquest, when all causes were drawn into the king's courts, and process issued only from term to term; which was found exceedingly dilatory, being at least four times as slow as the other. And hence a new remedy was invented in many cases, to do justice to the people and to determine the possession in the proper counties, and yet by the king's judges. This was the remedy by *assize*, which is called, by statute Westm. 2, 13 Edw. I. c. 24, *festinum remedium*, in comparison with that by a writ of entry; it not admitting of many dilatory pleas and proceedings to which other real actions are subject.(*b*)[13]

2. The writ of *assize* is said to have been invented by Glanvil, chief justice to Henry the Second;(*c*) and if so, it seems to owe its introduction to the parliament held at Northampton in the twenty-second year of that prince's reign; when justices in eyre were appointed to go round the kingdom in order to take these assizes: and the assizes themselves *(particularly those of *mort d'ancestor* and *novel disseisin*) were clearly pointed out and described.(*d*)

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(*x*) Ibid. 16.

(*y*) F. N. B. 148. Finch, L. 314. Stat. Westm. 2, 13 Edw. I. c. 7.

(*z*) See Bracton, *l.* 4, *tr.* 7, c. 6, § 4. Britton, c. 114, fol. 264. The most usual were,—1. The writs of entry *sur disseisin* and of *intrusion*, (F. N. B. 191, 203,) which are brought to remedy either of those species of ouster. 2. The writs of *dum fuit infra ætatem* and *dum fuit non compos mentis*, (ibid. 192, 202,) which lie for a person of full age, or one who hath recovered his understanding, after having (when under age or insane) aliened his lands, or for the heirs of such alienor. 3. The writs of *cui in vita* and *cui ante divortium*, (ibid. 193, 204,) for a woman, when a widow or divorced, whose husband during the coverture (*cui in vita sua, vel cui ante divortium, ipsa contradicere non potuit*) hath aliened her estate. 4. The writ *ad communem legem*, (ibid. 207,) for the reversioner, after the alienation and death of the particular tenant for life. 5. The writs *in casu proviso* and *in consimili casu*, (ibid. 205, 206,) which lay not *ad communem legem*, but are given, by stat. Gloc. 6 Edw. I. c. 7, and Westm. 2, 13 Edw. I. c. 24, for the reversioner after the alienation, but during the life of the tenant in dower or other tenant for life. 6. The writ *ad terminum qui præteriit*, (ibid. 201,) for the reversioner, when the possession is withheld by the lessee or a stranger after the determination of a lease for years. 7. The writ *causa matrimonii prælocuti*, (ibid. 205,) for a woman who giveth land to a man in fee or for life, to the intent that he may marry her, and he doth not. And the like in case of other deforcements.

(*a*) Gilb. Ten. 42.

(*b*) Booth, 262.

(*c*) Mirror, c. 2, § 25.

(*d*) § 9. *Si dominus feodi negat hæredibus defuncti saisinam ejusdem feodi, justitiarii domini regis faciant inde fieri, recognitionem per xii. legales homines, qualem saisinam defunctus inde habuit, die qua fuit vivus et mortuus; et, sicut recognitum fuerit, ita hæredibus ejus restituant.* § 10. *Justitiarii domini regis faciant fieri recognitionem de disaisinis factis super assisam, a tempore quo dominis rex venit in Angliam proxime post pacem factam inter ipsum et regem filium suum.* Spelm. *Cod.* 330.

[13] The remedy by writ of entry was abolished by 3 & 4 W. IV. c. 27, s. 36.—Stewart.

As a writ of entry is a real action which *disproves* the title of the tenant by showing the unlawful commencement of his possession, so an assize is a real action which *proves* the title of the demandant merely by showing his or his ancestor's possession:(*e*) and these two remedies are in all other respects so totally alike that a judgment or recovery in one is a bar against the other; so that when a man's possession is once established by either of these possessory actions it can never be disturbed by the same antagonist in any other of them. The word *assize* is derived by Sir Edward Coke(*f*) from the Latin *assideo*, to sit together; and it signifies, originally, the jury who try the cause and sit together for that purpose. By a figure it is now made to signify the court or jurisdiction which summons this jury together by a commission of assize, or *ad assisas capiendas;* and hence the judicial assemblies held by the king's commission in every county, as well to take these writs of assize, as to try causes at *nisi prius*, are termed in common speech the *assizes*. By another somewhat similar figure the name of assize is also applied to this action, for recovering possession of lands; for the reason, saith Littleton,(*g*) why such writs at the beginning were called assize, was, for that in these writs the sheriff is ordered to summon a jury or assize; which is not expressed in any other original writ.(*h*)

This remedy, by writ of assize, is only applicable to two species of injury by ouster, viz., *abatement*, and a recent or *novel disseisin*. If the abatement happened upon the death of the demandant's father or mother, brother or sister, uncle or aunt, nephew or niece, the remedy is by an assize of *mort d'ancestor*, or death of one's ancestor. This *writ directs the sheriff to summon a jury or assize, who shall view the land in question, and recognise whether such ancestor was seised thereof on the day of his death, and whether the demandant be the next heir:(*i*) soon after which the judges come down by the king's commission to take the recognition of assize: when, if these points are found in the affirmative, the law immediately transfers the possession from the tenant to the demandant. If the abatement happened on the death of one's grandfather or grandmother, then an assise of *mort d'ancestor* no longer lies, but a writ of *ayle* or *de avo:* if on the death of the great-grandfather or great-grandmother, then a writ of *besayle* or *de proavo:* but if it mounts one degree higher, to the *tresayle*, or grandfather's grandfather, or if the abatement happened upon the death of any collateral relation other than those before mentioned, the writ is called a writ of *cosinage* or *de consanguineo*.(*k*) And the same points shall be inquired of in all these actions *ancestrel* as in an assize of *mort d'ancestor;* they being of the very same nature:(*l*) though they differ in this point of form, that these *ancestrel* writs (like all other writs of *præcipe*) expressly assert a title in the demandant, (viz., the seisin of the ancestor at his death, and his own right of inheritance,) the assize asserts nothing directly, but only prays an inquiry whether those points be so.(*m*) There is also another ancestrel writ, denominated a *nuper obiit*, to establish an equal division of the land in question, where, on the death of an ancestor who has several heirs, one enters and holds the others out of possession.(*n*) But a man is not allowed to have any of these actions ancestrel for an abatement consequent on the death of any collateral relation beyond the fourth degree;(*o*) though in the lineal ascent he may proceed *ad infinitum*.(*p*) For there must be some boundary, else the privilege would be universal; which is absurd: and therefore the law pays no regard to the possession of a collateral ancestor who was no nearer than the fifth degree.

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*It was always held to be a law(*q*) that where lands were devisable in a man's last will by the custom of the place, there an assize of *mort d'ancestor* did not lie. For where lands were so devisable, the right of

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(*e*) Finch, L. 284.
(*f*) 1 Inst. 153.
(*g*) § 234.
(*h*) Co. Litt. 159.
(*i*) F. N. B. 195. Finch, L. 290.
(*k*) Finch, L. 266, 267.
(*l*) Stat. Westm. 2, 13 Edw. I. c. 20.
(*m*) 2 Inst. 399.
(*n*) F. N. B. 197. Finch, L. 298.
(*o*) Hale on F. N. B. 221.
(*p*) Fitz. Abr. tit. *cosinage*, 15.
(*q*) Bracton, *l.* 4, *de assis. mortis antecessoris*, c. 13, § 3. F. N. B. 196.

possession could never be determined by a process which inquired only of these two points, the seisin of the ancestor and the heirship of the demandant. And hence it may be reasonable to conclude, that when the statute of wills, 32 Hen. VIII. c. 1, made all socage-lands devisable, an assize of *mort d'ancestor* no longer could be brought of lands held in socage;(*r*) and that now, since the statute 12 Car. II. c. 24, (which converts all tenures, a few only excepted, into free and common socage,) no assize of *mort d'ancestor* can be brought of any lands in the kingdom, but that, in case of abatements, recourse must be properly had to the writs of entry.[14]

An assize of *novel* (or recent) *disseisin* is an action of the same nature with the assize of *mort d'ancestor* before mentioned, in that herein the demandant's possession must be shown. But it differs considerably in other points; particularly in that it recites a complaint by the demandant of the disseisin committed, in terms of direct averment; whereupon the sheriff is commanded to reseize the land and all the chattels thereon, and keep the same in his custody till the arrival of the justices of assize, (which in fact hath been usually omitted;)(*s*) and in the mean time to summon a jury to view the premises, and make recognition of the assize before the justices.(*t*) At which time the tenant may plead either the general issues *nul tort, nul disseisin*, or any special plea. And if, upon the general issue, the recognitors find an actual seisin in the demandant, and his subsequent disseisin by the present tenant, he shall have judgment to recover his seisin, and damages for the injury sustained: being the only case in which damages were recoverable in any possessory actions at the common law;(*u*) the tenant being in all other cases allowed to retain the inter-
*188] mediate profits of the *land, to enable him to perform the feodal service. But costs and damages were annexed to many other possessory actions by the statutes of Marlberge, 52 Hen. III. c. 16, and Glocester, 6 Edw. I. c. 1. And to prevent frequent and vexatious disseisins, it is enacted by the statute of Merton, 20 Hen. III. c. 3, that if a person disseised recover seisin of the land again by assize of *novel disseisin*, and be again disseised of the same tenements by the same disseisor, he shall have a writ of *re-disseisin;* and if he recover therein, the re-disseisor shall be imprisoned; and by the statute of Marlberge, 52 Hen. III. c. 8, shall also pay a fine to the king: to which the statute Westm. 2, 13 Edw. I. c. 26 hath superadded double damages to the party aggrieved. In like manner, by the same statute of Merton, when any lands or tenements are recovered by assize of *mort d'ancestor*, or other injury, or any judgment of the court, if the party be afterwards disseised by the same person against whom judgment was obtained, he shall have a writ of *post-disseisin* against him; which subjects the post-disseisor to the same penalties as a re-disseisor. The reason of all which, as given by Sir Edward Coke,(*w*) is because such proceeding is a contempt of the king's courts, and in despite of the law; or, as Bracton more fully expresses it,(*x*) "*talis qui ita convictus fuerit, dupliciter delinquit contra regem: quia facit disseisinam et roberiam contra pacem suam; et etiam ausu temerario irrita facit ea, quæ in curia domini regis rite acta sunt: et propter duplex delictum merito sustinere debet pœnam duplicatam.*"

In all these possessory actions there is a time of limitation settled, beyond which no man shall avail himself of the possession of himself or his ancestors, or take advantage of the wrongful possession of his adversary. For, if he be negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance, to recover the possession merely; both to punish his neglect, (*nam leges vigilantibus, non dormientibus, subveniunt*,) and also because it is pre-

(*r*) See 1 Leon. 267.
(*s*) Booth, 211. Bract. 4, 1, 19, § 7.
(*t*) F. N. B. 177.
(*u*) Bract. 187. Stat. Marlbr. c. 16.
(*w*) 2 Inst. 83, 84.
(*x*) *L.* 4, c. 49.

[14] In Launder *vs.* Brooks and others, Cro. Car. 562, the court of King's Bench "resolved that an assize of *mort d'ancestor* lies of lands devisable; but if the defendant plead that the land is by custom devisable, *and was devised to him*, it is a good bar to the action." This seems more sensible than to deny generally a form of action to the heir because in a particular case there may be a good bar to his right.—Coleridge.

sumed that the supposed wrong-doer has in such a length of time procured a legal title, otherwise *he would sooner have been sued. This time of limitation by the statute of Merton, 20 Hen. III. c. 8, and Westm. 1, 3 [*189 Edw. I. c. 39, was successively dated from particular eras, viz., from the return of king John from Ireland, and from the coronation, &c. of king Henry the Third. But this date of limitation continued so long unaltered that it became indeed no limitation at all; it being above three hundred years from Henry the Third's coronation to the year 1540, when the present statute of limitations(*y*) was made. This, instead of limiting actions from the date of a particular event, as before, which in process of years grew absurd, took another and more direct course, which might endure forever: by limiting a certain period, as fifty years for lands, and the like period(*z*) for customary and prescriptive rents, suits, and services, (for there is no time of limitation upon rents created by deed, or reserved on a particular estate,)(*a*) and enacting that no person should bring any possessory action, to recover possession thereof merely upon the seisin, or dispossession of his ancestors, beyond such certain period. But this does not extend to services which by common possibility may not happen to become due more than once in the lord's or tenant's life; as fealty, and the like.(*b*) And all writs, grounded upon the possession of the demandant himself, are directed to be sued out within thirty years after the disseisin complained of; for if it be an older date, it can with no propriety be called a fresh, recent, or *novel disseisin;* which name Sir Edward Coke informs us was originally given to this proceeding, because the disseisin must have been since the last *eyre* or circuit of the justices, which happened once in seven years, otherwise the action was gone.(*c*) And we may observe,(*d*) that the limitation, prescribed by Henry the Second at the first institution of the assize of *novel disseisin*, was from his own return into England, after the peace made between him and the young king his son; which was but the year before.[15]

*What has been here observed may throw some light on the doctrine [*190 of *remitter*, which we spoke of in the second chapter of this book; and which we may remember was where one who hath right to lands, but is out of possession, hath afterwards the freehold cast upon him by some subsequent defective title, and enters by virtue of that title. In this case the law remits him to his antient and more certain right, and by an equitable fiction supposes him to have gained possession in consequence and by virtue thereof: and this, because he cannot possibly obtain judgment at law to be restored to his prior right, since he is himself the tenant of the land, and therefore hath nobody against whom to bring his action. This determination of the law might seem superfluous to a hasty observer; who perhaps would imagine, that since the tenant hath now both the right and also the possession, it little signifies by what means such possession shall be said to be gained. But the wisdom of our antient law determined nothing in vain. As the tenant's possession was gained by a defective title, it was liable to be overturned by showing that defect in a writ of entry; and then he must have been driven to his writ of right, to recover his just inheritance: which would have been doubly hard, because during the time he was himself tenant he could not establish his prior title by any possessory actions. The law therefore remits him to his prior title, or puts him in the same condition as if he had recovered the land by writ of entry. Without the remitter, he would have had *jus, et seisinam* separate; a good right, but a bad possession: now, by the remitter, he hath the most perfect of all titles, *juris et seisinæ conjunctionem.*

III. By these several possessory remedies the right of possession may be re-

(*y*) 32 Hen. VIII. c. 2.

(*z*) So Berthelet's original edition of the statute, A.D. 1540, and Cay's, Pickering's, and Rufthead's editions, examined with the record. Rastell's and other intermediate editions, which Sir Edward Coke (2 Inst. 95) and other subsequent writers have followed, make it only *forty* years for rents, &c.

(*a*) 8 Rep. 65.

(*b*) Co. Litt. 115.

(*c*) 1 Inst. 153. Booth, 210.

(*d*) See page 184.

[15] But all these distinctions are now chiefly of interest as matters of antiquity; for all writs of assize are abolished. 3 & 4 W. IV. c. 27, s. 36.—STEWART.

stored to him that is unjustly deprived thereof. But the right of *possession* (though it carries with it a strong presumption) is not always conclusive evidence of the right of *property*, which may still subsist in another man. For, as *one man may have the *possession*, and another the *right of possession*, which is recovered by these possessory actions; so one man may have the *right of possession*, and so not be liable to eviction by any possessory action, and another may have the *right of property*, which cannot be otherwise asserted than by the great and final remedy of a writ of right, or such correspondent writs as are in the nature of a writ of right.

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This happens principally in four cases: 1. Upon discontinuance by the alienation of tenant in tail: whereby he who had the right of possession hath transferred it to the alienee; and therefore his issue, or those in remainder or reversion, shall not be allowed to recover by virtue of that possession, which the tenant hath so voluntarily transferred. 2, 3. In case of judgment given against either party, whether by his own default, or upon trial of the merits, in any possessory action: for such judgment, if obtained by him who hath not the true ownership, is held to be a species of deforcement; which, however, binds the right of possession, and suffers it not to be ever again disputed, unless the right of property be also proved. 4. In case the demandant, who claims the right, is barred from these possessory actions by length of time and the statute of limitations before mentioned: for an undisturbed possession for fifty years ought not to be devested by any thing but a very clear proof of the absolute right of property. In these four cases the law applies the remedial instrument of either the writ of right itself, or such other writs as are said to be of the same nature.

1. And first, upon an alienation by tenant in tail, whereby the estate-tail is *discontinued*, and the remainder or reversion is by failure of the particular estate displaced, and turned into a mere right, the remedy is by action of *formedon*, (*secundum formam doni*,) which is in the nature of a writ of right,(*e*) and is the highest action that tenant in tail can have.(*f*) For he cannot have an absolute writ of right, which is confined only to such as claim in fee-simple: and for that reason this writ of *formedon* was granted him by the statute *de donis* or *Westm. 2, 13 Edw. I. c. 1, which is therefore emphatically called *his* writ of right.(*g*) This writ is distinguished into three species: a *formedon* in the *descender*, in the *remainder*, and in the *reverter*. A writ of *formedon* in the *descender* lieth, where a gift in tail is made, and the tenant in tail alienes the lands entailed, or is disseised of them, and dies; in this case the heir in tail shall have this writ of *formedon* in the *descender*, to recover these lands so given in tail against him who is then the actual tenant of the freehold.(*h*) In which action the demandant is bound to state the manner and form of the gift in tail, and to prove himself heir *secundum formam doni*. A *formedon* in the *remainder* lieth, where a man giveth lands to another for life or in tail, with remainder to a third person in tail or in fee, and he who hath the particular estate dieth without issue inheritable, and a stranger intrudes upon him in remainder and keeps him out of possession.(*i*) In this case the remainder-man shall have his writ of *formedon* in the *remainder*, wherein the whole form of the gift is stated, and the happening of the event upon which the remainder depended. This writ is not given in express words by the statute *de donis;* but is founded upon the equity of the statute, and upon this maxim in law, that if any one hath a right to the land, he ought also to have an action to recover it. A *formedon* in the *reverter* lieth, where there is a gift in tail, and afterwards by the death of the donee or his heirs without issue of his body the reversion falls in upon the donor, his heirs, or assigns: in such case the reversioner shall have his writ to recover the lands, wherein he shall suggest the gift, his own title to the reversion minutely derived from the donor, and the failure of issue upon which his reversion takes place.(*k*) This lay at common law, before the statute *de donis*, if the donee aliened before he had performed the condition of the gift, by having

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(*e*) Finch. L. 267.
(*f*) Co. Litt. 316.
(*g*) F. N. B. 255.
(*h*) F. N. B. 211, 212.
(*i*) Ibid. 217.
(*k*) Ibid. 219. 8 Rep. 88.

issue, and afterwards died without any.(*l*) The time of limitation in a *formedon*, by statute 21 Jac. I. c. 16, is twenty years;[16] within *which space [*193 of time after his title accrues, the demandant must bring his action, or else he is forever barred.[17]

2. In the second case; if the owners of a particular estate, as for life, in dower, by the curtesy, or in fee-tail, are barred of the right of possession by a recovery had against them, through their default or non-appearance in a possessory action, they were absolutely without any remedy at the common law: as a writ of right does not lie for any but such as claim to be tenants of the fee-simple. Therefore the statute Westm. 2, 13 Edw. I. c. 4 gives a new writ for such persons, after their lands have been so recovered against them by default, called a *quod ei deforceat;* which, though not strictly a writ of right, so far partakes of the nature of one, as that it will restore the right to him who has been thus unwarily deforced by his own default.(*m*) But in case the recovery were not had by his own default, but upon defence in the inferior possessory action, this still remains final with regard to these particular estates, as at the common law: and hence it is, that a common recovery (on a writ of entry in the *post*) had, not by default of the tenant himself, but (after his defence made and voucher of a third person to warranty) by default of such vouchee, is now the usual bar to cut off an estate-tail.(*n*)

3, 4. Thirdly, in case the right of possession be barred by a recovery upon the merits in a possessory action, or lastly by the statute of limitations, a claimant in fee-simple may have a *mere writ of right;* which is in its nature the highest writ in the law,(*o*) and lieth only of an estate in fee-simple, and not for him who hath a less estate. This writ lies *concurrently* with all other real actions, in which an estate of fee-simple may be recovered: and it also lies *after* them, being as it were an appeal to the mere right, when judgment hath been had as to the possession in an inferior possessory *action.(*p*) But though a writ [*194 of right may be brought, where the demandant is entitled to the possession, yet it rarely is advisable to be brought in such cases; as a more expeditious and easy remedy is had, without meddling with the property, by proving the demandant's own, or his ancestor's, possession, and their illegal ouster, in one of the possessory actions. But in case the right of possession be lost by length of time, or by judgment against the true owner in one of these inferior suits, there is no other choice: this is then the only remedy that can be had; and it is of so forcible a nature, that it overcomes all obstacles, and clears all objections that may have arisen to cloud and obscure the title. And, after issue once joined in a writ of right, the judgment is absolutely final; so that a recovery had in this action may be pleaded in bar of any other claim or demand.(*q*)

The pure, proper, or mere writ of right lies only, we have said, to recover lands in fee-simple, unjustly withheld from the true proprietor. But there are

(*l*) Finch, L. 268.
(*m*) F. N. B. 155.
(*n*) See book ii. ch. 21.
(*o*) F. N. B. 1.
(*p*) Ibid. 1, 5.
(*q*) Ibid. 6. Co. Litt. 158.

[16] The twenty years within which a *formedon* in the *descender* ought to be commenced under the 21 Jac. I. c. 16, begin to run when the title descends to the first heir in tail, unless he lie under a disability; and the heirs of such person who suffers the twenty years to elapse without commencing the formedon are utterly excluded, and the right of entry is forever lost. 3 Brod. & Bing. 217. 6 East, 83; and see note 10, *ante*, 178.—CHITTY.

[17] It might seem, and has been contended, that a fresh title accrues to the issue in tail of a person who has been barred by the lapse of time, and therefore that such issue would have another twenty years in which to bring his *formedon*. But if this construction prevailed at all, it is obvious that it would equally prevail through any number of descents, and would virtually repeal the statute in the most pernicious manner. In the case of Tolson *vs.* Kaye, 3 Brod. & Bing. 217, the court of Common Pleas, therefore, determined that the *first* descent of the title, within twenty years after which the statute requires the *formedon* to be sued out, is the descent upon that claimant who, being free from any disability, suffers twenty years to elapse without asserting his right; and, consequently, that the bar which operates upon him equally concludes al claiming as his heirs.—COLERIDGE.

also some other writs which are said to be *in the nature of* a writ of right, because their process and proceedings do mostly (though not entirely) agree with the writ of right: but in some of them the fee-simple is not demanded; and in others not land, but some incorporeal hereditament. Some of these have been already mentioned, as the writ of *right of dower, of formedon*, &c., and the others will hereafter be taken notice of under their proper divisions. Nor is the mere writ of right alone, or always, applicable to every case of a claim of lands in fee-simple: for if the lord's tenant in fee-simple dies without heir, whereby an escheat accrues, the lord shall have a writ of *escheat*,(*r*) which is in the nature of a writ of right.(*s*) And if one of two or more coparceners deforces the other, by usurping the sole possession, the party aggrieved shall have a writ of right, *de rationabili parte*,(*t*) which may be grounded on the *seisin of the ancestor at any time during his life; whereas in a *nuper obiit* (which is a possessory remedy)(*u*) he must be seised at the time of his death. But, waiving these and other minute distinctions, let us now return to the general writ of right.

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This writ ought to be first brought in the court-baron(*w*) of the lord, of whom the lands are holden; and then it is open or *patent:* but if he holds no court, or hath waived his right, *remisit curiam suam*, it may be brought in the king's courts by writ of *præcipe* originally;(*x*) and then it is a writ of right *close*;(*y*) being directed to the sheriff and not the lord.(*z*) Also, when one of the king's immediate tenants *in capite* is deforced, his writ of right is called a writ of *præcipe in capite*, (the improper use of which, as well as of the former *præcipe quia dominus remisit curiam*, so as to oust the lord of his jurisdiction, is restrained by *magna carta*,)(*a*) and, being directed to the sheriff and originally returnable in the king's courts, is also a writ of right *close*.(*b*) There is likewise a little writ of *right close, secundum consuetudinem manerii*, which lies for the king's tenants in antient demesne,(*c*) and others of a similar nature,(*d*) to try the right of their lands and tenements in the court of the lord exclusively.(*e*) But the writ of *right patent* itself may also at any time be removed into the county-court, by writ of *tolt*,(*f*) and from thence into the king's courts by writ of *pone*(*g*) or *recordari facias*, at the suggestion of either party that there is a delay or defect of justice.(*h*)

In the progress of this action,(*i*) the demandant must allege some seisin of the lands and tenements in himself,[18] or else in some person under whom he claims, and then derive the right *from the person so seised to him-

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(*r*) F. N. B. 143.
(*s*) Booth, 135.
(*t*) F. N. B. 9.
(*u*) See page 186.
(*w*) Append. No. I. § 1.
(*x*) F. N. B. 2. Finch, L. 313.
(*y*) Booth, 91.
(*z*) Append. No. I. § 4.
(*a*) C. 24.
(*b*) F. N. B. 5.
(*c*) See book ii. ch. 6.
(*d*) Kitchen, tit. *Copyhold*.
(*e*) Bracton, *l.* 1, c. 11, *l.* 4, *tr.* 1, c. 9. and *tr.* 3, c. 13. § 9. Old Tenur. t. *tenir en socage*. Old N. B. t. *garde*, and t. *briefe de recto claus*. F. N. B. 11.
(*f*) Append. No. I. § 2.
(*g*) Ibid. § 3.
(*h*) F. N. B. 3, 4.
(*i*) Append. No. I. § 5.

[18] A writ of right cannot be maintained without showing *an actual seisin by taking the esplees*, either in the demandant himself or the ancestor from whom he claims. 1 H. B. 1. And the demandant must allege in his count that his ancestor was seised *of right*, as well as that he was seised in his demesne as of fee. 2 B. & P. 570. 5 East, 272. And if the count state that the lands descended to four women, as nieces and co-heirs of J. S., it must also show how they were nieces. 3 B. & P. 453. 1 N. R. 66. Proof of possession of land and pernancy of the rents is *prima facie* evidence of a seisin in fee of the pernor. But proof of forty years' subsequent possession by a daughter, while a son and heir lived near and knew the fact, is much stronger evidence that the first possessor had only a particular estate. 5 Taunt. 326. 1 Marsh 68. The court requires a strict observance of the prescribed forms in this proceeding, and will not assist the demandant who applies to rectify omissions or irregularities. 2 N. R. 429. 1 Marsh, 602. 1 Taunt. 415. 1 Bing. 208. The court will not permit the mise joined in a writ of right to be tried by a jury instead of the grand assize, though both parties desire it. 1 B. & P. 192. As to summoning and swearing the four knights, see 3 Moore, 249. 1 Taunt. & Brod. 17. They may be summoned from the grand jury when present at the assizes. Ib. As to the tender of the demymark, and what the demandant must prove previous to the tenant being put upon proof of his title, see Holt, C.

self; to which the tenant may answer by denying the demandant's right, and averring that he has more right to hold the lands than the demandant has to demand them: and this right of the tenant being shown, it then puts the demandant upon the proof of his title: in which, if he fails, or if the tenant hath shown a better, the demandant and his heirs are personally barred of their claim; but if he can make it appear that his right is superior to the tenant's, he shall recover the land against the tenant and his heirs forever. But even this writ of right, however superior to any other, cannot be sued out at any distance of time. For by the antient law no seisin could be alleged by the demandant, but from the time of Henry the First;(*k*) by the statute of Merton, 20 Hen. III. c. 8, from the time of Henry the Second; by the statute of Westm. 1, 3 Edward I. c. 39, from the time of Richard the First; and now, by statute 32 Henry VIII. c. 2, seisin in a writ of right shall be within sixty years. So that the possession of lands in fee-simple uninterruptedly, for threescore years, is at present a sufficient title against all the world; and cannot be impeached by any dormant claim whatsoever.[19]

I have now gone through the several species of injury by ouster and dispossession of the freehold, with the remedies applicable to each. In considering which I have been unavoidably led to touch upon such obsolete and abstruse learning, as it lies intermixed with, and alone can explain the reason of, those parts of the law which are now more generally in use. For, without contemplating the whole fabric together, it is impossible to form any clear idea of the meaning and connection of those disjointed parts which still form a considerable branch of the modern law; such as the doctrine of entries and remitter, the levying of fines, and the suffering of common recoveries. Neither indeed is any considerable part of that, which I have selected in this chapter from among the venerable monuments of our ancestors, so *absolutely antiquated as to be out of *force*, though the whole is certainly out of *use:* there being [*197 but a very few instances for more than a century past of prosecuting any real action for land by writ of *entry*, *assize*, *formedon*, writ of right, or otherwise. The forms are indeed preserved in the practice of common recoveries; but they are forms and nothing else; for which the very clerks that pass them are seldom capable to assign the reason. But the title of lands is now usually tried in actions of *ejectment* or *trespass;* of which in the following chapters.[20]

(*k*) Glanv. *l.* 2, c. 3. Co. Litt. 114.

N. P. 657; and see the precedents and notes, 3 Chitty on Pl. 4th ed. 1355 to 1390.—CHITTY.

[19] This is far from being universally true: for an uninterrupted possession for sixty years will not create a title where the claimant or demandant had no right to enter within that time; as where an estate in tail, for life, or for years continues above sixty years, still the reversioner may enter and recover the estate; the possession must be adverse, and lord Coke says, "It has been resolved that although a man has been out of possession of land for sixty years, yet if his entry is not tolled he may enter and bring any action of his own possession; and if his entry be congeable, and he enter, he may have an action of his own possession." 4 Co. 11, b.—CHRISTIAN.

[20] All the real actions which have been mentioned in this chapter, and all others whatsoever, with the exceptions of the writ of *right of dower*, the writ of *dower unde nihil habet*, and writ of *quare impedit*, have been abolished; and the title to lands is now *always* tried, as it was *usually* in the time of Blackstone, by an action of *ejectment* or of *trespass*. —STEWART.

CHAPTER XI.

OF DISPOSSESSION, OR OUSTER, OF CHATTELS REAL.

*198] *Having in the preceding chapter considered with some attention the several species of injury by dispossession or ouster of the *freehold*, together with the regular and well-connected scheme of remedies by actions real, which are given to the subject by the common law, either to recover the possession only, or else to recover at once the possession, and also to establish the right of property; the method which I there marked out leads me next to consider injuries by ouster of *chattels real;* that is, by amoving the possession of the tenant from an estate by statute-merchant, statute-staple, recognizance in the nature of it, or *elegit;* or from an estate for years.

I. Ouster, or amotion of possession, from estates held by statute, recognizance, or *elegit*, is only liable to happen by a species of disseisin, or turning out of the legal proprietor, before his estate is determined by raising the sum for which it is given him in pledge. And for such ouster, though the estate be merely a chattel interest, the owner shall have the same remedy as for an injury to a freehold; viz., by assize of *novel disseisin.*(*a*) But this depends upon the several statutes *199] which *create these respective interests,(*b*) and which expressly provide and allow this remedy in case of dispossession. Upon which account it is that Sir Edward Coke observes,(*c*) that these tenants are said to hold their estates *ut liberum tenementum,* until their debts are paid: because by the statutes they shall have an assize, as tenants of the freehold shall have; and in that respect they have the similitude of a freehold.(*d*)[1]

II. As for *ouster*, or amotion of possession, from an *estate for years;* this happens only by a like kind of disseisin, ejection, or turning out, of the tenant from the occupation of the land during the continuance of his term. For this injury the law has provided him with two remedies, according to the circumstances and situation of the wrong-doer: the writ of *ejectione firmæ;* which lies against any one, the lessor, reversioner, remainder-man, or any stranger, who is himself the wrong-doer and has committed the injury complained of; and the writ of *quare ejecit infra terminum,* which lies not against the wrong-doer or ejector himself, but his feoffee or other person claiming under him. These are mixed actions, somewhat between real and personal: for therein are two things recovered, as well restitution of the term of years, as damages for the ouster or wrong.

1. A writ then of *ejectione firmæ*, or action of trespass in *ejectment,*[2] lieth where

(*a*) F. N. B. 178.
(*b*) Stat. Westm. 2. 13 Edw. I. c. 18. Stat. *de mercatoribus,* 27 Edw. III. c. 9. Stat. 23 Hen. VIII. c. 6, § 9.
(*c*) 1 Inst. 43.
(*d*) See book ii. ch. 10.

[1] The assize of novel disseisin, as we have seen in the notes to the last chapter, is now abolished. These tenants therefore have the same remedy for the ouster of their possession as the tenant of the freehold,—an ejectment.—Stewart.

[2] See, in general, Adams on Ejectment. Tidd Prac. 8 ed. 518, &c. Runington on Ejectment, by Ballatine. Com. Dig. Ejectment. 1 Chitty on Pl. 4 ed. 172.

In general, ejectment will lie to recover possession of any thing whereon an entry can be made, and whereof the sheriff can deliver possession. But an ejectment cannot be maintained for a close, (11 Rep. 55. Godb. 53.) a manor, without describing the quantity of land therein, (Latch. 61. Lutw. Rep. 301. Hetl. 146,) a messuage *and tenement*, (1 East. 441. Stra. 834;) but after verdict (even pending a rule to arrest the judgment on this ground) the court will give leave to enter the verdict according to the judge's notes for the messuage only, (8 East. 357:) nor a messuage *or tenement*, (3 Wils. 23,) nor a messuage situate in the parishes of A. *and* B., *or one of them*, (7 Mod. 457,) nor for things that lie merely in grant, not capable of being delivered in execution, as an advowson, common in gross, (Cro. Jac. 146,) a piscary. Ib. Cro. Car. 492. 8 Mod. 277. 1 Brownl. 142. *Contra, per* Ashurst, J., 1 T. R. 361. And where the owner of the fee by indenture granted to A. free liberty to dig for tin, and all other metals, throughout certain lands there described, and the use of all water, water-courses, and to make

lands or tenements are let for a term of years; and afterwards the lessor, reversioner, remainder-man, or any stranger, doth eject or oust the lessee of his term.(*e*) In this case he shall have his writ of *ejection* to call the defendant to answer for entering on the lands so demised to the plaintiff for a term that is not yet expired, and ejecting him.(*f*) And by this writ the plaintiff shall recover back his term, or the remainder of it, with damages.

*Since the disuse of real actions, this mixed proceeding is become the common method of trying the title to lands or tenements. It may not [*200 therefore be improper to delineate, with some degree of minuteness, its history, the manner of its process, and the principles whereon it is grounded.

We have before seen,(*g*) that the writ of covenant, for breach of the contract contained in the lease for years, was antiently the only specific remedy for recovering against the lessor a term from which he had ejected his lessee, together with damages for the ouster. But if the lessee was ejected by a stranger, claiming under a title superior(*h*) to that of the lessor, or by a grantee of the reversion, (who might at any time by a common recovery have destroyed the term,)(*i*) though the lessee might still maintain an action of covenant against the lessor for non-performance of his contract or lease, yet he could not by any means recover the term itself. If the ouster was committed by a mere stranger, without any title to the land, the lessor might indeed by a real action recover possession of the freehold, but the lessee had no other remedy against the ejector but in damages, by a writ of *ejectione firmæ*, for the trespass committed in ejecting him from his farm.(*k*) But afterwards, when the courts of equity began to oblige the ejector to make a specific restitution of the land to the party immediately injured, the courts of law also adopted the same method of doing complete justice; and, in the prosecution of a writ of ejectment, introduced a species of remedy not warranted by the original writ nor prayed by the declaration, (which are *calculated for damages merely, and are silent as to any restitution.) viz., a judgment to recover the term, and a writ of possession [*201 thereupon.(*l*) This method seems to have been settled as early as the reign of Edward IV.;(*m*) though it hath been said(*n*) to have first begun under Henry VII., because it probably was then first applied to its present principal use, that of trying the title to the land.

The better to apprehend the contrivance whereby this end is effected, we must recollect that the remedy by ejectment is in its original an action brought by one who hath a lease for years, to repair the injury done him by dispossession. In order therefore to convert it into a method of trying titles to the freehold, it is first necessary that the claimant do take possession of the lands, to empower him to constitute a lessee for years, that may be capable of receiving this injury of dispossession. For it would be an offence, called in our law *maintenance*, (of which in the next book,) to convey a title to another, when the grantor is not in possession of the land; and indeed it was doubted at first, whether this occasional possession, taken merely for the purpose of conveying the title, excused the lessor from the legal guilt of maintenance.(*o*) When

(*e*) F. N. B. 220.
(*f*) See Appendix, No. II. § 1.
(*g*) See page 157.
(*h*) F. N. B. 145.
(*i*) See book ii. ch. 9.
(*k*) P. 6, Ric. II. *Ejectione firmæ n'est que un action de trespass en son nature, et le plaintiff ne recovera son terme que est a venir, nient plus que en trespass home recovera damages pur tresspass nient fait, mes a feser; mes il convient a suer par action de covenant al comen law a recoverer son terme: quod tota curia concessit. Et per* Belknap, *la comen ley est, lou home est ouste de son terme par estranger, il avera ejectione firmæ versus cesty queluy ouste; et sil soit ouste par son lessor, briefe de covenant; et si par lessée ou grantee de reversion, briefe de covenant versus son lessor, et countera especial count, &c.* Fitz. Abr. tit. *eject. firm* 2. See Bract. *l.* 4, *tr.* 1, c. 36.
(*l*) See Append. No. II. § 4, *prope fin.*
(*m*) 7 Edw. IV. 6. *Per* Fairfax; *si home port ejectione firmæ, le plaintiff recovera son terme qui est arere, si bien come in quare ejecit infra terminum: et, si nul soit arrere, donques tout in damages.* Bro. Abr. tit. *quare ejecit infra terminum*, 6.
(*n*) F. N. B. 220.
(*o*) 1 Ch. Rep. Append. 39.

adits, &c. reserving to himself liberty to drive any new adit and to carry any new water-course over the premises granted, habendum for twenty-one years, with right of re-entry for breach of covenants, this deed, it was held, did not amount to a lease, but contained a mere license to dig, &c., and the grantee could not maintain ejectment for mines lying within the limits of the set but not connected with the workings of the grantee. 2 B. & A. 724.—CHITTY.

therefore a person, who hath right of entry into lands, determines to acquire that possession, which is wrongfully withheld by the present tenant, he makes (as by law he may) a formal entry on the premises; and being so in the possession of the soil, he there, upon the land, seals and delivers a lease for years to some third person or lessee: and, having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land till the prior tenant, or he who had the previous possession, enters thereon afresh and ousts him; or till some other person (either by accident or by agreement beforehand) *202] comes upon the land, and turns him *out or ejects him. For this injury the lessee is entitled to his action of ejectment against the tenant, or this *casual ejector*, whichever it was that ousted him, to recover back his term and damages. But where this action is brought against such a casual ejector as is before mentioned, and not against the very tenant in possession, the court will not suffer the tenant to lose his possession without any opportunity to defend it. Wherefore it is a standing rule, that no plaintiff shall proceed in ejectment to recover land against a casual ejector, without notice given to the tenant in possession, (if any there be,) and making him a defendant if he pleases. And, in order to maintain the action, the plaintiff must, in case of any defence, make out four points before the court; viz., *title, lease, entry*, and *ouster*. First, he must show a good *title* in his lessor, which brings the matter of right entirely before the court; then, that the lessor, being seised or possessed by virtue of such title, did make him the *lease* for the present term; thirdly, that he, the lessee or plaintiff, did *enter* or take possession in consequence of such lease; and then, lastly, that the defendant *ousted* or ejected him. Whereupon he shall have judgment to recover his term and damages; and shall, in consequence, have a *writ of possession*, which the sheriff is to execute by delivering him the undisturbed and peaceable possession of his term.

This is the regular method of bringing an action of ejectment, in which the title of the lessor comes collaterally and incidentally before the court, in order to show the injury done to the lessee by this ouster. This method must be still continued in due form and strictness, save only as to the notice to the tenant, whenever the possession is vacant, or there is no actual occupant of the premises; and also in some other cases.[3] But, as much trouble and formality were found to attend the actual making of the *lease, entry*, and *ouster*, a new and more easy method of trying titles by writ of ejectment, where there is any actual tenant or occupier of the premises in dispute, was invented somewhat more than a century ago, by the lord chief justice Rolle,(*p*) who then sat in the court *203] of *upper* bench; so called during the exile of king Charles the *Second. This new method entirely depends upon a string of legal fictions; no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant; but all are merely ideal, for the sole purpose of trying the title.[4]

(*p*) Styl. Pract. Reg. 108, edit. 1657.

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[3] When the remedy by ejectment is pursued in an inferior court, the fictions of the modern system are not applicable; for inferior courts have not the power of framing rules for confessing lease, entry, and ouster, nor the means, if such rules were entered into, of enforcing obedience to them. 1 Keb. 690, 795. Gilb. Eject. 38. Adams on Eject. 173. If the rule requiring service of notice upon the tenant in possession cannot be observed on account of his having quitted, and his place of residence is unknown, (2 Stra. 1064. 4 T. R. 464,) the claimant must resort to the ancient practice, (Ad. Eject. 181,) except in particular cases, provided for by the 4 Geo. II. c. 28, 11 Geo. II. c. 19, and 57 Geo. III. c. 52.—Chitty.

[4] An actual entry is necessary to avoid a fine levied with proclamations, according to the statute 4 Hen. VII. c. 24, (see book 2, p. 352:) and the demise laid in the ejectment must be subsequent to the entry: but that is the only case in which an actual entry is required, (2 Stra. 1086. Doug. 468. 1 T. R. 741. 4 Bro. P. C. 353. 3 Burr. 1895. 7 T. R. 433. 1 Prest. Conv. 207. 9 East, 17:) unless it is an ejectment brought to recover on a vacant possession, and not by a landlord upon a right of re-entry under the 4 Geo. II. c. 28; in which case the lessor or his attorney must actually seal a lease upon the premises to the plaintiff, who must be ejected by a real person. See the mode of proceeding, 2 Crompt. Prac. 198.—Christian.

To this end, in the proceedings(*q*) a lease for a term of years is stated to have been made, by him who claims title, to the plaintiff who brings the action, as by John Rogers to Richard Smith, which plaintiff ought to be some real person, and not merely an ideal fictitious one who hath no existence, as is frequently though unwarrantably practised;(*r*)[5] it is also stated that Smith the lessee entered; and that the defendant William Stiles, who is called the *casual ejector*, ousted him; for which ouster he brings this action. As soon as this action is brought, and the complaint fully stated in the declaration,(*s*) Stiles, the casual ejector, or defendant, sends a written notice to the tenant in possession of the lands, as George Saunders, informing him of the action brought by Richard Smith, and transmitting him a copy of the declaration; withal assuring him that he, Stiles the defendant, has no title at all to the premises, and shall make no defence; and therefore advising the tenant to appear in court and defend his own title: otherwise he, the casual ejector, will suffer judgment to be had against him; and thereby the actual tenant Saunders will inevitably be turned out of possession.(*t*) On receipt of this friendly caution, if the tenant in possession does not within a limited time apply to the court to be admitted a defendant in the stead of Stiles, he is supposed to have no right at all; and, upon judgment being had against Stiles the casual ejector, Saunders the real tenant will be turned out of possession by the sheriff.

But, if the tenant in possession applies to be made a defendant, it is allowed him upon this condition; that he enter into a rule of court(*u*) to confess, at the trial of the cause, three of the four requisites for the maintenance of the plaintiff's action; viz., the *lease* of Rogers the lessor, the *entry* of Smith *the plaintiff, and his *ouster* by Saunders himself, now made the defendant instead of Stiles: which requisites being wholly fictitious, should the defendant put the plaintiff to prove them, he must of course be non-suited for want of evidence; but by such stipulated confession of *lease*, *entry*, and *ouster*, the trial will now stand upon the merits of the *title* only.[6] This done, the declaration is altered by inserting the name of George Saunders instead of William Stiles, and the cause goes down to trial under the name of Smith, (the plaintiff,) on the demise of Rogers, (the lessor,) against Saunders, the new defendant. And therein the lessor of the plaintiff is bound to make out a clear title; otherwise his fictitious lessee cannot obtain judgment to have possession of the land for the term supposed to be granted.[7] But, if the lessor makes out his title in a [*204

(*q*) See Append. No. II. §§ 1, 2.
(*r*) 6 Mod. 309.
(*s*) Append. No. II. § 2.
(*t*) Ibid.
(*u*) Ibid. § 3.

[5] The practice was reprobated, because it was considered that it provided no responsibility for costs in case the defendant succeeded. But this objection is now obviated by its being always part of the consent rule that in such case the lessor of the plaintiff will pay the costs, and an attachment will lie against him for disobedience of this as of every other rule of court. Adams on Eject. 235, 298.—CHITTY.

[6] It has been determined that no ejectment can be maintained where the lessor of the plaintiff has not a legal right of entry; and the heir at law was barred from recovering in ejectment where there was an unsatisfied term raised for the purpose of securing an annuity, though the heir claimed the estate subject to that charge. But a satisfied term may be presumed to be surrendered. 2 T. R. 695. 1 T. R. 758. In Doe on the demise of Bowerman *vs.* Sybourn, 7 T. R. 2, lord Kenyon declared that in all cases where trustees ought to convey to the beneficial owner he would leave it to the jury to presume, where such a presumption might reasonably be made, that they had conveyed accordingly, in order to prevent a just title from being defeated by a matter of form. But if such a presumption cannot be made, he who has only the equitable estate cannot recover in ejectment. Jones *vs.* Jones, 7 T. R. 46. The doctrine respecting the presumption of a surrender of a term, though assigned to attend the inheritance, still prevails. 2 B. & A. 710, 782. 3 Bar. & Cres. 616; but see Mr. Sugden's able essay on the subject of presuming the surrender of a term. A person who claims under an *elegit* sued out against the landlord cannot recover in ejectment against the tenant whose lease was granted prior to the plaintiff's judgment. 8 T. R. 2.—CHRISTIAN.

[7] Before the following rules it was necessary for lessor of plaintiff to prove on the trial the defendant's possession of the premises in question, although the defendant had entered into the general consent rule, to confess lease, entry, and ouster. 7 T. R. 327.

satisfactory manner, then judgment and a writ of possession shall go for Richard Smith the nominal plaintiff, who by this trial has proved the right of John Rogers, his supposed lessor. Yet, to prevent fraudulent recoveries of the possession, by collusion with the tenant of the land, all tenants are obliged by statute 11 Geo. II. c. 19, on pain of forfeiting three years' rent, to give notice to their landlords, when served with any declaration in ejectment; and any landlord may by leave of the court be made a co-defendant to the action, in case the tenant himself appears to it; or, if he makes default, though judgment mus be then signed against the casual ejector, yet execution shall be stayed, in case the landlord applies to be made a defendant, and enters into the common rule; a right which indeed the landlord had, long before the provision of this statute;(*v*) in like manner as (previous to the statute of Westm. 2, c. 3) if in a real action the tenant of the freehold made default, the remainder-man or reversioner had a right to come in and defend the possession; lest, if judgment were had against the tenant, the estate of those behind should be turned to a naked right.(*w*)[8] But, if the new defendants, whether landlord or tenant, or both, after entering into the common rule, fail to appear at the trial, and to confess lease, entry, and ouster, the plaintiff, Smith, must indeed be there *non-suited, for want of proving those requisites; but judgment will in the end be entered against the casual ejector Stiles; for the condition on which Saunders, or his landlord, was admitted a defendant is broken, and therefore the plaintiff is put again in the same situation as if he never had appeared at all; the consequence of which (we have seen) would have been, that judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out Saunders, and delivered possession to Smith. The same process therefore as would have been had, provided no conditional rule had been ever made, must now be pursued as soon as the condition is broken.[9]

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(*v*) Styl. Pract. Reg. 108, 111, 265. 7 Mod. 70. Salk. 257. Burr. 1301.

(*w*) Bracton, *l.* 5, c. 10, § 14.

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1 B. & P. 573. But by rule in King's Bench, M. T. 1820, it was ordered that in every action of ejectment the defendant shall specify in the consent rule for what premises he intends to defend, and shall consent in such rule to confess upon the trial that the defendant (if he defends as tenant, or, in case he defends as landlord, that his tenant) was, at the time of the service of the declaration, in the possession of such premises; and that if upon the trial the defendant shall not confess such possession, as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff, in that case to be taxed. In the following year the same rule was adopted by the court of Common Pleas. See 2 Brod. & Bing. 470.—Chitty.

[8] A devisee, although he has never been in possession, has been permitted to defend as a landlord under this statute. 11 Geo. II. c. 19. 4 T. R. 122.—Chitty.

[9] Where an ejectment is defended merely to continue the possession of the premises, and no defence is made at the trial, the practice is for the crier of the court, first, to call the defendant to confess lease, entry, and ouster, and then the plaintiff, as in other cases of nonsuits, to come forth, or he will lose his writ of nisi prius. Though in this case the judgment is given against the casual ejector, yet the costs are taxed as in other cases, and if the real defendant refuses to pay them the court will grant an attachment against him. Salk. 259. In like manner, if there be a verdict for the defendant, or the nominal plaintiff be non-suited without the default of the defendant, the defendant must tax his costs and sue out a writ of execution against the nominal plaintiff; and if, upon serving the lessor of the plaintiff with his writ and a copy of the rule to confess lease, entry, and ouster, the lessor of the plaintiff does not pay the costs, the court will grant an attachment against him. 2 Cromp. Pract. 214. In ejectment the unsuccessful party may re-try the same question as often as he pleases without the leave of the court; for by making a fresh demise to another nominal character, it becomes the action of a new plaintiff upon another right, and the courts of law cannot any further prevent this repetition of the action than by ordering the proceedings in one ejectment to be stayed till the costs of a former ejectment, though brought in another court, be discharged. 2 Bla. Rep. 1158. Barnes, 133. But a court of equity, in some instances where there have been several trials in ejectment for the same premises, though the title was entirely legal, has granted a perpetual injunction. 1 P. Wms. 672.—Christian.

New proceedings for the recovery of land have been created by the Common-Law

The damages recovered in these actions, though formerly their only intent, are now usually (since the title has been considered as the principal question) very small and inadequate, amounting commonly to one shilling, or some other trivial sum. In order therefore to complete the remedy when the possession has been long detained from him that hath the right to it, an action of trespass also lies, after a recovery in ejectment, to recover the mesne profits which the tenant in possession has wrongfully received.[10] Which action may be brought in the name of either the nominal plaintiff in the ejectment, or his lessor, against the tenant in possession, whether he be made party to the ejectment or suffers judgment to go by default.(x) In this case the judgment in ejectment is conclusive evidence against the defendant for all profits which have accrued since the date of the demise stated in the former declaration of the plaintiff; but if the plaintiff sues for any antecedent profits the defendant may make a new defence.[11]

(x) 4 Burr. 668.

Procedure Act, 1852, and the former action of ejectment has given place altogether to this new procedure.

The form of action which has been abolished was valuable in this respect,—that it allowed no questions to be raised except that of title. If the person who brought the action had a right to possession, he was entitled to recover, without regard to whether the person in possession or who took defence to the action had ousted him or not. The new action is also an action for recovery of the land, without regard to any other claim which may exist between the parties.

An action of ejectment is now commenced by the issue of a writ directed to the persons in possession by name, and to all persons entitled to defend the possession of the property claimed, which property must be described in the writ with reasonable certainty.

The writ must state the names of all the persons in whom the title is alleged to be; and it commands the persons to whom it is directed to appear, within sixteen days after service in the court from which it issued, to defend the possession of the property sued for, or such part thereof as they may think fit. It must also contain a notice that in default of appearance they will be turned out of possession.—STEWART.

It has not been deemed necessary to pursue the new procedure further than is contained in the foregoing extract. The action has been divested of its cumbrous fictions, and all the ends of real justice are attained by a simple and intelligible process. Many of the United States had long preceded England in this valuable reform; but several still continue to employ the ancient form; and in the circuit courts of the United States, in those States in which it was in use when those courts were established, it is still employed.—SHARSWOOD.

[10] But with reference to mesne profits accrued up to the day of the verdict, and in cases where the tenancy existed under lease or agreement, resort to this separate action is superseded by sect. 2 of stat. 1 Geo. IV. c. 87, which enacts, "Wherever thereafter it shall appear on the trial of any ejectment, at the suit of a landlord against a tenant, that such tenant or his attorney hath been served with due notice of trial, the plaintiff shall not be non-suited for default of the defendant's appearance, or of confession of lease, entry, and ouster; but the production of the consent rule and undertaking of the defendant shall in all such cases be sufficient evidence of lease, entry, and ouster; and the judge before whom such cause shall come on to be tried shall, whether the defendant shall appear upon such trial or not, permit the plaintiff on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits thereof which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same down to the time of the verdict given in the cause, or to some preceding day, to be specially mentioned therein; and the jury on the trial finding for the plaintiff shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits. The said act not to bar the landlord from bringing trespass for the mesne profits to accrue from the verdict or the day so specified therein down to the day of the delivery of possession of the premises recovered in the ejectment."—CHITTY.

[11] The defendant may plead the statute of limitations, and by that means protect himself from the payment of all mesne profits except those which have accrued within the last six years. Bull. N. P. 88.—CHRISTIAN.

The common remedy by ejectment is generally treated as a mixed action, the party interested thereby recovering his *estate* and *damages* for the ouster; but as those damages are nominal, and the claimant must in order to recover the intermediate profits resort to an action of trespass, such action of ejectment is in substance merely for the recovery

Such is the modern way of obliquely bringing in question the title to lands and tenements, in order to try it in this collateral manner; a method which is now universally adopted in almost every case. It is founded on the same principle as the antient writs of assize, being calculated to try the mere *possessory* title to an estate; and hath succeeded to those real actions, *as being infinitely more convenient for attaining the end of justice; because, the form of the proceeding being entirely fictitious, it is wholly in the power of the

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of the estate. But in one instance, in favour of landlords, a remedy by ejectment is given nearly resembling the ancient and mixed action; for it is enacted by 1 Geo. IV. c. 87, that upon refusal by a late tenant to deliver up possession upon the expiration of his tenancy by lease or *written* agreement, and after lawful demand in writing, the landlord, on bringing an ejectment, may address a notice at the foot of the declaration to the tenant, requiring him to appear in court on the first day of the next term, or if in Wales, or the counties palatine of Chester, Lancaster, or Durham, on the first day of the assizes, or appearance-day, there to be made defendant, and to find bail; or in case of his non-appearance, upon production of the lease, agreement, &c. and the proper affidavits by the landlord, &c., the court may grant a rule, calling on the tenant to show cause why he should not, upon being admitted defendant, besides entering into the common rule, undertake, in case a verdict should pass against him, to give the plaintiff a judgment, to be entered up against the real defendant of the term next preceding the trial, and also why he should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum (to be named) conditioned to pay the costs and damages which shall be recovered by the plaintiff in the action. Upon the rule being made absolute, if the tenant do not conform, judgment to be for the plaintiff. The act further provides that, whether the defendant appear or not at the trial, the plaintiff may go into proof, and the jury give damages for mesne profits down to the verdict or a day specified therein. See 1 Dowl. & Ryl. 433. But when the required undertaking is given, it is provided that if it appear to the judge that the finding of the jury was contrary to the evidence, he may order a stay of execution till the fifth day of the next term; and he is bound to make this order if the defendant desire it, upon his undertaking to give security not to commit any kind of waste, or sell the crops, &c. And if the result of the trial under this act be against the landlord, the tenant shall have judgment with double costs.

The statute 1 Geo. IV. c. 87 does not extend to the case of a lessee holding over after notice to quit, given by himself, where his tenancy has not expired by the efflux of time. 1 Dowl. & Ryl. 540. And where a tenant holds from year to year, without a lease or agreement *in writing*, it is not within the first section of the statute. (1 Geo. IV. c. 87.) 5 B. & A. 770. But an agreement *in writing*, for apartments for *three months* certain, comes within the meaning of the words of the act, where the party holds for any term, or number of years certain, or from year to year. 5 B. & A. 766. 1 Dowl. & Ryl. 433. A tenant being in possession, under an agreement that the landlord should grant a lease for eight years, and that the tenant should pay 40*s.* for every day he held over, continued to hold the whole time, though the lease was never granted; and, upon his holding over, notice to quit and demand of possession, with notice of ejectment, was regularly served. It was held that the tenant was not to be treated as a tenant from year to year, and that the demand of possession was sufficient notice within the statute, so as to entitle the plaintiff to the benefit of the undertaking and security required by that statute. 2 Dowl. & Ryl. 565.

The rule nisi, calling on a tenant to enter into a recognizance under this statute, need not specify all the particulars thereby required, as the court may mould the rule according to its requisites, upon showing cause. 5 B. & A. 766. 1 Dowl. & Ryl. 433. The time within which the undertaking and security required by the statute shall be given is to be fixed by the court at the time the rule is granted. 2 Dowl. & Ryl. 688. After a rule granted in a cause entitled Doe, &c. *vs.* Roe, to which the tenant in possession appeared, judgment was entered up and execution taken out against the tenant by *name*, and it was held not to be irregular. 3 Dowl. & Ryl. 230.

The court, on making a rule absolute under this act (no cause being shown) for the tenant's undertaking to give the plaintiff judgment, to be entered up against the real defendant, and to enter into a recognizance in a *reasonable sum* conditioned to pay the costs and damages which should be recovered by the plaintiff in the action, ordered the tenant to appear in the next succeeding term, to find such bail as was specified in the former rule; and, on no cause being shown to that order, they directed the rule for entering up judgment for the plaintiff to be made absolute. The court can only give a reasonable sum for the costs of the action, and not for the mesne profits, the amount of which must be ascertained by the prothonotary. 6 Moore, 54. See further, as to the proceedings on this statute, Tidd, 8 ed. 541, &c.—Chitty.

court to direct the application of that fiction so as to prevent fraud and chicane, and eviscerate the very truth of the title. The writ of ejectment and its nominal parties (as was resolved by all the judges)(*y*) are "judicially to be considered as the fictitious form of an action really brought by the lessor of the plaintiff against the tenant in possession: invented, under the control and power of the court, for the advancement of justice in many respects; and to force the parties to go to trial on the merits, without being entangled in the nicety of pleadings on either side."[12]

But a writ of ejectment is not an adequate means to try the title of all estates; for on those things whereon an entry cannot in fact be made, no entry shall be supposed by any fiction of the parties. Therefore an ejectment will not lie of an advowson, a rent, a common, or other incorporeal hereditament:(*z*) except for tithes in the hands of lay appropriators, by the express purview of statute 32 Hen. VIII. c. 7, which doctrine hath since been extended, by analogy, to tithes in the hands of the clergy:(*a*) nor will it lie in such cases where the entry of him that hath the right is taken away by descent, discontinuance, twenty years' dispossession, or otherwise.

This action of ejectment is, however, rendered a very easy and expeditious remedy to landlords whose tenants are in arrear, by statute 4 Geo. II. c. 28, which enacts that every landlord who hath by his lease a right of re-entry in case of non-payment of rent, when half a year's rent is due and no sufficient distress is to be had, may serve a declaration in ejectment on his tenant, or fix the same upon some notorious part of the premises, which shall be valid without any formal re-entry or previous demand of rent. And a recovery in such ejectment shall be final and conclusive, both in law and equity, unless the rent and all costs be paid or tendered within six calendar months afterwards.[13]

(*y*) Mich. 32 Geo. II. 4 Burr. 668.
(*z*) Brownl. 129. Cro. Car. 492. Stra. 54.
(*a*) Cro. Car. 301. 2 Lord Raym. 789.

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[12] Actions of ejectment, as has been observed, have succeeded to those real actions called possessory actions: but an inconvenience was found to result from them which did not follow from real actions, to which it has been found necessary to apply a remedy. Real actions could not be brought twice for the same thing; but a person might bring as many ejectments as he pleased,—which rendered the rights of parties subject to endless litigation. To remedy this, therefore, when two or more verdicts have been had upon the same title, and to the satisfaction of the court, the courts of equity will now grant a perpetual injunction to restrain the party from bringing any further ejectment. See Barefoot *vs.* Fry, Bunb. 158, pl. 228. Selw. N. P. 780.—ARCHBOLD.

[13] Where there is a sufficient distress upon the premises, the landlord cannot maintain an ejectment upon his right of re-entry for non-payment of rent under this statute; nor can he maintain an action of ejectment for a forfeiture at common law unless he has demanded the rent on the last of the specified days for the payment thereof, just before sunset. As where the proviso in a lease is, "that, if the rent shall be behind and unpaid by the space of thirty or any other number of days after the days of payment, it shall be lawful for the lessor to re-enter," a demand must be made of the precise rent in arrear on the thirtieth or other last day, a convenient time just before and until sunset, upon the land, or at the dwelling-house, or the *most* notorious place. 1 Saund. 287, n. 16. 7 T. R. 117.

The 11 Geo. II. c. 19, s. 16 gives the landlord a summary remedy, by application to two justices of the peace, where a tenant at rack-rent, or at full three-fourths of the yearly value, being in arrear a year's rent, deserts the premises and leaves the same uncultivated or unoccupied and no sufficient distress thereon. In such case, after fourteen days' notice, the justices may put the landlord in possession; and the 57 Geo. III. c. 52 extends the regulation to such tenants as are half a year in arrear. As to the proceeding of the justices under these acts, and how far the record of such proceedings will be conclusive in their behalf, see 3 Bar. & Cres. 649.

Difficulties having frequently arisen, and considerable expenses having been incurred, by reason of the refusal of persons who had been permitted to occupy, or who had intruded themselves into, *parish* houses, to deliver up possession of such houses, by stat. 59 Geo. III. c. 12, s. 24, two justices are empowered in such cases to cause possession to be delivered to church-wardens and overseers. The mode of proceeding is prescribed by this statute. The visitors and feoffees of a free grammar-school who have dismissed the school-master for misconduct cannot maintain ejectment for the school-house till they have determined the master's interests therein, upon summons in the ordinary manner,

*207] *2. The writ of *quare ejecit infra terminum* lieth, by the antient law, where the wrong-doer or ejector is not himself in possession of the lands, but another who claims under him. As where a man leaseth lands to another for years, and, after, the lessor or reversioner entereth and maketh a feoffment in fee, or for life, of the same lands to a stranger: now the lessee cannot bring a writ of *ejectione firmæ* or ejectment against the feoffee; because he did not eject him, but the reversioner; neither can he have any such action to recover his term against the reversioner who did oust him, because he is not now in possession. And upon that account this writ was devised, upon the equity of the statute of Westm. 2, c. 24, as in a case where no adequate remedy was already provided.(*b*) And the action is brought against the feoffee for deforcing, or keeping out, the original lessee during the continuance of his term; and herein, as in the ejectment, the plaintiff shall recover so much of the term as remains, and also shall have actual damages for that portion of it whereof he has been unjustly deprived. But since the introduction of fictitious ousters, whereby the title may be tried against any tenant in possession, (by what means soever he acquired it,) and the subsequent recovery of damages by action of trespass for mesne profits, this action is fallen into disuse.[14]

CHAPTER XII.

OF TRESPASS.

*208] *In the two preceding chapters we have considered such injuries to real property as consisted in an ouster or amotion of the possession. Those which remain to be discussed are such as may be offered to a man's real property without any amotion from it.

The second species, therefore, of real injuries, or wrongs that affect a man's lands, tenements, or hereditaments, is that of *trespass*. Trespass, in its largest and most extensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live, whether it relates to a man's person or his property. Therefore, beating another is a trespass, for which (as we have formerly seen) an action of trespass *vi et armis* in assault and battery will lie; taking or detaining a man's goods are respectively trespasses, for which an action of trespass *vi et armis*, or on the case in trover and conversion, is given by the law: so also, non-performance of promises or undertakings is a trespass, upon which an action of trespass on the case in *assumpsit* is grounded: and, in general, any misfeasance or act of one man whereby another is injuriously treated or damnified is a transgression or trespass in its largest sense: for which we have already seen(*a*) that whenever the act itself is directly and immediately injurious to the person or property of another, *209] *and therefore necessarily accompanied with some force, an action of trespass *vi et armis* will lie; but, if the injury is only consequential, a special action of trespass *on the case* may be brought.[1]

(*b*) F. N. B. 193. (*a*) See page 123.

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when he might be heard to answer the charges forming the ground of dismissal. 1 Bing. 357. 8 T. R. 109.—Chitty.

[14] And has now been for some time abolished. 3 & 4 W. IV. c. 27, s. 36.—Stewart.

[1] See these distinctions fully considered, 1 Chitty on Pl. 115 to 122 and 149 to 172. The distinctions between actions of trespass *vi et armis* for an immediate injury, and actions of trespass upon the case for a consequential damage, are frequently very subtle. See the subject much considered in 2 Bl. Rep. 892. In a case where an action of trespass *vi et armis* was brought against the defendant for throwing a lighted squib in a public market, which fell upon a stall, the owner of which, to defend himself and his goods, took it up and threw it to another part of the market, where it struck the plaintiff and

But, in the limited and confined sense in which we are at present to consider it, it signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of *meum* and *tuum*, or property in lands, being once established, it follows as a necessary consequence that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil: every entry, therefore, thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression. The Roman laws seem to have made a direct prohibition necessary in order to constitute this injury: "*qui alienum fundum ingreditur, potest a domino, si is præviderit, prohiberi ne ingrediatur.*"(*b*) But the law of England, justly considering that much inconvenience may happen to the owner before he has an opportunity to forbid the entry, has carried the point much further, and has treated every entry upon another's lands (unless by the owner's leave, or in some very particular cases) as an injury or wrong, for satisfaction of which an action of trespass will lie; but determines the *quantum* of that satisfaction, by considering how far the offence was wilful or inadvertent, and by estimating the value of the actual damage sustained.[2]

Every unwarrantable entry on another's soil the law entitles a trespass *by breaking his close:* the words of the writ of trespass commanding the defendant to show cause *quare clausum querentis fregit.* For every man's land is, in the eye of the law, enclosed and set apart from his neighbour's; and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal, invisible boundary, *existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other; for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, viz., the treading down and bruising his herbage.(*c*)[3] [*210

One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass;[4] or, at

(*b*) Inst. 2, 1, 12. (*c*) F. N. B. 87, 88.

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put out his eye, the question was much discussed whether the person injured ought to have brought an action of trespass *vi et armis*, or an action upon the case; and one of the four judges strenuously contended that it ought to have been an action upon the case. But I should conceive that the question was more properly this,—viz., whether an action of trespass *vi et armis* lay against the original or the intermediate thrower, or whether the act of the second thrower was involuntary, (which seems to have been the opinion of the jury,) or wilful and mischievous, and, if so, whether the first thrower alone ought not to have been answerable for the consequences. For if A. throws a stone at B., which, after it lies quietly at his foot, B. takes up and throws again at C., it is presumed that C. has his action against B. only; but if it is thrown at B., and B., by warding it off from himself, gives it a different direction, in consequence of which it strikes C., in that case it is wholly the act of A., and B. must be considered merely as an inanimate object, which may chance to divert its course. In the case of Leame *vs.* Bray, 3 East, 598, it was decided that if one man drives a carriage, being on the wrong side of the road, against another carriage, though unintentionally, the action ought to be trespass *vi et armis;* and the court declare generally that if the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis* by all the cases both ancient and modern.' —CHRISTIAN.

[2] Trespass for breaking a close is sustainable without previous notice; but it is most prudent to serve a notice and proceed for a subsequent trespass, upon which the judge on the trial will usually certify that the trespass was wilful, which will entitle plaintiff to full costs, though the damages be under 40*s*. 8 & 9 W. III. c. 11, s. 4. 3 Wils. 325 6 T. R. 11. 7 T. R. 449. 3 East, 405.—CHITTY.

[3] In an action of trespass for entering the grounds of another person and sporting over them, the jury may take into consideration, in determining their verdict, not only the actual damage sustained by the plaintiff, but circumstances of aggravation and insult on the part of the defendant. Merest *vs.* Harvey, 1 Marsh. 139. 5 Taunt. 442.—CHITTY.

[4] By the term "property either absolute or temporary" the student might be led to suppose that this action is only maintainable by one who is lawful owner or lawfully in

least, it is requisite that the party have a lease and possession of the vesture and herbage of the land.(*d*)[5] Thus, if a meadow be divided annually among the parishioners by lot, then, after each person's several portion is allotted, they may be respectively capable of maintaining an action for the breach of their several closes:(*e*) for they have an exclusive interest and freehold therein for the time. But before entry and actual possession one cannot maintain an action of trespass, though he hath the freehold in law.(*f*) And therefore an heir before entry cannot have this action against an abator; though a disseisee might have it against the disseisor, for the injury done by the disseisin itself, at which time the plaintiff was seised of the land; but he cannot have it for any act done after the disseisin until he hath gained possession by re-entry, and then he may well maintain it for the intermediate damage done; for after his re-entry the law, by a kind of *jus postliminii*, supposes the freehold to have all along continued in him.(*g*) Neither, by the common law, in case of an intrusion or deforcement, could the party kept out of possession sue the wrong-doer by a mode of redress which was calculated merely for injuries committed against the land while *in the possession* of the owner. But now, by the statute 6 Anne, c. 18, if a guardian or trustee for any infant, a husband seised *jure uxoris*, or a person having any estate or interest determinable upon a life or lives, shall, after the *determination of their respective interests, hold over and *211] continue in possession of the lands or tenements without the consent of the person entitled thereto, they are adjudged to be trespassers; and any reversioner or remainder-man expectant on any life-estate may once in every year, by motion to the court of chancery, procure the *cestuy que vie* to be produced by the tenant to the land, or may enter thereon in case of his refusal or wilful neglect. And by the statutes of 4 Geo. II. c. 28, and 11 Geo. II. c. 19, in case, after the determination of any term of life, lives, or years, any person

(*d*) Dyer, 285. 2 Roll. Abr. 549.
(*e*) Cro. Eliz. 421.
(*f*) 2 Roll. Abr. 553.
(*g*) 11 Rep. 5.

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possession. But the action is founded on possession, not on title. In his original complaint, the plaintiff relies only on his possession, and discloses no title; nor will he be bound to prove any, unless the defendant destroys the presumption arising from his possession by showing a title *prima facie* good in himself. Even if it should appear clearly that the plaintiff's possession was wrongful, he will recover damages in case the defendant is also a wrong-doer and has no title to rely on. Graham *vs.* Peat, 1 East, 244. Catteris *vs.* Cowper, 4 Taunt. 547.—Coleridge.

Where no one is in possession,—the land being vacant and uncultivated,—the party having the title or right of possession may maintain trespass. Gillespie *vs.* Dew, 1 Stew. 229. Aiken *vs.* Buck, 1 Wend. 466. Goodrich *vs.* Hathaway, 1 Verm. 485. It is settled that the owner of wild and uncultivated land is to be deemed in possession so as to maintain trespass until an adverse possession is clearly made out. Mather *vs.* Trinity Church, 3 Serg. & Rawle, 513. Cook *vs.* Foster, 2 Gilman, 652. Smith *vs.* Yell, 3 English, 470. "In a mere uncultivated country, in wild and impenetrable woods, in the sullen and solitary haunts of beasts of prey, what notoriety could an entry, a gathering of a twig or an acorn, convey to civilized man at the distance of hundreds of miles? The reason of the rule could not apply to such a state of things; and *cessante ratione, cessat ipsa lex.* We are entirely satisfied that a conveyance of wild or vacant lands gives a constructive seisin thereof in deed to the grantee: it attaches to him all the legal remedies incident to the estate." Story, J., in Green *vs.* Liter *et al*, 8 Cranch, 249.—Sharswood.

[5] As to the possession and title essential, see Chitty on Pl. 159 to 166. An exclusive interest in the crop, without an interest in the soil, is sufficient to sustain an action of trespass, (3 Burr. 1826. Bro. Abr. Tresp. 273. Bull. N. P. 85;) but possession, actual or constructive, must be proved. 1 East, 244. 4 Taunt. 547. 6 East, 602. Trespass will not lie for entering a pew or seat, because the plaintiff has not the *exclusive* possession, the possession of the church being in the parson. 1 T. R. 430. If trees are excepted in the lease, the land whereon they grow is necessarily excepted also: consequently the landlord may maintain trespass *for breaking his close*, if the tenant cut down the trees. Selw. N. P. 1287. Where two fields are separated by a hedge and ditch, the hedge *prima facie* belongs to the owner of the field in which the ditch is not. If there is a ditch on each side, the ownership of the hedge must be proved by acts of ownership. Ib. 1288. A person may cut his ditch to the edge of his own land; but if he goes beyond, he is a trespasser on his neighbour's land, though he may cut as wide as he pleases on his own land. 3 Taunt. 138.—Chitty.

shall wilfully hold over the same, the lessor or reversioner is entitled to recover by action of debt, either at the rate of double the annual value of the premises in case he himself hath demanded and given notice in writing to the tenant to deliver the possession; or else double the usual rent in case the notice of quitting proceeds from the tenant himself, having power to determine his lease, and afterwards neglects to carry that notice into due execution.[6]

A man is answerable for not only his own trespass, but that of his cattle also; for, if by his negligent keeping they stray upon the land of another, (and much more if he permits, or drives them on,) and they there tread down his neighbour's herbage and spoil his corn or his trees, this is a trespass for which the owner must answer in damages, and the law gives the party injured a double remedy in this case, by permitting him to distrain the cattle thus *damage-feasant*, or doing damage, till the owner shall make him satisfaction, or else by leaving him to the common remedy *in foro contentioso*, by action. And the action that lies in either of these cases of trespass committed upon another's land either by a man himself or his cattle is, the action of trespass *vi et armis*, whereby a man is called upon to answer *quare vi et armis clausum ipsius A., apud B., fregit, et blada ipsius A., ad valentiam centum solidorum, ibidem nuper crescentia cum quibusdam averiis depastus fuit, conculcavit, et consumpsit, &c.*:(*h*) for the law always couples the idea of force with that of intrusion upon the property of another. And herein, if any unwarrantable act of the *defendant or his beasts in coming upon the land be proved, [*212 it is an act of trespass for which the plaintiff must recover some damages; such, however, as the jury shall think proper to assess.

In trespasses of a permanent nature, where the injury is continually renewed, (as by spoiling or consuming the herbage with the defendant's cattle,) the declaration may allege the injury to have been committed by *continuation* from one given day to another, (which is called laying the action with a *continuando*,) and the plaintiff shall not be compelled to bring separate actions for every day's separate offence.(*i*) But where the trespass is by one or several acts, each of which terminates in itself, and being once done cannot be done again, it cannot be laid with a *continuando*; yet if there be repeated acts of trespass committed, (as cutting down a certain number of trees,) they may be laid to be done, not continually, but at divers days and times within a given period.(*k*)[7]

In some cases trespass is justifiable, or, rather, entry on another's land or house shall not in those cases be accounted trespass; as if a man comes thither to demand or pay money there payable, or to execute in a legal manner the process of the law. Also, a man may justify entering into an inn or public house without the leave of the owner first specially asked, because when a man professes the keeping such inn or public house he thereby gives a general license to any person to enter his doors. So a landlord may justify entering to distrain for rent; a commoner, to attend his cattle commoning on another's land; and a reversioner, to see if any waste be committed on the estate; for the apparent necessity of the thing.(*l*) Also, it hath been said that, by the common law and custom of England, the poor are allowed to enter and glean upon

(*h*) Registr. 94.
(*i*) 2 Roll. Abr. 545. Lord Raym. 240.
(*k*) Salk. 638, 639. Lord Raym. 823. 7 Mod. 152.
(*l*) 8 Rep. 146.

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[6] See 2 book, p. 151. Upon these statutes it has been determined that it is not necessary that the notice from the tenant should be in writing: but notice from the landlord to the tenant must. Burr. 1603. Bla. Rep. 533. And the 4 Geo. II. extends to cases where the tenant holds over fraudulently and perversely only, not where he continues his possession under a *bona fide* claim of right. 5 Esp. 203. See also ib. 215. The action for double rent may be maintained after recovery in ejectment. 9 East. 310.—CHITTY.

[7] The latter mode prevails in modern practice, and the form of declaring with a *continuando* has grown obsolete. Under the statement that the defendant, on a day named, and on divers other days and times between that day and the commencement of the suit, trespassed, the plaintiff may prove any number of trespasses within those limits, though none are specified except those on the earliest day named. 1 Stark. R. 351.—CHITTY.

*213] another's ground after the harvest without *being guilty of trespass :(m) which humane provision seems borrowed from the Mosaical law.(n)[8]

In like manner the common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land, because the destroying such creatures is said to be profitable to the public.(o)[9] But in cases where a man misdemeans himself or makes an ill use of the authority with which the law intrusts him, he shall be accounted a trespasser *ab initio* :(p) as if one comes into a tavern and will not go out in a reasonable time, but tarries there all night contrary to the inclinations of the owner; this wrongful act shall affect and have relation back, even to his first entry, and make the whole a trespass.(q) But a bare non-feasance, as not paying for the wine he calls for, will not make him a trespasser; for this is only a breach of contract, for which the taverner shall have an action of debt or *assumpsit* against him.(r) So, if a landlord distrained for rent and wilfully killed the distress, this, by the common law, made him a trespasser *ab initio* :(s) and so, indeed, would any other irregularity have done, till the statute 11 Geo. II. c. 19, which enacts that no subsequent irregularity of the landlord shall make his first entry a trespass; but the party injured shall have a special action of trespass or on the case, for the real specific injury sustained, unless tender of amends hath been made. But still, if a reversioner, who enters on pretence of seeing waste, breaks the house, or stays there all night; or if the commoner who comes to tend his cattle cuts down a tree; in these and similar cases the law judges that he entered for this unlawful purpose, and therefore, as the act which demonstrates such his purpose is a trespass, he shall be esteemed a trespasser *ab initio*.(t) So also, in the case of hunting the fox or the badger, a man cannot justify breaking the soil *214] and digging him out of his earth; for though *the law warrants the hunting of such noxious animals for the public good, yet it is held(u) that such things must be done in an ordinary and usual manner; therefore, as there is an ordinary course to kill them, viz., by hunting, the court held that the digging for them was unlawful.

A man may also justify in an action of trespass, on account of the freehold and right of entry being in himself; and this defence brings the title of the estate in question. This is therefore one of the ways devised, since the disuse of real actions, to try the property of estates; though it is not so usual as that by ejectment, because that, being now a mixed action, not only gives damages

(m) Gilb. Ev. 253. Trials *per pais*, ch. 15, p. 438.
(n) Levit. xix. 9, and xxiii. 22. Deut. xxiv. 19, &c.
(o) Cro. Jac. 321.
(p) Finch, L. 47. Cro. Jac. 148.
(q) 2 Roll. Abr. 561.
(r) 8 Rep. 147.
(s) Finch, L. 47.
(t) 8 Rep. 146.
(u) Cro. Jac. 321.

[8] Two actions of trespass have been brought in the Common Pleas against gleaners, with an intent to try the general question.—viz., whether such a right existed. In the first, the defendant pleaded that he, being a poor, necessitous, and indigent person, entered the plaintiff's close to glean; in the second, the defendant's plea was as before, with the addition that he was an inhabitant legally settled within the parish. To the plea in each case there was a general demurrer. Mr. J. Gould delivered a learned judgment in favour of gleaning, but the other three judges were clearly of opinion that this claim had no foundation in law; that the only authority to support it was an extra-judicial dictum of lord Hale; that it was a practice incompatible with the exclusive enjoyment of property, and was productive of vagrancy and many mischievous consequences. 1 H. Bl. Rep. 51, 52, n. (a.)—Chitty.

[9] It has been determined that it is lawful to follow a fox with horses and hounds over another's grounds, if no more damage be done than is necessary for the destruction of the animal by such a pursuit, (1 T. R. 338;) but, in the Earl of Essex *vs.* Capel, Hertford Assizes, A.D. 1809, 2 Chitty Game L. 1381, a different doctrine was laid down by lord Ellenborough, who said, "These pleasures are to be taken only when there is the consent of those who are likely to be injured by them; but they must be necessarily subservient to the consent of others. There may be such a public nuisance by a noxious animal as may justify the running him to his earth; but then you cannot justify the digging for him afterwards: that has been ascertained and settled to be law; but even if an animal may be pursued with dogs, it does not follow that fifty or sixty people have therefore a right to follow the dogs and trespass on other people's lands." The jury, under his lordship's direction, found a verdict for the plaintiff. And see 1 Stark. 351.—Chitty.

for the ejection, but also possession of the land: whereas in trespass, which is merely a personal suit, the right can be only ascertained, but no possession delivered; nothing being recovered but damages for the wrong committed.

In order to prevent trifling and vexatious actions of trespass, as well as other personal actions, it is (*inter alia*) enacted by statutes 43 Eliz. c. 6, and 22 & 23 Car. II. c. 9, § 136, that where the jury, who try an action of trespass, give less damages than forty shillings, the plaintiff shall be allowed no more costs than damages, unless the judge shall certify under his hand that the freehold or title of the land came chiefly in question.[10] But this rule now admits of two exceptions more, which have been made by subsequent statutes. One is by statute 8 & 9 W. III. c. 11, which enacts, that in all actions of trespass, wherein it shall appear that the trespass was wilful and malicious, and it be so certified by the judge, the plaintiff shall recover full costs.[11] Every trespass is *wilful*, where the defendant has notice, and is especially forewarned not to come on the land; as every trespass is *malicious*, though the damage may not amount to forty shillings, where the intent of the defendant plainly appears to *be to harass and distress the plaintiff. The other exception is by statute 4 & 5 W. and [*215 M. c. 23, which gives full costs against any inferior tradesman, apprentice, or other dissolute person, who is convicted of a trespass in hawking, hunting, fishing, or fowling, upon another's land. Upon this statute it has been adjudged, that if a person be an inferior tradesman, as a clothier for instance, it matters not what qualification he may have in point of estate; but, if he be guilty of such trespass, he shall be liable to pay full costs.(*w*)[12]

CHAPTER XIII.

OF NUISANCE.

*A THIRD species of real injuries to a man's lands and tenements, is [*216 by *nuisance*. Nuisance, *nocumentum*, or annoyance, signifies any thing that worketh hurt, inconvenience, or damage. And nuisances are of two kinds: *public* or *common* nuisances, which affect the public, and are annoyance to *all* the king's subjects: for which reason we must refer them to the class of public wrongs, or crimes and misdemeanours: and *private* nuisances, which are the objects of our present consideration, and may be defined, any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another.(*a*) We will therefore, first, mark out the several kinds of nuisances, and then their respective remedies.

(*w*) Lord Raym. 149. (*a*) Finch, L. 188.

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[10] And if this appears upon the face of the pleadings, it is considered tantamount to the judge's certificate, and the plaintiff is entitled to his full costs. 2 Lev. 234. 1 East, 350. Selw. N. P. 1324. 6 T. R. 281. 7 T. R. 650. See, also, *post*, 401, n. 21.—ARCHBOLD.

But by stat. 3 & 4 Vict. c. 24, explained by stat. 4 & 5 Vict. c. 28, these statutes are repealed, and their provisions are consolidated and extended; it being enacted that if the plaintiff in any action of trespass, either to the person, or to real or personal property, or for libel, slander, or malicious prosecution, brought in any of her Majesty's courts at Westminster, shall recover less damages than 40*s*., he shall not be entitled to recover any costs whatever, whether it shall be given upon any issue tried or judgment passed by default, unless the judge or presiding officer shall certify on the back of the record (if the action be in trespass) that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought.—STEWART.

[11] It has been supposed that the judge must certify in open court after the trial, otherwise the certificate is void, (2 Wils. 21;) but the contrary has recently been decided. 2 B. & C. 580, 621.—CHITTY.

[12] But now, by the stat. 1 & 2 W. IV. c. 32, s. 1, this act is repealed; and, by s. 6, all certificated persons are allowed to sport, subject to the law of trespass.—STEWART.

I. In discussing the several kinds of nuisances, we will consider, first, such nuisances as may affect a man's corporeal hereditaments, and then those that may damage such as are incorporeal.

1. First, as to *corporeal* inheritances. If a man builds a house so close to mine that his roof overhangs my roof and throws the water off his roof upon mine, this is a nuisance, for which an action will lie.(*b*) Likewise to erect a house or other building so near to mine that it obstructs my antient *lights and windows, is a nuisance of a similar nature.(*c*) But in this latter case it is necessary that the windows be *antient*, that is, have subsisted there a long time without interruption; otherwise there is no injury done. For he hath as much right to build a new edifice upon his ground as I have upon mine; since every man may erect what he pleases upon the upright or perpendicular of his own soil, so as not to prejudice what has long been enjoyed by another; and it was my folly to build so near another's ground.(*d*)[1] Also if a person keeps his hogs, or other noisome animals, so near the house of another that the stench of them incommodes him and makes the air unwholesome,[2] this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house.(*e*) A like injury is, if one's neighbour sets up and exercises an offensive trade; as a

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(*b*) F. N. B. 184.
(*c*) 9 Rep. 58.
(*d*) Cro. Eliz. 118. Salk. 459.
(*e*) 9 Rep. 58.

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[1] Where A. had enjoyed lights made in a building not erected at the extremity of his land, looking upon the premises of B., without interruption for at least thirty-eight years, and there was no evidence of the time when the lights were first put out, and C., the purchasor of B.'s premises, erected in their stead a building which obstructed A.'s lights: held that an action was maintainable for the obstruction, though there was no proof of knowledge in B. or his agents of the existence of the windows. Cross *vs.* Lewis, 2 B. & C. 686. 4 D. & R. 234, S. C. Where the plaintiff is entitled to lights by means of blinds fronting a garden of the defendant's, which he takes away, and opens an uninterrupted view into the garden, the defendant cannot justify making an erection to prevent the plaintiff from so doing, if he thereby render the plaintiff's house more dark than before. Cotterell *vs.* Griffiths, 4 Esp. 69. A parol license to put a sky-light over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling-house through a window) cannot be recalled at pleasure after it has been executed at the defendant's expense,—at least not without tendering the expenses he had been put to; and therefore no action lies as for a private nuisance in stopping the light and air, &c. and communicating a stench from the defendant's premises to the plaintiff's house by means of such sky-light. Winter *vs.* Brockwell, 8 East, 308. If an ancient window be raised and enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of light and air to any part of the space occupied by the ancient window, although a greater portion of light and air be admitted through the unobstructed part of the enlarged window than was anciently enjoyed. Chandler *vs.* Thompson, 3 Camp. 80. Le Blanc, J. To constitute an illegal obstruction, by building, of the plaintiff's ancient lights, it is not sufficient that the plaintiff has less light than he had before, but there must be such a privation of light as will render the occupation of his house uncomfortable, and prevent him, if in trade, from carrying on his business as beneficially as he had previously done. Back *vs.* Stacy, 2 C. & P. 485. Best, L. C. J. C. P. The occupier of one of two houses built nearly at the same time and purchased of the same proprietor may maintain a special action on the case against the tenant of the other for obstructing his window-lights by adding to his own building, however short the previous period of enjoyment by the plaintiff. Compton *vs.* Richards, 1 Price, 27. And where the owner of a house divided into two tenements demised one of them to the defendant: held that he was liable to an action on the case for obstructing windows existing in the house at the time of the demise, although of recent construction, and though there was no stipulation against the obstruction. Rivieri *vs.* Bower, 1 R. & M. 24. Abbott, [Lord Tenterden,] L. C. J. If an ancient light has been completely shut up with bricks and mortar above twenty years, it loses its privilege. Lawrence *vs.* Obee, 3 Camp. 514. Lord Ellenborough, L. C. J.—Chitty.

[2] Lord Mansfield has said that "it is not necessary that the smell should be unwholesome: it is enough if it renders the enjoyment of life and property uncomfortable." 1 Burr. 337.

So also it will be a nuisance if life is made uncomfortable by the apprehension of danger: it has therefore been held to be a nuisance, a misdemeanour, to keep great quantities of gunpowder near dwelling-houses. 2 Stra. 1167.—Christian.

tanner's, a tallow-chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, "*sic utere tuo, ut alienum non lædas:*" this therefore is an actionable nuisance.(*f*) So that the nuisances which affect a man's *dwelling* may be reduced to these three: 1. Overhanging it; which is also a species of trespass, for *cujus est solum, ejus est usque ad cœlum:*[3] 2. Stopping antient lights: and, 3. Corrupting the air with noisome smells: for light and air are two indispensable requisites to every dwelling.[4] But depriving one of a mere matter of pleasure, as of a fine prospect by building a wall, or the like: this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance.(*g*)

As to nuisance to one's *lands:* if one erects a smelting-house for lead so near the land of another, that the vapour and smoke kill his corn and grass, and damage his cattle therein, this is held to be a nuisance.(*h*) And by consequence it follows, that if one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance: for it is incumbent on *him to find some other place to do [*218 that act, where it will be less offensive. So also if my neighbour ought to scour a ditch, and does not, whereby my land is overflowed, this is an actionable nuisance.(*i*)

With regard to *other* corporeal hereditaments: it is a nuisance to stop or divert water that uses to run to another's meadow[5] or mill;(*k*) to corrupt or poison a water-course, by erecting a dye-house or a lime-pit for the use of trade, in the upper part of the stream;(*l*) or, in short, to do any act therein that in its consequences must necessarily tend to the prejudice of one's neighbour. So closely does the law of England enforce that excellent rule of gospel morality, of "doing to others as we would they should do unto ourselves."

2. As to *incorporeal* hereditaments, the law carries itself with the same equity.[6] If I have a way, annexed to my estate, across another's land, and he obstructs me in the use of it, either by totally stopping it, or putting logs across it, or ploughing over it, it is a nuisance: for in the first case I cannot enjoy my right

(*f*) Cro. Car. 510.
(*g*) 9 Rep. 58.
(*h*) 1 Roll. Abr. 89.
(*i*) Hale on F. N. B. 427.
(*k*) F. N. B. 184.
(*l*) 9 Rep. 59. 2 Roll. Abr. 141.

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[3] But the following note of a case describes an injury not exactly coming within either of the above three sections. A. has immemorially had for watering his lands a channel through his own field, in a porous field, through the banks of which channel, when filled, the water percolates and thence passes through the contiguous soil of B. below the surface without producing visible injury. B. builds a new house in his land below the level of his soil, in the current of the percolating water. Held that A. cannot now justify filling his channel, if the percolating water thereby injures the house of B. Cowper *vs.* Barber, 3 Taunt. 99.—CHITTY.

[4] And where defendant employed a steam-engine in his business, as a printer, which produced a continual noise and vibration in the plaintiff's apartment, which adjoined the premises of the defendant, it was held that this was a nuisance. Duke of Northumberland *vs.* Clowes, C. P. at Westminster, A.D. 1824.—CHITTY.

[5] After twenty years' uninterrupted enjoyment of a spring of water, an absolute right to it is gained by the occupier of the close in which it issues above ground; and the owner of an adjoining close cannot lawfully cut a drain whereby the supply of water by the spring is diminished. Balston *vs.* Bensted, 1 Camp. 463. Lord Ellenborough, L. C. J. And see Bealey *vs.* Shaw, 6 East, 208. 2 Smith, 321, S. C.—CHITTY.

[6] Here we should mention a recent change in the law which limits actions and suits relating to incorporeal hereditaments. The prescriptive rights to profits and easements over the soil of another were rendered very difficult of proof, as by the ancient rule of the common law enjoyment of such rights was to be proved from time whereof the memory of man ran not to the contrary, or during legal memory. This rule was partly alleviated by the modern practice of the courts and the doctrine of *presumption*, by which proof of enjoyment as far as living witnesses could speak was held sufficient to raise a presumption of enjoyment from a remote era, and a grant would be presumed; but still frequent difficulties arose, to obviate which the statute 2 & 3 W. IV. c. 71 has been passed, under which the periods at which claims may be made for incorporeal hereditaments are much limited.—STEWART.

at all, and in the latter I cannot enjoy it so commodiously as I ought.(*m*) Also, if I am entitled to hold a fair or market, and another person sets up a fair or market so near mine that he does me a prejudice, it is a nuisance to the freehold which I have in my market or fair.(*n*) But, in order to make this out to be a nuisance, it is necessary, 1. That my market or fair be the elder, otherwise the nuisance lies at my own door. 2. That the market be erected within the third part of twenty miles from mine. For Sir Matthew Hale(*o*) construes the *dieta*, or reasonable day's journey, mentioned by Bracton,(*p*) to be twenty miles; as indeed it is usually understood, not only in our own law,(*q*) but also in the civil,(*r*) from which we probably borrowed it. So that if the new market be *219] not within seven miles of the old one, it is no *nuisance: for it is held reasonable that every man should have a market within one-third of a day's journey from his own home; that, the day being divided into three parts, he may spend one part in going, another in returning, and the third in transacting his necessary business there. If such market or fair be on the same day with mine, it is *prima facie* a nuisance to mine, and there needs no proof of it, but the law will intend it to be so; but if it be on any other day, it *may* be a nuisance: though whether it *is* so or not, cannot be intended or presumed, but I must make proof of it to the jury. If a ferry is erected on a river, so near another antient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness, for the ease of all the king's subjects; otherwise he may be grievously amerced:(*s*) it would be therefore extremely hard if a new ferry were suffered to share his profits which does not also share his burden. But where the reason ceases, the law also ceases with it: therefore it is no nuisance to erect a mill so near mine as to draw away the custom, unless the miller also intercepts the water. Neither is it a nuisance to set up any trade, or a school, in a neighbourhood or rivalship with another: for by such emulation the public are like to be gainers; and, if the new mill or school occasion a damage to the old one, it is *damnum absque injuria*.(*t*)

II. Let us next attend to the remedies which the law has given for this injury of nuisance. And here I must premise that the law gives no *private* remedy for any thing but a *private* wrong. Therefore no *action* lies for a public or common nuisance, but an *indictment* only: because, the damage being common to all the king's subjects, no *one* can assign his particular proportion of it; or, if he could, it would be extremely hard if every subject in the kingdom were allowed to harass the offender with separate actions. For this reason, no person, natural or corporate, can have an action for a public nuisance, or punish *220] it; but only the king in his public *capacity of supreme governor and *pater-familias* of the kingdom.(*u*) Yet this rule admits of one exception, where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance, in which case he shall have a private satisfaction by action.[7] As if, by means of a ditch dug across the public way, which is a common nuisance, a man or his horse suffer any injury by falling therein; there, for this particular damage, which is not common to others, the party shall have his action.(*w*)[8] Also, if a man hath abated or re-

(*m*) F. N. B. 183. 2 Roll. Abr. 140.
(*n*) F. N. B. 148. 2 Roll. Abr. 140.
(*o*) Hale on F. N. B. 184.
(*p*) *L.* 3, c. 16.
(*q*) 2 Inst. 567.
(*r*) *Ff.* 2, 11, 1.
(*s*) 2 Roll. Abr. 140.
(*t*) Hale on F. N. B. 184.
(*u*) Vaugh. 341, 342.
(*w*) Co. Litt. 56. 5 Rep. 73.

[7] Every person who suffers actual damage, whether direct or consequential, from a common nuisance may maintain an action for his own particular injury. Lansing *vs.* Smith, 4 Wend. 9. Abbot *vs.* Mills, 3 Verm. 529. The damage occasioned by a nuisance need not be direct to support an action. Erecting a dam in a navigable stream, that obstructed plaintiff's raft, is a sufficient damage. Hughes *vs.* Heiser, 1 Binn. 463. Pittsburg *vs.* Scott, 1 Barr. 309.—Sharswood.

[8] But the particular damage in this case must be direct, and not consequential, as by being delayed in a journey of importance. Bull. N. P. 26. Carth. 194. And if the plaintiff has not acted with ordinary care and skill, with a view to protect himself from the mischief, he cannot recover. 11 East, 60. 2 Taunt. 414. It is upon the same prin-

moved a nuisance which offended him, (as we may remember it was stated in the first chapter of this book that the party injured hath a right to do,) in this case he is entitled to no action.(x) For he had choice of two remedies: either without suit, by abating it himself by his own mere act and authority, or by suit, in which he may both recover damages and remove it by the aid of the law; but, having made his election of one remedy, he is totally precluded from the other.[9]

The remedies by suit are, 1. By action *on the case* for damages, in which the party injured shall only recover a satisfaction for the injury sustained, but cannot thereby remove the nuisance. Indeed, every continuance of a nuisance is held to be a fresh one;(y) and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it.[10] Yet the founders of the law of England did not rely upon probabilities merely, in order to give relief to the injured. They have therefore provided two other actions: the *assize of nuisance*, and the writ of *quod permittat prosternere;* which not only give the plaintiff satisfaction for his injury past, but also strike at the root and remove the cause itself, the nuisance that occasioned the injury. These two actions, however, can only be brought by the tenant of the freehold; so that a lessee for years is confined to his action upon the case.(z)

*2. An *assize of nuisance* is a writ, wherein it is stated that the party injured complains of some particular fact done, *ad nocumentum liberi tenementi sui*, and therefore commanding the sheriff to summon an assize, that is, a jury, and view the premises, and have them at the next commission of assizes, that justice may be done therein:(a) and if the assize is found for the plaintiff, he shall have judgment of two things: 1. To have the nuisance abated; and, 2. [*221

(x) 9 Rep. 55.
(y) 2 Leon. pl. 129. Cro. Eliz. 402.
(z) Finch, L. 289.
(a) F. N. B. 183.

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ciple that parties suffering special damage by a public nuisance are entitled, under 5 W. and M. c. 11, s. 3, to receive their expenses in prosecuting an indictment against the party guilty of the nuisance. See 16 East, 196. Willes, 71. Cro. Eliz. 664. If a party living in the neighbourhood, and who has been in the habit of passing to and fro on a highway, is obliged by a nuisance thereto to take a more circuitous route in his transit to and from the nearest market-town to his house, it is a private injury, for which he may sue as well as indict. 3 M. & S. 472. So, being delayed four hours by an obstruction in a highway, and being thereby prevented from performing the same journey as many times in a day as if the obstruction had not existed, is a sufficient injury to entitle a party to sue for the obstruction. 2 Bingh. 283. So, if the nuisance prevent the plaintiff navigating his barges on a public navigable creek, and compel him to convey his goods out of the same over a great distance of land, it is actionable. 4 M. & S. 101. But the mere obstruction of the plaintiff in his business, (1 Esp. N. C. 148. 4 M. & S. 103,) or delaying him a little while in a journey, (Carth. 191,) is not such a damage as will entitle the party to his action: the damage ought to be direct, not consequential. Carth. 191.

There are also various other injuries which partake of both a criminal and civil nature, for which both an indictment as well as an action will lie,—as for a forcible entry, enticing away a servant, using false weights, disobeying an order of justices, extortion, or for a libel, &c.—CHITTY..

[9] If one abates a private nuisance, he cannot afterwards maintain an assize of nuisance; but he may maintain an action on the case to recover damages. Tate *vs.* Parrish, 7 Monroe. 325. The commentator cites no authority for the position in the text. The distinction taken in the American case seems a reasonable one. The nuisance must be subsisting at the time an assize is commenced, but surely need not be to entitle the party who has suffered a special injury to recover his damages.—SHARSWOOD.

[10] An action for continuing a nuisance cannot be maintained against him who did not erect it, without a previous request made to him to remove or abate it. Pierson *vs.* Glean, 2 Green, 36.

Parties who cause a nuisance by acts done on the land of a stranger are liable for its continuance; and it is no defence that they cannot lawfully enter to abate the nuisance without rendering themselves liable to an action by the owner of the land. Smith *vs.* Elliott, 9 Barr. 345. One who demises premises for carrying on a business necessarily injurious to the adjacent proprietors is liable as the author of the nuisance. Fisk *vs.* Dodge, 4 Denio, 317.—SHARSWOOD.

To recover damages.(*b*) Formerly an assize of nuisance only lay against the very wrong-doer himself who levied or did the nuisance, and did not lie against any person to whom he had alienated the tenements whereon the nuisance was situated. This was the immediate reason for making that equitable provision in statute Westm. 2, 13 Edw. I. c. 24, for granting a similar writ *in casu consimili*, where no former precedent was to be found. The statute enacts that "*de cetero non recedant querentes a curia domini regis, pro eo quod tenementum transfertur de uno in alium;*" and then gives the form of a new writ in this case; which only differs from the old one in this, that where the assize is brought against the very person only who levied the nuisance, it is said "*quod A.* the [wrong-doer] *injuste levavit tale nocumentum;*" but, where the lands are aliened to another person, the complaint is against both, "*quod A.* [the wrong-doer] *et B.* [the alienee] *levaverunt.*"(*c*) For every continuation, as was before said, is a fresh nuisance, and therefore the complaint is as well grounded against the alienee who continues it as against the alienor who first levied it.

3. Before this statute, the party injured, upon any alienation of the land wherein the nuisance was set up, was driven to his *quod permittat prosternere*, which is in the nature of a writ of right, and therefore subject to greater delays.(*d*) This is a writ commanding the defendant to permit the plaintiff to *222] abate, *quod permittat prosternere*, the nuisance complained of; *and, unless he so permits, to summon him to appear in court, and show cause why he will not.(*e*) And this writ lies as well *for* the alienee of the party first injured, as *against* the alienee of the party first injuring; as hath been determined by all the judges.(*f*) And the plaintiff shall have judgment herein to abate the nuisance, and to recover damages against the defendant.

Both these actions of *assize of nuisance*, and of *quod permittat prosternere*, are now out of use,[11] and have given way to the action on the case; in which, as was before observed, no judgment can be had to abate the nuisance, but only to recover damages. Yet, as therein it is not necessary that the freehold should be in the plaintiff and defendant respectively, as it must be in these real actions, but it is maintainable by one that hath possession only, against another that hath like possession, the process is therefore easier,[12] and the effect will be much the same, unless a man has a very obstinate as well as an ill-natured neighbour; who had rather continue to pay damages than remove his nuisance. For in such a case recourse must at last be had to the old and sure remedies, which will effectually conquer the defendant's perverseness, by sending the sheriff with his *posse comitatus*, or power of the county, to level it.

CHAPTER XIV.

OF WASTE.

*223] *The fourth species of injury, that may be offered to one's real property, is by *waste*, or destruction in lands and tenements. What shall be called waste was considered at large in a former book,(*a*) as it was a means of forfeiture, and thereby of transferring the property of real estates. I shall, therefore, here only beg leave to remind the student, that waste is a spoil and destruction of the estate, either in houses, woods, or lands; by demolishing

(*b*) 9 Rep. 55.
(*c*) 9 Rep. 55.
(*d*) 2 Inst. 405.
(*e*) F. N. B. 124.
(*f*) 5 Rep. 100, 101.
(*a*) See book ii. ch. 18.

[11] Both are now abolished, by the stat. 3 & 4 W. IV. c. 27.—Stewart.

[12] It must not be inferred from this that the reversioner cannot maintain this action; for if the nuisance be calculated to affect his reversionary interest, he can maintain an action on the case for damages as well as the person in possession. See Beddingfield *vs.* Onslow, 3 Lev. 209. Leader *vs.* Moxon, 3 Wils. 461. 3 Black. 924, S. C.—Archbold.

not the temporary profits only, but the very substance of the thing; thereby rendering it wild and desolate; which the common law expresses very significantly by the word *vastum;* and that this *vastum*, or waste, is either voluntary, or permissive; the one by an actual and designed demolition of the lands, woods, and houses; the other arising from mere negligence, and want of sufficient care in reparations, fences, and the like. So that my only business is at present to show to whom this waste is an injury; and of course who is entitled to any, and what, remedy by action.

I. The persons who may be injured by waste are such as have some *interest* in the estate wasted; for if a man be the absolute tenant in fee-simple,[1] without any encumbrance or charge on the premises, he may commit whatever waste his *own indiscretion may prompt him to, without being impeachable, or accountable for it to any one. And, though his heir is sure to be the [*224 sufferer, yet *nemo est hæres viventis;* no man is certain of succeeding him, as well on account of the uncertainty which shall die first, as also because he has it in his power to constitute what heir he pleases, according to the civil-law notion of an *hæres natus* and an *hæres factus;* or, in the more accurate phraseology of our English law, he may aliene or devise his estate to whomever he thinks proper, and by such alienation or devise may disinherit his heir at law. Into whose hands soever, therefore, the estate wasted comes, after a tenant in fee-simple, though the waste is undoubtedly *damnum*, it is *damnum absque injuria.*

One species of interest which is injured by waste is that of a person who has a right of common in the place wasted; especially if it be common of *estovers*, or a right of cutting and carrying away wood for house-bote, plough-bote, &c. Here, if the owner of the wood demolishes the whole wood, and thereby destroys all possibility of taking estovers, this is an injury to the commoner, amounting to no less than a disseisin of his common of estovers, if he chooses so to consider it; for which he has his remedy to recover possession and damages by assize, if entitled to a freehold in such common; but if he has only a chattel interest, then he can only recover damages by an action on the case for this waste and destruction of the woods out of which his estovers were to issue.(*b*)

But the most usual and important interest, that is hurt by this commission of waste, is that of him who hath the remainder or reversion of the *inheritance*, after a particular estate for life or years in being. Here, if the particular tenant, (be it the tenant in dower or by curtesy, who was answerable for waste at the common law,(*c*) or the lessee for life or years, *who was first made liable [*225 by the statutes of Marlberge(*d*) and of Glocester,)(*e*) if the particular tenant, I say, commits or suffers any waste, it is a manifest injury to him that has the inheritance, as it tends to mangle and dismember it of its most desirable incidents and ornaments, among which timber and houses may justly be reckoned the principal. To him therefore in remainder and reversion, to whom the *inheritance* appertains in expectancy,(*f*) the law hath given an adequate remedy. For he, who hath the remainder *for life* only, is not entitled to sue for waste; since his interest may never perhaps come into possession, and then he hath suffered no injury.[2] Yet a parson, vicar, archdeacon, prebendary, and the like, who are seised in right of their churches of any remainder or reversion,

(*b*) F. N. B. 59. 9 Rep. 112.
(*c*) 2 Inst. 299.
(*d*) 52 Hen. III. c. 23.
(*e*) 6 Edw. I. c. 5.
(*f*) Co. Litt. 53.

[1] A tenant in fee-tail has the same uncontrolled and unlimited power in committing waste as a tenant in fee-simple.—CHRISTIAN.

[2] No person is entitled to an action of waste against a tenant for life but he who has the immediate estate of *inheritance* in remainder or reversion, expectant upon the estate for life. If between the estate of the tenant for life who commits waste, and the subsequent estate of inheritance, there is interposed an estate of freehold to any person *in esse*, then, during the continuance of such interposed estate, the action of waste is suspended; and if the first tenant for life dies during the continuance of such interposed estate, the action is gone forever. Co. Litt. 218, b. 2 Saund. 252, note 7. See further, as to the persons who may maintain a writ or action for waste, id. ibid.—CHRISTIAN.

may have an action of waste; for they, in many cases, have for the benefit of the church and of the successor a fee-simple qualified; and yet, as they are not seised in their own right, the writ of waste shall not say, *ad exhæredationem ipsius*, as for other tenants in fee-simple; but *ad exhæredationem ecclesiæ*, in whose right the fee-simple is holden.(*g*)

II. The redress for this injury of waste is of two kinds; preventive and corrective: the former of which is by writ of *estrepement*, the latter by that of *waste*.

1. Estrepement is an old French word, signifying the same as waste or extirpation: and the writ of *estrepement* lay at the common law, *after* judgment obtained in any action real,(*h*) and before possession was delivered by the sheriff; to stop any waste which the vanquished party might be tempted to commit in lands which were determined to be no longer his. But as in some cases the demandant may be justly apprehensive that the tenant may make waste or *estrepement* pending the suit, well knowing the weakness of his title, therefore the statute of Glocester(*i*) gave another writ of *estrepement pendente placito*, *226] commanding the sheriff firmly *to inhibit the tenant "*ne faciat vastum vel estrepementum pendente placito dicto indiscusso.*"(*k*) And by virtue of either of these writs the sheriff may resist them that do, or offer to do, waste; and, if otherwise he cannot prevent them, he may lawfully imprison the wasters, or make a warrant to others to imprison them: or, if necessity require, he may take the *posse comitatus* to his assistance. So odious in the sight of the law is waste and destruction.(*l*) In suing out these two writs this difference was formerly observed; that in actions merely possessory, where no damages are recovered, a writ of *estrepement* might be had at any time *pendente lite*, nay, even at the time of suing out the original writ, or first process: but, in an action where damages were recovered, the demandant could only have a writ of *estrepement*, if he was apprehensive of waste after verdict had;(*m*) for, with regard to waste done before the verdict was given, it was presumed the jury would consider that in assessing the *quantum* of damages. But now it seems to be held, by an equitable construction of the statute of Glocester, and in advancement of the remedy, that a writ of *estrepement*, to prevent waste, may be had in every stage, as well of such actions wherein damages are recovered, as of those wherein only possession is had of the lands; for peradventure, saith the law, the tenant may not be of ability to satisfy the demandant his full damages.(*n*) And therefore now, in an action of waste itself, to recover the place wasted and also damages, a writ of *estrepement* will lie, as well before as after judgment. For the plaintiff cannot recover damages for more waste than is contained in his original complaint; neither is he at liberty to assign or give in evidence any waste made after the suing out of the writ: it is therefore reasonable that he should have this writ of *preventive* justice, since he is in his present suit debarred of any further *remedial*.(*o*) If a writ of *estrepement*, forbidding waste, be directed and delivered to the tenant himself, as it may be, and he afterwards proceeds to *227] commit waste, an action may be carried on upon the *foundation of this writ; wherein the only plea of the tenant can be, *non fecit vastum contra prohibitionem:* and, if upon verdict it be found that he did, the plaintiff may recover costs and damages,(*p*) or the party may proceed to punish the defendant for the contempt: for if, after the writ directed and delivered to the tenant or his servants, they proceed to commit waste, the court will imprison them for this contempt of the writ.(*q*) But not so, if it be directed to the sheriff, for then it is incumbent upon him to prevent the *estrepement* absolutely, even by raising the *posse comitatus*, if it can be done no other way.

Besides this preventive redress at common law, the courts of equity, upon bill exhibited therein, complaining of waste and destruction, will grant an injunction in order to stay waste, until the defendant shall have put in his answer, and the

(*g*) Co. Litt. 341.
(*h*) 2 Inst. 328.
(*i*) 6 Edw. I. c. 13.
(*k*) Registr. 77.
(*l*) 2 Inst. 329.
(*m*) F. N. B. 60, 61.
(*n*) Ibid. 61.
(*o*) 5 Rep. 115.
(*p*) Moor. 100.
(*q*) Hob. 85.

court shall thereupon make further order. Which is now become the most usual way of preventing waste.[3]

2. A writ of *waste*[4] is also an action, partly founded upon the common law, and partly upon the statute of Glocester;(*r*) and may be brought by him who hath the immediate estate of inheritance in reversion or remainder, against the tenant for life, tenant in dower, tenant by curtesy, or tenant for years. This action is also maintainable in pursuance of statute(*s*) Westm. 2, by one tenant in common of the inheritance against another, who makes waste in the estate holden in common. The equity of which statute extends to joint-tenants, but not to coparceners; because by the old law coparceners might make partition, whenever either of them thought proper, and thereby prevent future waste, but tenants in common and joint-tenants could not; and therefore the statute gave them this remedy, compelling the defendant either to make partition, and take the place wasted to his own share, or to give security not to commit any further waste.(*t*) But these tenants in common and joint-tenants are *not liable to the penalties of the statute of Glocester, which extends only to such as have life-estates, and do waste to the prejudice of the inheritance. The waste, however, must be something considerable; for if it amount only to twelve pence, or some such petty sum, the plaintiff shall not recover in an action of waste; *nam de minimis non curat lex.*(*u*)[5] [*228

This action of waste is a mixed action; partly real, so far as it recovers land; and partly personal, so far as it recovers damages. For it is brought for both those purposes; and, if the waste be proved, the plaintiff shall recover the thing or place wasted, and also treble damages by the statute of Glocester. The writ of waste calls upon the tenant to appear and show cause why he hath committed waste and destruction in the place named, *ad exhæredationem*, to the disinherison, of the plaintiff.(*w*) And if the defendant makes default, or does not appear at the day assigned him, then the sheriff is to take with him a jury of twelve men, and go in person to the place alleged to be wasted, and there inquire of the waste done, and the damages; and make a return or report of the same to

(*r*) 6 Edw. I. c. 5.
(*s*) 13 Edw. I. c. 22.
(*t*) 2 Inst. 403, 404.
(*u*) Finch, L. 29.
(*w*) F. N. B. 55.

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[3] And is now the only one, the writ of *estrepement* having been abolished. 3 & 4 W. IV. c. 27, s. 36.—STEWART.

[4] The action or writ of waste is now very seldom brought, and has given way to a much more expeditious and easy remedy, by an *action on the case in the nature of waste.* The plaintiff derives the same benefit from it as from an action of waste in the *tenuit*, where the term is expired and he has got possession of his estate, and consequently can only recover damages for the waste; and though the plaintiff cannot in an action on the case recover the place wasted, where the tenant is still in possession, as he may do in an action of waste in the *tenet*, yet this latter action was found by experience to be so imperfect and defective a mode of recovering seisin of the place wasted that the plaintiff obtained little or no advantage from it; and therefore, where the demise was by deed, care was taken to give the lessor power of re-entry in case the lessee committed any waste or destruction; and an action on the case was then found to be much better adapted for the recovery of mere damages than an action of waste in the *tenuit*. It has also this further advantage over an action of waste, that it may be brought by him in the reversion or remainder for *life* or *years*, as well as in fee or in tail; and the plaintiff is entitled to costs in this action, which he cannot have in an action of waste. However, this action on the case prevailed at first with some difficulty. 3 Lev. 130. 4 Burr. 2141.

But now it is become the usual action as well for permissive as voluntary waste. Some recent decisions have made it doubtful whether an action on the case for permissive waste can be maintained against any tenant for years. See 1 New Rep. 290. 4 Taunt. 764. 7 Taunt. 302. 1 Moore, 100, S. C. See also 1 Saund. 323, a., n. (i.) Where the lessee even covenants not to do waste, the lessor has his election to bring either an action on the case, or of covenant against the lessee, for waste done by him during the term. 2 Black. Rep. 1111. See, further, 2 Saund. 252, and 1 Chitty on Pl. 4th ed. 132, 133.—CHITTY.

[5] See 2 Bos. & Pul. 86. But the doctrine that the smallness of the damages given by the jury shall defeat the action does not extend to other actions. See 1 Dowl. Rep. 209. 2 East, 154.—CHITTY.

the court, upon which report the judgment is founded.(x) For the law will not suffer so heavy a judgment, as the forfeiture and treble damages, to be passed upon a mere default, without full assurance that the fact is according as it is stated in the writ. But if the defendant appears to the writ, and *afterwards* suffers judgment to go against him by default, or upon a *nihil dicit*, (when he makes no answer, puts in no plea, in defence,) this amounts to a confession of the waste; since, having once appeared, he cannot now pretend ignorance of the charge. Now, therefore, the sheriff shall not go to the place to inquire of the fact whether any waste has, or has not, been committed; for this is already ascertained by the silent confession of the defendant; but he shall only, as in defaults upon other actions, make inquiry of the *quantum* of *damages.(y) *229] The defendant, on the trial, may give in evidence any thing that proves there was no waste committed, as that the destruction happened by lightning, tempest, the king's enemies, or other inevitable accident.(z)[6] But it is no defence to say that a stranger did the waste, for against him the plaintiff hath no remedy; though the defendant is entitled to sue such stranger in an action of trespass *vi et armis*, and shall recover the damages he has suffered in consequence of such unlawful act.(a)

When the waste and damages are thus ascertained, either by confession, verdict, or inquiry of the sheriff, judgment is given in pursuance of the statute of Glocester, c. 5, that the plaintiff shall recover the place wasted,[7] for which he has immediately a writ of *seisin*, provided the particular estate be still subsisting, (for, if it be expired, there can be no forfeiture of the land,) and also that the plaintiff shall recover treble the damages assessed by the jury, which he must obtain in the same manner as all other damages, in actions personal and mixed, are obtained, whether the particular estate be expired, or still in being.[8]

(x) Poph. 24. (y) Cro. Eliz. 18, 290. (z) Co. Litt. 53. (a) Law of *Nisi Prius*, 112.

[6] Action on the case doth not lie for permissive waste. 5 Rep. 13. Hale MSS. The case cited by lord Hale is that of the countess of Salop, who brought an action on the case against her tenant at will for negligently keeping his fire so that the house was burned; and the whole court held that neither action on the case nor any other action lay, because at common law, and before the statute of Glocester, action did not lie for waste against tenant for life or years, or any other tenant coming in by agreement of parties, and tenant at will is not within the statute. But if tenant at will stipulates with his lessor to be responsible for fire by negligence or for other permissive waste, without doubt an action will lie on such express agreement. The same observation holds with respect to tenants for life or years before the statute of Glocester; for though the law did not make them liable to any action, yet it did not restrain them from making themselves liable by agreement. At the common law lessees were not answerable to landlords for accidental or negligent burning; for as to fires by accident, it is expressed in Fleta that *fortuna ignis vel hujusmodi eventûs inopinati omnes tenentes excusant;* and lady Shrewsbury's case is a direct authority to prove that tenants are equally excusable for fires by negligence. Fleta, lib. i. c. 12. Then came the statute of Glocester, which, by making tenants for life and years liable to waste without exception, consequently rendered them answerable for destruction by fire; but now, by the 6 Anne, c. 31, the ancient law is restored, for the statute of Anne exempts all persons from actions for accidental fire in any house, except in the case of special agreements between landlord and tenant. See 14 Geo. III. c. 78, s. 86. It was doubted under this statute whether a covenant to repair generally extends to the case of fire, and so becomes an agreement within the statute; and therefore, where it is intended that the tenant shall not be liable, it has been usual in the covenant for repairing expressly to except accidents by fire. See Harg. Co. Litt. 57, a.—Christian.

But it is now settled that a general unqualified covenant to repair subjects the tenant to the expense of rebuilding. 6 T. R. 650. The tenant at all events continues liable to pay rent. 3 Anst. 687. 3 Dowl. 233. 1 T. R. 310. 4 Taunt. 45. 18 Ves. Jr. 115.—Chitty.

[7] The verdict for the plaintiff in a writ of waste ought to find the place wasted. 2 Bingh. R. 262.—Chitty.

[8] But this writ of waste has also been abolished, by 3 & 4 W. IV. c. 27, s. 36; and there now only remain therefore the two remedies already referred to: the first, to restrain waste by obtaining an injunction in a court of equity; and the second, to obtain damages for the waste after it has been committed, by an action on the case in a court of law, which action lies not only against the tenant, but against any stranger by whom an act of waste has been committed.—Stewart.

CHAPTER XV.

OF SUBTRACTION.

*SUBTRACTION, which is the fifth species of injuries affecting a man's real property, happens when any person who owes any suit, duty, custom, or service to another withdraws or neglects to perform it. It differs from a disseisin, in that *this* is committed without any denial of the right, consisting merely of non-performance; *that* strikes at the very title of the party injured, and amounts to an ouster or actual dispossession. Subtraction, however, being clearly an injury, is remediable by due course of law; but the remedy differs according to the nature of the services, whether they be due by virtue of any tenure, or by custom only. [*230

I. Fealty, suit of court, and rent are duties and services usually issuing and arising *ratione tenuræ*, being the conditions upon which the antient lords granted out their lands to their feudatories, whereby it was stipulated that they and their heirs should take the oath of fealty or fidelity to their lord, which was the feodal bond, or *commune vinculum*, between lord and tenant; that they should do suit or duly attend and follow the lord's courts, and there from time to time give their assistance, by serving on juries, either to decide the property of their neighbours in the court-baron or correct their misdemeanours in the court-leet; and, lastly, that they should yield to the lord certain annual stated returns, in military attendance, in provisions, in arms, in matters of ornament or pleasure, in rustic employments or *prædial labours, or (which is *instar omnium*) in money, which will provide all the rest; all which are comprised under the one general name of *reditus*, return, or rent. And the subtraction or non-observance of any of these conditions, by neglecting to swear fealty, to do suit of court, or to render the rent or service reserved, is an injury to the freehold of the lord, by diminishing and depreciating the value of his seignory. [*231

The general remedy for all these is by *distress;* and it is the only remedy at the common law for the two first of them. The nature of distresses, their incidents and consequences, we have before more than once explained:(*a*) it may here suffice to remember that they are a taking of beasts or other personal property by way of pledge to enforce the performance of something due from the party distrained upon. And, for the most part, it is provided that distresses be reasonable and moderate; but in the case of distress for fealty or suit of court, no distress can be unreasonable, immoderate, or too large:(*b*) for this is the only remedy to which the party aggrieved is entitled, and therefore it ought to be such as is sufficiently compulsory; and, be it of what value it will, there is no harm done, especially as it cannot be sold or made away with, but must be restored immediately on satisfaction made. A distress of this nature, that has no bounds with regard to its quantity and may be repeated from time to time until the stubbornness of the party is conquered, is called a *distress infinite;* which is also used for some other purposes, as in summoning jurors, and the like.

Other remedies for subtraction of rents or services are, 1. By action of *debt*, for the breach of this express contract, of which enough has been formerly said. This is the most usual remedy when recourse is had to any action at all for the recovery of pecuniary rents, to which species of render almost all free services are now reduced since the abolition of the military tenures. But for a freehold rent, reserved on *a lease for life, &c., no action of *debt* lay by the common law during the continuance of the freehold out of which it issued;(*c*) for the law would not suffer a *real* injury to be remedied by an action that was merely *personal*. However, by the statutes 8 Anne, c. 14, and 5 Geo. III. c. 17, actions of debt may now be brought at any time to recover [*232

(*a*) See pages 6, 148. (*b*) Finch, L. 285. (*c*) 1 Roll. Abr. 595.

such freehold rents. 2. An assize of *mort d'ancestor* or *novel disseisin* will lie of rents as well as of lands,(*d*) if the lord, for the sake of trying the possessory right, will make it his election to suppose himself ousted or disseised thereof. This is now seldom heard of; and all other real actions to recover rents, being in the nature of writs of right, and therefore more dilatory in their progress, are entirely disused, though not formally abolished by law.[1] Of this species, however, is, 3. The writ *de consuetudinibus et servitiis*, which lies for the lord against his tenant who withholds from him the rents and services due by custom or tenure for his land.(*e*) This compels a specific payment or performance of the rent or service; and there are also others, whereby the lord shall recover the land itself in lieu of the duty withheld. As, 4. The writ of *cessavit;* which lies by the statutes of Glocester, 6 Edward I. c. 4, and of Westm. 2, 13 Edw. I. c. 21 and 41, when a man who holds lands of a lord by rent or other services neglects or *ceases* to perform his services for two years together; or where a religious house hath lands given it on condition of performing some certain spiritual service, as reading prayers or giving alms, and neglects it; in either of which cases, if the *cesser* or neglect have continued for two years, the lord or donor and his heirs shall have a writ of *cessavit* to recover the land itself, *eo quod tenens in faciendis servitiis per biennium jam cessavit.*(*f*) In like manner, by the civil law, if a tenant who held lands upon payment of rent or services, or "*jure emphyteutico,*" neglected to pay or perform them *per totum triennium*, he might be ejected from such emphyteutic lands.(*g*) But, by the statute of Glocester, the *cessavit* does not lie for lands let upon fee-farm rents, unless they *233] have lain fresh and uncultivated for two years, and there be *not sufficient distress upon the premises; or unless the tenant hath so enclosed the land that the lord cannot come upon it to distrain.(*h*) For the law prefers the simple and ordinary remedies by distress or by the actions just now mentioned to this extraordinary one of forfeiture for a *cessavit:* and therefore the same statute of Glocester has provided further, that upon tender of arrears and damages before judgment, and giving security for the future performance of the services, the process shall be at an end, and the tenant shall retain his land; to which the statute of Westm. 2 conforms so far as may stand with convenience and reason of law.(*i*) It is easy to observe that the statute(*k*) 4 Geo. II. c. 28 (which permits landlords who have a right of re-entry for non-payment of rent to serve an ejectment on their tenants when half a year's rent is due and there is no sufficient distress on the premises) is in some measure copied from the antient writ of *cessavit*: especially as it may be satisfied and put an end to in a similar manner, by tender of the rent and costs within six months after. And the same remedy is, in substance, adopted by statute 11 Geo. II. c. 19, § 16,[2] which enacts that where any tenant at rack-rent shall be one year's rent in arrear, and shall desert the demised premises, leaving the same uncultivated or unoccupied, so that no sufficient distress can be had; two justices of the peace (after notice affixed on the premises for fourteen days without effect) may give the landlord possession thereof, and thenceforth the lease shall be void. 5. There is also another very effectual remedy, which takes place when the tenant upon a writ of assize for rent, or on a replevin, disowns or disclaims his tenure, whereby the lord loses his verdict; in which case the lord may have a writ of right, *sur disclaimer*, grounded on this denial of tenure; and shall upon proof of the tenure recover back the land itself so holden, as a punishment to the tenant for such his false disclaimer.(*l*) This piece of retaliating justice, whereby the tenant who endeavours to defraud his lord is himself deprived of the estate,

(*d*) F. N. B. 195.
(*e*) Ibid. 151.
(*f*) Ibid. 208.
(*g*) Cod. 4, 66, 2.
(*h*) F. N. B. 209. 2 Inst. 298.
(*i*) 2 Inst. 401, 460.
(*k*) See page 206.
(*l*) Finch, L. 270, 271.

[1] Now formally abolished, 3 & 4 W. IV. c. 27, s. 36.—Stewart.

[2] And see by 57 Geo. III. c. 52, which gives similar power though only half a year's rent is in arrear, and although no right of re-entry be reserved.—Chitty.

as it evidently proceeds upon feodal principles, *so it is expressly to be met with in the feodal constitutions:(m) "*vasallus, qui abnegavit feudum ejusve conditionem, exspoliabitur.*" [*234

And, as on the one hand the antient law provided these several remedies to obviate the knavery and punish the ingratitude of the tenant, so on the other hand it was equally careful to redress the oppression of the lord; by furnishing, 1. The writ of *ne injuste vexes;(n)* which is an antient writ founded on that chapter(o) of *magna carta,*[3] which prohibits distresses for greater services than are really due to the lord; being itself of the prohibitory kind, and yet in the nature of a writ of right.(p)[4] It lies, where the tenant in fee-simple and his ancestors have held of the lord by certain services, and the lord hath obtained seisin of more or greater services, by the inadvertent payment or performance of them by the tenant himself. Here the tenant cannot in an avowry avoid the lord's possessory right, because of the seisin given by his own hands; but is driven to this writ, to devest the lord's possession, and establish the mere right of property, by ascertaining the services, and reducing them to their proper standard. But this writ does not lie for tenant in tail; for he may avoid such seisin of the lord, obtained from the payment of his ancestors, by plea to an avowry in replevin.(q) 2. The writ of *mesne, de medio;* which is also in the nature of a writ of right,(r) and lies, when upon a subinfeudation the *mesne,* or middle lord,(s) suffers his under-tenant, or tenant *paravail,* to be distrained upon by the lord *paramount,* for the rent due to him from the mesne lord.(t) And in such case the tenant shall have judgment to be acquitted (or indemnified) by the mesne lord; and if he makes default therein, or does not appear originally to the tenant's writ, he shall be forejudged of his mesnalty, and the tenant shall hold immediately of the lord paramount himself.(u)[5]

*II. Thus far of the remedies for subtraction of rents or other services due by *tenure.* There are also other services due by antient *custom* and *prescription* only. Such is that of doing suit to another's mill: where the persons, resident in a particular place, by usage time out of mind have been accustomed to grind their corn at a certain mill; and afterwards any of them go to another mill, and withdraw their suit (their *secta, a sequendo*) from the antient mill. This is not only a damage, but an injury, to the owner; because this prescription might have a very reasonable foundation; viz., upon the erection of such mill by the ancestors of the owner for the convenience of the inhabitants, on condition that, when erected, they should all grind their corn there only. And for this injury the owner shall have a writ *de secta ad molendinum,*(w) commanding the defendant to do his suit at that mill, *quam ad illud facere debet, et solet,* or show good cause to the contrary: in which action the [*235

(m) Feud. l. 2, t. 26.
(n) F. N. B. 10.
(o) C. 10.
(p) Booth, 126.
(q) F. N. B. 11. 2 Inst. 21.
(r) Booth, 136.
(s) See book ii. ch. 5, pages 59, 60.
(t) F. N. B. 135.
(u) 2 Inst. 374.
(w) F. N. B. 123.

[3] Lord Coke (2 Inst. p. 21) expressly denies this, and cites the writ from Glanville, and says it is mentioned in the Mirror.—COLERIDGE.

[4] At common law an action on the case may be supported by a tenant, or third person, against a landlord for distraining for more rent than is due; and that is now the usual remedy. 2 Chitty on Pl. 4th ed. 719.—CHITTY.

[5] But these several writs have long been obsolete and are now abolished. 3 & 4 W. IV. c. 27, s. 36.—STEWART.

The remedy of the tenant in either of the cases above stated is now by an ordinary personal action. Where, as in the first case stated, the tenant has overpaid the landlord in ignorance of the facts, the money so overpaid is considered by the law to be money received for the use of the tenant, and the tenant may accordingly, provided there have been no laches on his part, recover it in an action. Marriott *vs.* Hampton, 2 Smith's Lead. Cases, 4th ed. p. 325, notes. In the second case stated,—that of an under-tenant paying the landlord in default of the mesne tenant's doing so,—the payment by the under-tenant is considered a payment *pro tanto* of the rent due to his immediate landlord, the mesne tenant, and may either be deducted from the rent accruing due to the mesne landlord, (Carter *vs.* Carter, 5 Bingh. 406,) or sued for in an action as money paid to his use. Exall *vs.* Partridge, 8 T. R. 308. Bandy *vs.* Cartwright, 8 Exc. 913.—KERR.

validity of the prescription may be tried, and if it be found for the owner, he shall recover damages against the defendant.(*x*) In like manner, and for like reasons, the register(*y*) will inform us, that a man may have a writ of *secta ad furnum, secta ad torrale, et ad omnia alia hujusmodi;* for suit due to his *furnum*, his public oven or bake-house; or to his *torrale*, his kiln, or malt-house; when a person's ancestors have erected a convenience of that sort for the benefit of the neighbourhood, upon an agreement (proved by immemorial custom) that all the inhabitants should use and resort to it when erected. But besides these special remedies for subtractions, to compel the specific performance of the service due by custom, an action *on the case* will also lie for all of them, to repair the party injured in damages.[6] And thus much for the injury of subtraction.

CHAPTER XVI.

OF DISTURBANCE.

*236] *THE sixth and last species of real injuries is that of *disturbance;* which is usually a wrong done to some incorporeal hereditament, by hindering or disquieting the owners in their regular and lawful enjoyment of it.(*a*) I shall consider five sorts of this injury: viz., 1. Disturbance of *franchises.* 2. Disturbance of *common.* 3. Disturbance of *ways.* 4. Disturbance of *tenure.* 5. Disturbance of *patronage.*

I. Disturbance of *franchises* happens when a man has the franchise of holding a court-leet, of keeping a fair or market, of free-warren, of taking toll, of seizing waifs or estrays, or (in short) any other species of franchise whatsoever, and he is disturbed or incommoded in the lawful exercise thereof. As if another, by distress, menaces, or persuasions, prevails upon the suitors not to appear at my court; or obstructs the passage to my fair or market; or hunts in my free-warren; or refuses to pay me the accustomed toll; or hinders me from seizing the waif or estray, whereby it escapes or is carried out of my liberty; in every case of this kind, all which it is impossible here to recite or suggest, there is an injury done to the legal owner; his property is damnified; and the profits arising from such his franchise are diminished. To remedy which, as the *237] law has given no other writ, he is *therefore entitled to sue for damages by a special action *on the case;* or, in case of toll, may take a distress if he pleases.(*b*)

II. The disturbance of *common* comes next to be considered; where any act is done, by which the right of another to his common is incommoded or diminished. This may happen, in the first place, where one who hath no right of common puts his cattle into the land; and thereby robs the cattle of the commoners of their respective shares of the pasture. Or if one, who hath a right of common, puts in cattle which are not commonable, as hogs and goats; which amounts to the same inconvenience. But the lord of the soil may (by custom or prescription, but not without) put a stranger's cattle into the common;(*c*) and also, by a like prescription for common appurtenant, cattle that are not commonable may be put into the common.(*d*) The lord also of the soil may justify making burrows therein, and putting in rabbits, so as they do not increase to so large a number as totally to destroy the common.(*e*) But in general in case the beasts of a stranger, or the uncommonable cattle of a commoner, be found upon the land,

(*x*) Co. Entr. 461.
(*y*) Fol. 153.
(*a*) Finch. L. 187.
(*b*) Cro. Eliz. 558.
(*c*) 1 Roll. Abr. 396.
(*d*) Co. Litt. 122.
(*e*) Cro. Eliz. 876. Cro. Jac. 195. Lutw. 108.

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[6] This is now the only action in use for most of the injuries specified in this chapter, the ancient appropriate writs having become so obsolete that few special pleaders, if any would know how to proceed in them. See, further, 2 Saund. 113, b.—CHRISTIAN.

the lord or any of the commoners may distrain them damage-feasant:(*f*) or the commoner may bring an action on the case to recover damages, provided the injury done be any thing considerable: so that he may lay his action with a *per quod*, or allege that *thereby* he was deprived of his common. But for a trivial trespass the commoner has no action; but the lord of the soil only, for the entry and trespass committed.(*g*)[1]

Another disturbance of common is by *surcharging* it; or putting more cattle therein than the pasture and herbage will sustain, or the party hath a right to do. In this case he that surcharges does an injury to the rest of the owners, by depriving them of their respective portions, or at least *contracting them into a smaller compass. This injury by surcharging can, properly speaking, only happen where the common is *appendant* or *appurtenant*,(*h*) and of course limitable by law; or where, when *in gross*, it is expressly limited and certain; for where a man hath common *in gross*, *sans nombre* or *without stint*, he cannot be a surcharger. However, even where a man is said to have common without stint, still there must be left sufficient for the lord's own beasts;(*i*) for [*238

(*f*) 9 Rep. 112.
(*g*) Ibid.
(*h*) See book ii. ch. 3.
(*i*) 1 Roll. Abr. 399.

[1] If cattle escape into the common, and are driven out by the owner as soon as he has notice, though the lord may have his action of trespass, yet the commoner cannot bring his action upon the case, because sufficient feeding still remains for him. But if cattle are permitted to depasture the common, whether they belong to a stranger or are the supernumerary cattle of a commoner, an action lies; and it is not necessary to prove specific injury, for the *right* of the commoner is injured by such an act, and, if permitted, the wrong-doer might gain a right by repeated acts of encroachment. 2 Bla. Rep. 1233. 4 T. R. 71. 2 East, 154. 1 Saund. 346, b. And where A., being possessed of a portion of a lammas-field over which a right of common existed part of the year, took down the customary post-and-rail fence, containing gaps through which the commoner's cattle might pass, and built a *wall* with a single doorway, at which they might enter and return, it was held that this was a disturbance of the common right, and an action was maintainable, though the abridgment of the right was inconsiderable. 1 McCleland's Rep. 373. One farthing damages will sustain the verdict in such case. Ib.; and 2 East, 154. It has been held that a claim of common for all the plaintiff's cattle *levant* and *couchant* on his land was supported by evidence of a custom for all the occupiers of a large common field to turn cattle into the whole field when the corn was taken off, the number of cattle being regulated by the extent, and not the produce of each man's land in the field, although the cattle were not actually maintained on such land during the winter. 1 B. & A. 706. In an action for disturbance of common, where the plaintiff stated that he was possessed of a *messuage and land*, by reason whereof he was entitled to the right of common, and it appeared on the trial that he was possessed of land only, it was held that the allegation was divisible, and the plaintiff entitled to damages *pro tanto*. 2 B. & A. 360. See 15 East, 115. The declaration must in all cases allege that the plaintiff thereby could not use his common in so ample a manner as he ought to have done. 9 Co. 113, a.—CHITTY.

The passage referred to in the Reports is this:—"If the trespass be so small that the commoner has not any loss, but sufficient in ample manner remains for him, no action lies for it." Mr. Serjeant Williams observes that this must be understood with some restriction. Undoubtedly if cattle escape into the common and are driven out by the owner as soon as he has notice, though the lord may have an action of trespass for the injury to his soil, the commoner cannot bring an action upon the case; for this seems to fall directly within the rule. But if cattle are permitted to depasture the common, whether they are a stranger's or the supernumerary cattle of a commoner, whether they are driven or escape there, a commoner may have an action upon the case, in which it does not seem necessary for him to prove any *specific injury* sustained. The consumption of the grass by the other cattle is of itself a diminution of the right and profit of the commoner, and considered as a sufficient proof of the damage alleged in the declaration; for if the other cattle had not been there, the commoner's cattle might have eaten every blade of grass which was consumed by the other. Besides, the law considers that the *right* of the commoner is injured by such an act, and therefore allows him to bring an action for it to prevent the wrong-doer from gaining a right by repeated acts of encroachment. For wherever any act injures another's right, and would also be evidence in favour of the wrong-doer claiming the right on any future occasion, an action may be maintained for such act without proof of any specific injury. Mellor *vs.* Spateman, 1 Saund. Rep. 546, a., n. 2, citing Wells *vs.* Watling, 2 Bla. Rep. 1233. Hobson *vs.* Todd, 4 T. R. 71.—COLERIDGE.

the law will not suppose that, at the original grant of the common, the lord meant to exclude himself.[2]

The usual remedies, for surcharging the common, are either by distraining so many of the beasts as are above the number allowed, or else by an action of trespass, both which may be had by the lord: or lastly, by a special action on the case for damages; in which any commoner may be plaintiff.(*j*) But the antient and most effectual method of proceeding is by writ of *admeasurement* of *pasture*. This lies either where a common appurtenant or in gross is certain as to number, or where a man has common appendant or appurtenant to his land, the quantity of which common has never yet been ascertained. In either of these cases, as well the lord,[3] as any of the commoners, is entitled to this writ of admeasurement; which is one of those writs that are called *vicontiel*,(*k*) being directed to the sheriff, (*vicecomiti*,) and not to be returned to any superior court till finally executed by him. It recites a complaint, that the defendant hath surcharged, *superoneravit*, the common; and therefore commands the sheriff to admeasure and apportion it; that the defendant may not have more than belongs to him, and that the plaintiff may have his rightful share. And upon this suit all the commoners shall be admeasured, as well those who have not as those who have surcharged the common; as well the plaintiff as the defendant.(*l*) *239] The execution of this writ must be by a jury of twelve men, who are upon their *oaths to ascertain, under the superintendence of the sheriff, what and how many cattle each commoner is entitled to feed. And the rule for this admeasurement is generally understood to be, that the commoner shall not turn more cattle upon the common than are sufficient to manure and stock the land to which his right of common is annexed; or, as our antient law expressed it, such cattle only as are *levant* and *couchant* upon his tenement;(*m*) which, being a thing uncertain before admeasurement, has frequently, though erroneously, occasioned this unmeasured right of common to be called a common *without stint* or *sans nombre*;(*n*) a thing which, though possible in law,(*o*) does in fact very rarely exist.[4]

(*j*) Freem. 273.
(*k*) 2 Inst. 369. Finch, L. 314.
(*l*) F. N. B. 125.
(*m*) Bro. Abr. tit. *prescription*, 28.
(*n*) Hardr. 117.
(*o*) Lord Raym. 407.

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[2] The modern doctrine upon this subject is somewhat different; for it is now held that a prescription for a sole and several pasture, &c. in exclusion of the owner of the soil *for the whole year* is good, (2 Lev. 2. Pollexf. 13. 1 Mod. 74;) for it does not exclude the lord from all the profits of the soil, as he is entitled to the mines, trees, and quarries. And though a man cannot prescribe to have common *eo nomine* for the *whole* year in exclusion of the lord, (1 Lev. 268. 1 Ventr. 395,) still, the lord may by custom be restrained to a qualified right of common during a *part* of the year, (Yelv. 129;) and it is said the lord may be restrained, together with the commoners, from using the common at all during a part of the year. 1 Saund. 353, n. (2.) See also 2 H. Bl. 4. And it is said to have been clearly held that the commoners may prescribe to have common in exclusion of the lord for a part of the year. 2 Roll. Abr. 267, L. pl. 1.—Chitty.

This seems to be too generally expressed; for the lord's right may be narrowed down to any thing short of absolute exclusion for the whole year. He may, together with the commoners, be entirely excluded for a part of the year, his right may be limited to the feeding of a limited number for a part of the year, or the commoner may have the pasture entirely to his exclusion for a part of the year. Potter *vs.* North, 1 Saund. Rep. 353, n. 2.—Coleridge.

[3] Finch, in the passage cited, expressly says that "the lord cannot have the writ of admeasurement against his tenants surcharging; for he may distrain the surplusage for damage-feasant." And Fitz. N. B. 125, D. is an authority to the same effect. Lord Hale, citing several cases from the year-books, is of a different opinion. But all these seem agreed that the commoner cannot have it against the lord.—Coleridge.

[4] The lord may distrain not only the cattle of a stranger, but also so many of a commoner's cattle as surcharge the common. 2 Bla. R. 818. Willes, 638. A commoner can only distrain the cattle of a stranger, (1 Roll. Abr. 320, 405, pl. 5. Yelv. 104,) and not of the lord, (2 Buls. 117,) nor where a commoner overcharges the common, by putting in cattle that are not *levant* and *couchant*, can another commoner distrain the surplus, at least before admeasurement. 3 Wils. 287. 2 Lutw. 1238. 4 Burr. 2426. But where the right of common is limited to a *certain number* of cattle, without any relation to the quan-

If, after the admeasurement has thus ascertained the right, the same defendant surcharges the common again, the plaintiff may have a writ of *second surcharge, de secunda superoneratione*, which is given by the statute Westm. 2, 13 Edw. I. c. 8, and thereby the sheriff is directed to inquire by a jury whether the defendant has in fact again surcharged the common contrary to the tenure of the last admeasurement; and, if he has, he shall then forfeit to the king the supernumerary cattle put in, and also shall pay damages to the plaintiff.(*p*) This process seems highly equitable: for the first offence is held to be committed through mere inadvertence, and therefore there are no damages or forfeiture on the first writ, which was only to ascertain the right which was disputed; but the second offence is a wilful contempt and injustice, and therefore punished very properly with not only damages but also forfeiture. And herein the right, being once settled, is never again disputed; but only the fact is tried, whether there be any second surcharge or no: which gives this neglected proceeding[5] a great advantage over the modern method by action on the case, wherein the *quantum* of common belonging to the defendant must be proved upon every fresh trial for every repeated offence.

*There is yet another disturbance of common, when the owner of the land, or other person, so encloses or otherwise obstructs it that the commoner is precluded from enjoying the benefit to which he is by law entitled. [*240

This may be done either by erecting fences, or by driving the cattle off the land, or by ploughing up the soil of the common.(*q*) Or it may be done by erecting a warren therein, and stocking it with rabbits in such quantities that they devour the whole herbage and thereby destroy the common. For, in such case, though the commoner may not destroy the rabbits, yet the law looks upon this as an injurious disturbance of his right, and has given him his remedy by action against the owner.(*r*)[6] This kind of disturbance does indeed amount to a disseisin, and, if the commoner chooses to consider it in that light, the law has given him an assize of *novel disseisin*, against the lord, to recover the possession of his common.(*s*) Or it has given a writ of *quod permittat*, against any stranger, as well as the owner of the land, in case of such a disturbance to the plaintiff as amounts to a total deprivation of his common; whereby the defendant shall be compelled to permit the plaintiff to enjoy his common as he ought.(*t*) But if the commoner does not choose to bring a *real* action to recover seisin, or to try the right, he may (which is the easier and more usual way) bring an action on the case for his damages, instead of an assize or a *quod permittat*.(*u*)[7]

There are cases, indeed, in which the lord may enclose and abridge the common; for which, as they are no injury to any one, so no one is entitled to any remedy. For it is provided by the statute of Merton, 20 Hen. III. c. 4,

(*p*) F. N. B. 126. 2 Inst. 370.
(*q*) Cro. Eliz. 198.
(*r*) Cro. Jac. 195.
(*s*) F. N. B. 179.
(*t*) Finch, L. 275. F. N. B. 123.
(*u*) Cro. Jac. 195.

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tity of land which the commoner possesses, and he puts in a greater number, perhaps another commoner may distrain the supernumerary cattle. 4 Burr. 2431. It seems clear that a claim of common *pleaded* by an inhabitant, as an inhabitant merely, is bad: it must be pleaded either in the name of a corporation for the benefit of the inhabitants, or in a que estate. 6 Co. 69, b. 4 T. R. 717. 1 Saund. 346, f., n. (g.) But if the defendant be lord of the manor, or one who puts his cattle on the common with the lord's license, the commoner cannot maintain an action unless he has sustained a specific injury; for the lord is entitled to what remains of the grass, and therefore may consume it himself, or license another to depasture it. 4 T. R. 73. 2 Mod. 6. 6 Willes, 619.—CHITTY.

[5] Now abolished, 3 & 4 W. IV. c. 27, s. 36.—STEWART.

[6] It is the policy of the law not to allow commoners to abate, except only in a few cases; for an action will best ascertain the just measure of the damage sustained. But if the lord erect a wall, gate, hedge, or fence round the common, to prevent the commoner's cattle from going into the common, the commoner may abate the erection, because it is inconsistent with the grant. 1 Burr. 259. 6 T. R. 485.—CHITTY.

[7] This is now the only remedy, these real actions having been abolished. 3 & 4 W. IV. c. 27, s. 36.—STEWART.

that the lord may *approve*, that is, enclose and convert to the uses of husbandry, (which is a melioration or approvement,) any waste grounds, woods, or pastures, in which his tenants have common *appendant* to their estates, provided he leaves *sufficient common to his tenants, according to the proportion of their land. And this is extremely reasonable; for it would be very hard if the lord, whose ancestors granted out these estates to which the commons are appendant, should be precluded from making what advantage he can of the rest of his manor, provided such advantage and improvement be noway derogatory from the former grants. The statute Westm. 2, 13 Edw. I. c. 46 extends this liberty of approving, in like manner, against *all others* that have common *appurtenant*, or *in gross*, as well as against the tenants of the lord who have their common *appendant;* and further enacts that no assize of *novel disseisin* for common shall lie against a lord for erecting on the common any windmill, sheep-house, or other necessary buildings therein specified: which, Sir Edward Coke says,(*w*) are only put as examples; and that any other necessary improvements may be made by the lord, though in reality they abridge the common and make it less sufficient for the commoners. And lastly, by statute 29 Geo. II. c. 36, and 31 Geo. II. c. 41, it is particularly enacted that any lords of wastes and commons, with the consent of the major part in number and value of the commoners, may enclose any part thereof for the growth of timber and underwood.[8]

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III. The third species of disturbance, that of *ways*, is very similar in its nature to the last; it principally happening when a person who hath a right to a way over another's grounds, by grant or prescription, is obstructed by enclosures or other obstacles, or by ploughing across it; by which means he cannot enjoy his right of way, or at least not in so commodious a manner as he might have done. If this be a way annexed to his estate, and the obstruction is made by the tenant of the land, this brings it to another species of injury; for it is then a *nuisance*, for which an assize will lie, as mentioned in a former chapter.(*x*) But if the right of way thus obstructed by the tenant be only in *gross*, (that is, annexed to a man's person and unconnected with any lands or *tenements,) or if the obstruction of a way belonging to a house or land is made by a stranger, it is then in either case merely a disturbance; for the obstruction of a way in gross is no detriment to any lands or tenements, and therefore does not fall under the legal notion of a nuisance, which must be laid *ad nocumentum liberi tenementi;*(*y*) and the obstruction of it by a stranger can never tend to put the *right* of way in dispute; the remedy, therefore, for

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(*w*) 2 Inst. 476.
(*x*) C. 13, p. 218.
(*y*) F. N. B. 183.

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[8] As the lord may approve, leaving a sufficiency of common, the commoner abates an erection at the peril of an action. A person seised in fee of the waste may approve, although he be not lord. 3 T. R. 445. But there can be no approvement against the tenants of a manor, who have a right to dig gravel in the wastes and take estovers, (2 T. R. 391,) nor against common of turbary, (1 Taunt. 435:) and although the lord may approve against common of pastures, by 20 Hen. III. c. 4, 5 T. R. 411, yet there may be other rights of common against which he cannot approve. 6 T. R. 741. A custom for tenants to approve by the lord's consent and by presentment of the homage does not restrain the lord's right to approve. 2 T. R. 392, n. The lord may, with consent of the homage, grant part of the soil for building, if the exercise of the right be immemorial, (5 T. R. 417, n.;) but a custom for the lord to grant leases of the waste without restriction is bad in point of law. 3 B. & A. 153.

The cultivation of common lands, and the enclosure and management of them, are now carried on under private acts of parliament, subject to and adopting the regulations laid down in the 13 Geo. III. c. 81 and 41 Geo. III. c. 109, which are incorporated into all special enclosure acts.—Chitty.

By the general enclosure acts, (41 Geo. III. c. 109, amended by 1 & 2 Geo. IV. c. 23, 6 & 7 W. IV. c. 115, and 3 & 4 Vict. c. 31,) it is particularly enacted that any lords of wastes and commons, with the consent of two-third parts in number and value of the commoners, may enclose any part thereof for the growth of timber and underwood.—Stewart.

these disturbances is not by assize or any real action, but by the universal remedy of action on the case to recover damages.(z)

IV. The fourth species of disturbance is that of disturbance of *tenure*, or breaking that connection which subsists between the lord and his tenant, and to which the law pays so high a regard, that it will not suffer it to be wantonly dissolved by the act of a third person. To have an estate well tenanted is an advantage that every landlord must be very sensible of; and therefore the driving away of a tenant from off his estate is an injury of no small consequence. So that if there be a tenant at will of any lands or tenements, and a stranger, either by menaces and threats, or by unlawful distresses, or by fraud and circumvention, or other means, contrives to drive him away, or inveigle him to leave his tenancy, this the law very justly construes to be a wrong and injury to the lord,(a) and gives him a reparation in damages against the offender by a special action on the case.

V. The fifth and last species of disturbance, but by far the most considerable, is that of disturbance of *patronage;* which is a hinderance or obstruction of a patron to present his clerk to a benefice.

This injury was distinguished at common law from another species of injury, called *usurpation;* which is an absolute ouster or dispossession of the patron, and happens when a stranger, that hath no right, presenteth a clerk, and he is thereupon *admitted and instituted.(b) In which case of usurpation, [*243 the patron lost by the common law not only his turn of presenting *pro hac vice*, but also the absolute and perpetual inheritance of the advowson, so that he could not present again upon the next avoidance, unless in the mean time he recovered his right by a real action, viz., a writ of *right of advowson.*(c) The reason given for his losing the present turn, and not ejecting the usurper's clerk, was that, the final intent of the law in creating this species of property being to have a fit person to celebrate divine service, it preferred the peace of the church (provided a clerk were once admitted and instituted) to the right of any patron whatever.[9] And the patron also lost the inheritance of his advowson, unless he recovered it in a writ of right, because by such usurpation he was put out of possession of his advowson, as much as when by actual entry and ouster he is disseised of lands or houses; since the only possession of which an advowson is capable is by actual presentation and admission of one's clerk. As, therefore, when the clerk was once instituted (except in the case of the king, where he must also be inducted)(d) the church became absolutely *full;* so the usurper by such plenarty, arising from his own presentation, became in fact *seised* of the advowson: which seisin it was impossible for the true patron to remove by any possessory action, or other means, during the plenarty or fulness of the church; and when it became void afresh, he could not then present, since another had the right of possession. The only remedy, therefore, which the patron had left, was to try the mere right in a writ of *right of advowson;* which is a peculiar writ of right, framed for this special purpose, but in every other respect corresponding with other writs of right:(e) and if a man recovered therein, he regained the possession of his advowson, and was entitled to present at the next avoidance.(f) But in order to such recovery he must allege a pre-

(z) Hale on F. N. B. 185. Lutw. 111, 119.
(a) Hal. Anal. c. 40. 1 Roll. Abr. 108.
(b) Co. Litt. 227.
(c) 6 Rep. 49.
(d) Ibid.
(e) F. N. B. 30.
(f) Ibid. 36.

[9] And this preference of the peace of the church to the litigated rights of patrons was held to prevail in all cases, without any regard to infancy, coverture, or any such like disability of the patron; for it was a maxim of the common law "that he who came in by admission and institution came in by a judicial act; and the law presumes that the bishop who has the care of the souls of all within his diocese, for which he shall answer at his fearful and final account, (in respect of which he ought to keep and defend them against all heretics and schismatics and other ministers of the devil,) will not do or assent to any wrong to be done to their patronages, which is of their earthly possession, but, if the church be litigious, that he will inform himself of the truth by a *de jure patronatus*, and so do right." 6 Coke, 49.—CHITTY.

sentation in himself or some of his ancestors, which proves him or them to have been once in possession: for, as a grant of the advowson, during the ful-
*244] ness of church, conveys *no manner of possession for the present, therefore a purchasor, until he hath presented, hath no actual seisin whereon to ground a writ of right.(g) Thus stood the common law.

But, bishops in antient times, either by carelessness or collusion, frequently instituting clerks upon the presentation of usurpers, and thereby defrauding the real patrons of their right of possession, it was in substance enacted by statute Westm. 2, 13 Edw. I, c. 5, § 2, that if a possessory action be brought within six months after the avoidance, the patron shall (notwithstanding such usurpation and institution) recover that very presentation; which gives back to him the seisin of the advowson. Yet still, if the true patron omitted to bring his action within six months, the seisin was gained by the usurper, and the patron, to recover it, was driven to the long and hazardous process of a writ of right. To remedy which, it was further enacted, by statute 7 Anne, c. 18, that no usurpation shall displace the estate or interest of the patron, or turn it to a mere right; but that the true patron may present upon the next avoidance, as if no such usurpation had happened. So that the title of usurpation is now much narrowed, and the law stands upon this reasonable foundation: that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church and as a punishment for my own negligence; but that turn is the only one I shall lose thereby. Usurpation now gains no right to the usurper with regard to any future avoidance, but only to the present vacancy: it cannot indeed be remedied after six months are past; but during those six months it is only a species of disturbance.

Disturbers of a right of advowson may therefore be these three persons: the pseudo-patron, his clerk, and the ordinary; the pretended patron, by presenting to a church to which he has no right, and thereby making it litigious or dis-
*245] putable; the clerk, by demanding or obtaining institution, *which tends to and promotes the same inconvenience; and the ordinary, by refusing to admit the real patron's clerk, or admitting the clerk of the pretender. These disturbances are vexatious and injurious to him who hath the right: and therefore, if he be not wanting to himself, the law (besides the writ of *right of advowson*, which is a final and conclusive remedy) hath given him two inferior possessory actions for his relief; an assize of *darrein presentment*, and a writ of *quare impedit;* in which the patron is always the plaintiff, and not the clerk. For the law supposes the injury to be offered to him only, by obstructing or refusing the admission of his nominee; and not to the clerk, who hath no right in him till institution, and of course can suffer no injury.

1. An assize of *darrein presentment*, or last presentation, lies when a man, or his ancestors, under whom he claims, have presented a clerk to a benefice, who is instituted, and afterwards upon the next avoidance a stranger presents a clerk, and thereby disturbs him that is the real patron. In which case the patron shall have this writ(h) directed to the sheriff to summon an assize or jury, to inquire who was the last patron that presented to the church now vacant, of which the plaintiff complains that he is deforced by the defendant: and, according as the assize determines that question, a writ shall issue to the bishop; to institute the clerk of that patron, in whose favour the determination is made, and also to give damages, in pursuance of statute Westm. 2, 13 Edw. I. c. 5. This question, it is to be observed, was, before the statute 7 Anne before mentioned, entirely conclusive as between the patron or his heirs and a stranger: for, till then, the full possession of the advowson was in him who presented last and his heirs: unless, since that presentation, the clerk had been evicted within six months, or the rightful patron had recovered the advowson in a writ of right; which is a title superior to all others. But that statute having given a right to any person to bring a *quare impedit*, and to recover (if his title be good)
*246] notwithstanding the last presentation, by whomsoever *made; assizes of *darrein presentment*, now not being in any wise conclusive, have been

(g) 2 Inst. 357.

(h) F. N. B. 31.

totally disused, as indeed they began to be before;[10] a *quare impedit* being more general, and therefore a more usual action. For the assize of *darrein presentment* lies only where a man has an advowson by descent from his ancestors; but the writ of *quare impedit* is equally remediable whether a man claims title by descent or by purchase.(*i*)

2. I proceed therefore, secondly, to inquire into the nature(*k*) of a writ of *quare impedit*, now the only action used in case of the disturbance of patronage;[11] and shall first premise the usual proceedings previous to the bringing of the writ.

Upon the vacancy of a living, the patron, we know, is bound to present within six calendar months,(*l*) otherwise it will lapse to the bishop. But if the presentation be made within that time, the bishop is bound to admit and institute the clerk, if found sufficient;(*m*) unless the church be full, or there be notice of any litigation. For, if any opposition be intended, it is usual for each party to enter a *caveat* with the bishop, to prevent his institution of his antagonist's clerk. An institution after a *caveat* entered is void by the ecclesiastical law;(*n*) but this the temporal courts pay no regard to, and look upon a *caveat* as a mere nullity.(*o*) But if two presentations be offered to the bishop upon the same avoidance, the church is then said to become *litigious;* and, if nothing further be done, the bishop may suspend the admission of either, and suffer a lapse to incur. Yet if the patron or clerk on either side request him to award a *jus patronatus*, he is bound to do it. A *jus patronatus* is a commission from the bishop, directed usually to his chancellor and others of competent learning: who are to summon a jury of six clergymen and six laymen, to inquire into and examine who is the *rightful patron;(*p*) and if, upon such inquiry made and certificate [*247 thereof returned to the commissioners, he admits and institutes the clerk of that patron whom they return as the true one, the bishop secures himself at all events from being a disturber, whatever proceedings may be had afterwards in the temporal courts.

The clerk refused by the bishop may also have a remedy against him in the spiritual court, denominated a *duplex querela:*(*q*) which is a complaint in the nature of an appeal from the ordinary to his next immediate superior; as from a bishop to the archbishop, or from an archbishop to the delegates;[12] and if the superior court adjudges the cause of refusal to be insufficient, it will grant institution to the appellant.

Thus far matters may go on in the mere ecclesiastical course; but in contested presentations they seldom go so far; for, upon the first delay or refusal of the bishop to admit his clerk, the patron usually brings his writ of *quare impedit* against the bishop, for the temporal injury done to his property in disturbing him in his presentation. And, if the delay arises from the bishop alone, as upon pretence of incapacity, or the like, then he only is named in the writ; but if there be another presentation set up, then the pretended patron and his clerk are also joined in the action; or it may be brought against the patron and clerk, leaving out the bishop; or against the patron only. But it is most advisable to bring it against all three: for if the bishop be left out, and the suit be not determined till the six months are past, the bishop is entitled to present by lapse; for he is not party to the suit;(*r*) but, if he be named, no lapse can possibly accrue till the right is determined. If the patron be left out, and the writ be brought only against the bishop and the clerk, the suit is of no effect, and the writ shall abate:(*s*) for the right of the patron is the principal question in the cause.(*t*) If the *clerk be left out, and has received institution [*248 before the action brought, (as is sometimes the case,) the patron by this

(*i*) 2 Inst. 355.
(*k*) See Boswell's case, 6 Rep. 48.
(*l*) See book ii. ch. 18.
(*m*) See book i. ch. 11.
(*n*) 1 Burn, 207.
(*o*) 1 Roll. Rep. 191.
(*p*) 1 Burp, 16, 17.
(*q*) Ibid. 113.
(*r*) Cro. Jac. 98.
(*s*) Hob. 316.
(*t*) 7 Rep. 25.

[10] Now abolished, 3 & 4 W. IV. c. 27, s. 36.—STEWART.
[11] One of the few real actions which still remain in England.—STEWART.
[12] Now to the Judicial Committee of the Privy Council.—STEWART.

suit may recover his right of patronage, but not the present turn; for he cannot have judgment to remove the clerk, unless he be made a defendant, and party to the suit, to hear what he can allege against it. For which reason it is the safer way to insert all three in the writ.

The writ of *quare impedit*(*u*) commands the disturbers, the bishop, the pseudo-patron, and his clerk, to permit the plaintiff to present a proper person (without specifying the particular clerk) to such a vacant church, which pertains to his patronage; and which the defendants, as he alleges, do obstruct; and unless they so do, then that they appear in court to show the reason why they hinder him.

Immediately on the suing out of the *quare impedit*, if the plaintiff suspects that the bishop will admit the defendant's or any other clerk, pending the suit, he may have a prohibitory writ, called a *ne admittas*,(*w*) which recites the contention begun in the king's courts, and forbids the bishop to admit any clerk whatsoever till such contention be determined. And if the bishop doth, after the receipt of this writ, admit any person, even though the patron's right may have been found in a *jure patronatûs*, then the plaintiff, after he has obtained judgment in the *quare impedit*, may remove the incumbent, if the clerk of a stranger, by writ of *scire facias*;(*x*) and shall have a special action against the bishop, called a *quare incumbravit*,[13] to recover the presentation, and also satisfaction in damages for the injury done him by encumbering the church with a clerk pending the suit and after the *ne admittas* received.(*y*) But if the bishop has encumbered the church by instituting the clerk before the *ne admittas* issued, no *quare incumbravit* lies; for the bishop hath no legal notice till the writ of *ne admittas* is served upon *him.[14] The patron is therefore left to his *quare impedit* merely, which, as was before observed, now lies (since the statute of Westm. 2) as well upon a recent usurpation within six months past, as upon a disturbance without any usurpation had.

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In the proceedings upon a *quare impedit*, the plaintiff must set out his title at length, and prove at least one presentation in himself, his ancestors, or those under whom he claims; for he must recover by the strength of his own right, and not by the weakness of the defendant's;(*z*) and he must also show a disturbance before the action brought.(*a*) Upon this the bishop and the clerk usually disclaim all title: save only the one as ordinary, to admit and institute, and the other as presentee of the patron, who is left to defend his own right. And upon failure of the plaintiff in making out his own title, the defendant is put upon the proof of his, in order to obtain judgment for himself, if needful. But if the right be found for the plaintiff on the trial, three further points are also to be inquired: 1. If the church be full; and, if full, then of whose presentation: for if it be of the defendant's presentation, then the clerk is removable by writ brought in due time. 2. Of what value the living is: and this in order to assess the damages which are directed to be given by the statute of Westm. 2. 3. In case of plenarty upon a usurpation, whether six calendar(*b*) months have passed between the avoidance and the time of bringing the action, for then it would not be within the statute, which permits a usurpation to be devested by a *quare impedit* brought *infra tempus semestre*. So that plenarty is still a sufficient bar in an action of *quare impedit* brought above six months after the vacancy happens; as it was universally by the common law, however early the action was commenced.

If it be found that the plaintiff hath the right and hath commenced his action in due time, then he shall have *judgment to recover the presentation, and if the church be full by institution of any clerk, to remove him;

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(*u*) F. N. B. 32.
(*w*) F. N. B. 37.
(*x*) 2 Sid. 94.
(*y*) F. N. B. 43.
(*z*) Vaugh. 7, 8.
(*a*) Hob. 199.
(*b*) 2 Inst. 361.

[13] This writ is now abolished, by 3 & 4 W. IV. c. 27, s. 36.—Stewart.

[14] Yet it is said that if the bishop encumbers when no *quare impedit* is pending, and no debate for the church, *quare incumbravit* lies. N. N. 111, a., cited Com. Dig. *Quare Incumbravit*.—Chitty.

unless it were filled *pendente lite* by lapse to the ordinary, he not being a party to the suit; in which case the plaintiff loses his presentation *pro hac vice*, but shall recover two years' full value of the church from the defendant, the pretended patron, as a satisfaction for the turn lost by his disturbance; or in case of insolvency the defendant shall be imprisoned for two years.(*c*) But if the church remains still void at the end of the suit, then whichever party the presentation is found to belong to, whether plaintiff or defendant, shall have a writ directed to the bishop *ad admittendum clericum*,(*d*) reciting the judgment of the court, and ordering him to admit and institute the clerk of the prevailing party; and if upon this order he does not admit him, the patron may sue the bishop in a writ of *quare non admisit*,(*e*) and recover ample satisfaction in damages.

Besides these possessory actions, there may be also had (as hath before been incidentally mentioned) a writ of *right of advowson*, which resembles other writs of right; the only distinguishing advantage now attending it being that it is more conclusive than a *quare impedit*, since to an action of *quare impedit* a recovery had in a writ of right may be pleaded in bar.[15]

There is no limitation with regard to the time within which any actions touching advowsons are to be brought; at least, none later than the times of Richard I. and Henry III.: for by statute 1 Mar. st. 2, c. 5, the statute of limitations, 32 Hen. VIII. c. 2 is declared not to extend to any writ of right of advowson, *quare impedit*, or assize of *darrein presentment*, or *jus patronatûs*. And this upon very good reason: because it may very easily happen that the title to an advowson may not come in question, nor the right have opportunity to be tried, within sixty years, which is the longest period of limitation assigned by the statute of Henry VIII. For Sir Edward Coke(*f*) tells us that there was a parson of one of his *churches that had been incumbent there above fifty years; nor are instances wanting wherein two successive incumbents have continued for upwards of a hundred years.(*g*) Had therefore the last of these incumbents been the clerk of a usurper, or had he been presented by lapse, it would have been necessary and unavoidable for the patron, in case of a dispute, to have recurred back above a century in order to have shown a clear title and seisin by presentation and admission of the prior incumbent. But though, for these reasons, a limitation is highly improbable with respect only to the length of time, yet, as the title of advowson is, for want of some limitation, rendered more precarious than that of any other hereditament, (especially since the statute of queen Anne hath allowed possessory actions to be brought upon any prior presentation, however distant,) it might not perhaps be amiss if a limitation were established with respect to the number of avoidances, or, rather, if a limitation were compounded of the length of time and the number of avoidances together: for instance, if no seisin were admitted to be alleged in any of these writs of patronage after sixty years and three avoidances were past.[16]

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(*c*) Stat. Westm. 2, 13 Edw. I. c. 5, § 3.
(*d*) F. N. B. 38.
(*e*) Ibid. 47.
(*f*) 1 Inst. 115.
(*g*) Two successive incumbents of the rectory of Chelsfield-*cum*-Farnborough, in Kent, continued one hundred and one years, of whom the former was admitted in 1650, the latter in 1700, and died in 1751.

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[15] The writ of right of advowson has been abolished, 3 & 4 W. IV. c. 27, s. 36.—STEWART.

[16] A *quare impedit* lies for a church, an hospital, and a donative; and, by the equity of the statute of Westminster, it lies for prebends, chapels, vicarages. 3 T. R. 650. Willes's Rep. 608. 2 Roll. Abr. 380. This action may be brought by the king in right of his crown, or on a title by lapse by a common parson, or by several who have the same title, by an executor or administrator. To maintain the action, there must be a disturbance; as, if brought by a purchaser, he may allege a presentation in him from whom he purchased the same. Stra. 1007. 1 Hen. Bla. 376, 530. If there are distinct patrons of an advowson in one and the same church, as where one has the first portion and another the second, he who is disturbed may have a *quare impedit*, (3 T. R. 646;) and if there are distinct patrons and incumbents, so that the church is divided into moieties, he who is disturbed shall have the writ. 10 Rep. 136. 5 Rep. 102. 1 Inst. 18, a. 4 Rep. 75. And if the right of nomination is in one, and that of presentation in another, the *quare impedit*

In a writ of *quare impedit*, which is almost the only real action that remains in common use, and also in the assize of *darrein presentment*, and writ of right, the patron only, and not the clerk, is allowed to sue the disturber. But, by virtue of several acts of parliament,(*h*) there is one species of presentations, in which a remedy, to be sued in the temporal courts, is put into the hands of the clerks presented, as well as of the owners of the advowson. I mean the presentation to such benefices as belong to Roman Catholic patrons; which, according to their several counties, are vested in and secured to the two universities of this kingdom. And particularly by the statute of 12 Anne, st. 2, c. 14, s. 4, a new method of proceeding is provided; viz., that, besides the writs of *quare impedit*, which the universities as patrons are entitled to bring, they, or their clerks, may be at liberty to file a bill *in equity against any person presenting to such livings, and disturbing their right of patronage, or his *cestuy que trust*, or any other person whom they have cause to suspect; in order to compel a discovery of any secret trusts, for the benefit of papists, in evasion of those laws whereby this right of advowson is vested in those learned bodies; and also (by the statute 11 Geo. II. c. 17) to compel a discovery whether any grant or conveyance, said to be made of such advowson, were made *bona fide* to a protestant purchasor, for the benefit of protestants, and for a full consideration; without which requisites every such grant and conveyance of any advowson or avoidance is absolutely null and void. This is a particular law, and calculated for a particular purpose: but in no instance but this does the common law permit the clerk himself to interfere in recovering a presentation of which he is afterwards to have the advantage. For besides that he has (as was before observed) no temporal right in him till after institution and induction, and, as he therefore can suffer no wrong, is consequently entitled to no remedy; this exclusion of the clerk from being plaintiff seems also to arise from the very great honour and regard which the law pays to his sacred function. For it looks upon the cure of souls as too arduous and important a task to be eagerly sought for by any serious clergyman; and therefore will not permit him to contend openly at law for a charge and trust which it presumes he undertakes with diffidence.

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But when the clerk is in full possession of the benefice, the law gives him the same possessory remedies to recover his glebe, his rents, his tithes, and other ecclesiastical dues, by writ of entry, assize, ejectment, debt, or trespass, (as the case may happen,) which it furnishes to the owners of lay property. Yet he shall not have a writ of right, nor such other similar writs as are grounded upon

(*h*) Stat. 3 Jac. I. c. 5. 1 W. and M. c. 26. 12 Anne, st. 2, c. 14. 11 Geo. II. c. 17.

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will lie by the person having the nomination against the person who has the presentation and obstructs the right. 3 T. R. 651. Rast. 506, b. If there are two or more tenants in common, or joint-tenants, they must join in a *quare impedit* of an advowson, for it is an entire thing; and one of them cannot have a *quare impedit* of a moiety or of a third or fourth part of an advowson of a church, but they must all join; though it is otherwise of coparceners, for if they do not agree the eldest shall have the presentation. Bro. Joinder in Action, 103. But where A. and B. were the grantees of the next avoidance of a church, and before any avoidance A. released his interest to B., and then the church became void, it was holden that B. alone should present to the church, and if he be disturbed might bring a *quare impedit* in his own name only. Cro. Eliz. 600. If the suit be by an executor or administrator, upon an avoidance in the life of the testator, an allegation of the disturbance in the life of the testator is sufficient. R. Sav. 95. Lutw. 2. See also, as to the right of the executor to bring this action, Vin. Abr. Executors, P. pl. 7. Latch, 168, 169. Sir W. Jones, 175. Poph. 190. 1 Ventr. 30. As the defendant is considered an actor in a *quare impedit*, he may make up the issues, (Tidd. Prac. 793.) and may have a trial by proviso, although the plaintiff has not committed any laches in proceeding to trial. Ib. 820.—Chitty.

And this alteration in the law recommended by the learned commentator has recently been carried into effect by stat. 3 & 4 W. IV. c. 27, by which (s. 30) it is enacted that no advowson shall be recovered after three incumbencies occupying a period of sixty years' adverse possession: incumbencies after lapse are to be reckoned within the period, but not incumbencies after promotion to bishoprics, (s. 31:) and no advowson shall be recovered after one hundred years' adverse possession, although three incumbencies have not elapsed. S. 33.—Stewart.

the mere right; because he hath not in him the entire fee and right,(*i*) but he is entitled to a special remedy called a writ of *juris utrum*, which is sometimes styled the parson's writ of right,(*k*) *being the highest writ which he can have.(*l*) This lies for a parson or prebendary at common law, and [*253 for a vicar by statute 14 Edw. III. c. 17, and is in the nature of an assize, to inquire whether the tenements in question are frankalmoign belonging to the church of the demandant, or else the lay fee of the tenant.(*m*) And thereby the demandant may recover lands and tenements, belonging to the church, which were alienated by the predecessor; or of which he was disseised; or which were recovered against him by verdict, confession, or default, without praying in aid of the patron and ordinary; or on which any person has intruded since the predecessor's death.(*n*) But since the restraining statute of 13 Eliz. c. 10, whereby the alienation of the predecessor, or a recovery suffered by him of the lands of the church, is declared to be absolutely void, this remedy is of very little use, unless where the parson himself has been deforced for more than twenty years;(*o*) for the successor, at any competent time after his accession to the benefice, may enter, or bring an ejectment.[17]

CHAPTER XVII.

OF INJURIES PROCEEDING FROM, OR AFFECTING, THE CROWN.

*HAVING in the nine preceding chapters considered the injuries, or private wrongs, that may be offered by one subject to another, all of [*254 which are redressed by the command and authority of the king, signified by his original writs returnable in the several courts of justice, which thence derive a jurisdiction of examining and determining the complaint; I proceed now to inquire into the mode of redressing those injuries to which the crown itself is a party: which injuries are either where the crown is the aggressor, and which therefore cannot without a solecism admit of the same kind of remedy;(*a*) or else is the sufferer, and which then are usually remedied by peculiar forms of process, appropriated to the royal prerogative. In treating therefore of these, we will consider first the manner of redressing those wrongs or injuries which a subject may suffer from the crown, and then of redressing those which the crown may receive from a subject.

I. That the king can do no wrong, is a necessary and fundamental principle of the English constitution; meaning only, as has formerly been observed,(*b*) that, in the first place, whatever may be amiss in the conduct of public affairs is not *chargeable personally on the king; nor is he, but his ministers, [*255 accountable for it to the people; and, secondly, that the prerogative of the crown extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudice.(*c*) Whenever therefore it happens that, by misinformation, or inadvertence, the crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign,(*d*) (for who shall command the king?)(*e*) yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute: and, as

(*i*) F. N. B. 49.
(*k*) Booth, 221.
(*l*) F. N. B. 48.
(*m*) Registrar. 32.
(*n*) F. N. B. 48, 49.
(*o*) Booth, 221.
(*a*) Bro. Abr. tit. *petition*, 12; tit. *prerogative*, 2.
(*b*) Book i. ch. 7, pp. 243–246.
(*c*) Plowd. 437.
(*d*) Jenkins, 78.
(*e*) Finch, L. 83.

[17] It is now formally abolished, 3 & 4 W. IV. c. 27, s. 36. Until recently, defendants in actions of *quare impedit* were not liable for the payment of costs, and the patrons were thereby sometimes deterred from prosecuting their rights, (Edwards *vs.* Bishop of Exeter, 6 Bingh. N. C. 146;) but now, by stat. 4 & 5 W. IV. c. 39, plaintiffs are enabled to recover their full costs.—STEWART.

it presumes that to *know of* any injury and to *redress* it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.

The distance between the sovereign and his subjects is such, that it rarely can happen that any *personal* injury can immediately and directly proceed from the prince to any private man; and, as it can so seldom happen, the law in decency supposes that it never will or can happen at all; because it feels itself incapable of furnishing any adequate remedy, without infringing the dignity and destroying the sovereignty of the royal person, by setting up some superior power with authority to call him to account. The inconveniency therefore of a mischief that is barely possible is (as Mr. Locke has observed)(*f*) well recompensed by the peace of the public and security of the government, in the person of the chief magistrate being set out of the reach of coercion. But injuries to the rights of *property* can scarcely be committed by the crown without the intervention of its officers; for whom the law in matters of right entertains no respect or delicacy, but furnishes various methods of detecting the errors or misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice.

*256] *The common-law methods of obtaining possession or restitution from the crown, of either real or personal property, are, 1. By *petition de droit*, or petition of right: which is said to owe its original to king Edward the First.(*g*) 2. By *monstrans de droit*, manifestation or plea of right: both of which may be preferred or prosecuted either in the chancery or exchequer.(*h*) The former is of use, where the king is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself; in which case he must be careful to state truly the whole title of the crown, otherwise the petition shall abate;(*i*) and then, upon this answer being endorsed or underwritten by the king, *soit droit fait al partie*, (let right be done to the party,)(*j*) a commission shall issue to inquire of the truth of this suggestion:(*k*) after the return of which, the king's attorney is at liberty to plead in bar; and the merits shall be determined upon issue or demurrer, as in suits between subject and subject. Thus, if a disseisor of lands which are holden of the crown dies seised without any heir, whereby the king is *prima facie* entitled to the lands, and the possession is cast on him either by inquest of office, or by act of law without any office found; now the disseisee shall have remedy by petition of right, suggesting the title of the crown, and his own superior right before the disseisin made.(*l*) But where the right of the party, as well as the right of the crown, appears upon record, there the party shall have *monstrans de droit*, which is putting in a claim of right grounded on facts already acknowledged and established, and praying the judgment of the court, whether upon those facts the king or the subject hath the right. As if, in the case before supposed, the whole special matter is found by an inquest of office, (as well the disseisin, as the dying without an heir,) the party grieved shall have *monstrans de droit* at the common law.(*m*)

*257] But as this seldom happens, and *the remedy by *petition* was extremely tedious and expensive, that by *monstrans* was much enlarged and rendered almost universal by several statutes, particularly 36 Edw. III. c. 13, and 2 & 3 Edw. VI. c. 8, which also allow inquisitions of office to be traversed or denied wherever the right of a subject is concerned, except in a very few cases.(*n*) These proceedings are had in the petty-bag office in the court of chancery; and, if upon either of them the right be determined against the crown, the judgment is, *quod manus domini regis amoveantur et possessio restituatur petenti, salvo jure domini regis*;(*o*) which last clause is always added to judgment against the king,(*p*) to whom no *laches* is ever imputed, and whose right (till some late statutes)(*q*) was never defeated by any limitation or length of time. And by

(*f*) On Govt. p. 2, § 205.
(*g*) Bro. Abr. tit. *prerogative*, 2. Fitz. Abr. tit. *error*, 8.
(*h*) Skin. 609.
(*i*) Finch, L. 256.
(*j*) Stat. Tr. vii. 134.
(*k*) Skin. 608. East, Entr. 461.
(*l*) Bro. Abr. tit. *petition*, 20. 4 Rep. 58.
(*m*) 4 Rep. 55.
(*n*) Skin. 608.
(*o*) 2 Inst. 695. Rast. Entr. 463.
(*p*) Finch, L. 460.
(*q*) 21 Jac. I. c. 2. 9 Geo. III. c. 16.

such judgment the crown is instantly out of possession:(r) so that there needs not the indecent interposition of his own officers to transfer the seisin from the king to the party aggrieved.

II. The methods of redressing such injuries as the crown may receive from the subject are,—

1. By such usual common-law actions as are consistent with the royal prerogative and dignity. As therefore the king, by reason of his legal ubiquity, cannot be disseised or dispossessed of any real property which is once vested in him, he can maintain no action which supposes a dispossession of the plaintiff; such as an assize or an ejectment;(s)[1] but he may bring a *quare impedit*,(t) which always supposes the complainant to be seised or possessed of the advowson; and he may prosecute this writ, like every other by him brought, as well in the king's bench(u) as the common pleas, or in whatever court he pleases. So, too, he may bring an action of trespass for taking away his goods; but such actions are not usual (though in strictness maintainable) for breaking his close, or other injury done upon his soil or possession.(w) It would be equally tedious *and difficult, to run through every minute distinction that might be [*258 gleaned from our antient books with regard to this matter; nor is it in any degree necessary, as much easier and more effectual remedies are usually obtained by such prerogative modes of process as are peculiarly confined to the crown.

2. Such is that of *inquisition*, or *inquest of office;* which is an inquiry made by the king's officer, his sheriff, coroner, or escheator, *virtute officii*, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels.(x) This is done by a jury of no determinate number, being either twelve, or less, or more. As, to inquire whether the king's tenant for life died seised, whereby the reversion accrues to the king; whether A., who held immediately of the crown, died without heirs, in which case the lands belong to the king by escheat; whether B. be attainted of treason, whereby his estate is forfeited to the crown; whether C., who has purchased lands, be an alien, which is another cause of forfeiture; whether D. be an idiot *a nativitate*, and therefore, together with his lands, appertains to the custody of the king; and other questions of like import, concerning both the circumstances of the tenant and the value or identity of the lands. These inquests of office were more frequently in practice than at present during the continuance of the military tenures among us; when, upon the death of every one of the king's tenants, an inquest of office was held, called an *inquisitio post mortem*, to inquire of what lands he died seised, who was his heir, and of what age, in order to entitle the king to his marriage, wardship, relief, *primer-seisin*, or other advantages, as the circumstances of the case might turn out. To superintend and regulate these inquiries, the court of wards and liveries was instituted by statute 32 Hen. VIII. c. 46, which was abolished at the restoration of king Charles the Second, together with the oppressive tenures upon which it was founded.

*With regard to other matters, the inquests of office still remain in [*259 force, and are taken upon proper occasions; being extended not only to

(r) Finch, L. 459.
(s) Bro. Abr. tit. *prerogative*, 89.
(t) F. N. B. 32.
(u) *Dyversyté des courtes, c. bank le roy.*
(w) Bro. Abr. tit. *prerog.* 130. F. N. B. 90. Year-book, 4 Hen. IV. 4.
(x) Finch, L. 323, 324, 325.

[1] But this objection to an ejectment does not seem to apply where the king is *lessor of the plaintiff*; for it is the *lessee*, and not the lessor, who is supposed by the legal fiction to be ousted; and it is held that where the possession is not *actually* in the king, but in lease to another, then, if a stranger enter on the lessee, he gains possession without taking the reversion out of the crown, and may have his ejectment to recover the possession if he be afterwards ousted, because there is a possession in *pais*, and not in the king, and that possession is not privileged by prerogative. Hence it follows that the king's *lessee* may likewise have an ejectment to punish the trespasser and to recover the possession which was taken from him. 2 Leon. 206. Cro. Eliz. 331. Adams on Ejectm. 72.—

lands, but also to goods and chattels personal, as in the case of wreck, treasure-trove, and the like; and especially as to forfeitures for offences. For every jury which tries a man for treason or felony, every coroner's inquest that sits upon a *felo de se* or one killed by chance-medley, is, not only with regard to chattels, but also as to real interests in all respects, an inquest of office; and if they find the treason or felony, or even the flight, of the party accused, (though innocent,) the king is thereupon, by virtue of this *office found*, entitled to have his forfeitures; and also, in case of chance-medley, he or his grantees are entitled to such things, by way of deodand, as have moved to the death of the party.

These inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record, without which he, in general, can neither take nor part from any thing.(*y*) For it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon and seize any man's possession upon bare surmises without the intervention of a jury.(*z*) It is, however, particularly enacted by the statute of 33 Hen. VIII. c. 20, that in case of attainder for high treason the king shall have the forfeiture instantly, without any inquisition of office. And as the king hath (in general) no title at all to any property of this sort before office found, therefore, by the statute 18 Hen. VI. c. 6, it was enacted, that all letters-patent or grants of lands and tenements before office found, or returned into the exchequer, shall be void. And, by the bill of rights at the revolution, 1 W. and M. st. 2, c. 2, it is declared that all grants and promises of fines and forfeitures of particular persons before conviction (which is here the inquest of office) are illegal and void; which, indeed, was the law of the land in the reign of Edward the Third.(*a*)

*260] *With regard to real property, if an office be found for the king, it puts him in immediate possession, without the trouble of a formal entry, provided a subject in the like case would have had a right to enter; and the king shall receive all the mesne or intermediate profits from the time his title accrued.(*b*) As, on the other hand, by the *articuli super cartas*,(*c*) if the king's escheator or sheriff seize lands into the king's hand without cause, upon taking them out of the king's hand again the party shall have the mesne profits restored to him.

In order to avoid the possession of the crown, acquired by the finding of such office, the subject may not only have his *petition of right*, which discloses new facts not found by the office, and his *monstrans de droit*, which relies on the facts as found; but also he may (for the most part) *traverse* or deny the matter of fact itself, and put it in a course of trial by the common-law process of the court of chancery: yet still, in some special cases, he hath no remedy left but a mere petition of right.(*d*) These *traverses*, as well as the *monstrans de droit*, were greatly enlarged and regulated for the benefit of the subject by the statutes before mentioned, and others.(*e*) And in the traverses thus given by statute, which came in the place of the old petition of right, the party traversing is considered as the plaintiff,(*f*) and must therefore make out his own title, as well as impeach that of the crown, and then shall have judgment *quod manus domini regis amoveantur, &c.*

3. Where the crown hath unadvisedly granted any thing by letters-patent which ought not to be granted,(*g*) or where the patentee hath done an act *261] that amounts to a forfeiture of *the grant,(*h*) the remedy to repeal the patent is by a writ of *scire facias* in chancery.(*i*) This may be brought, either on the part of the king, in order to resume the thing granted; or, if the grant be injurious to the subject, the king is bound of right to permit him (upon his petition) to use his royal name for repealing the patent in

(*y*) Finch, L. 82.
(*z*) Gilb. Hist. Exch. 132. Hob. 347.
(*a*) 2 Inst. 48.
(*b*) Finch, L. 325, 326.
(*c*) 28 Edw. I. st. 3, c. 19.
(*d*) Finch, L. 324.
(*e*) Stat. 34 Edw. III. c. 13. 36 Edw. III. c. 13. 2 & 3 Edw. VI. c. 8.
(*f*) Law of Nisi Prius, 201, 202.
(*g*) See book ii. ch. 21.
(*h*) Dyer, 198.
(*i*) 3 Lev. 220. 2 Inst. 88.

a *scire facias*.(*k*) And so also, if upon office untruly found for the king he grants the land over to another, he who is grieved thereby and traverses the office itself is entitled, before issue joined, to a *scire facias* against the patentee in order to avoid the grant.(*l*)

4. An *information* on behalf of the crown, filed in the exchequer by the king's attorney-general, is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for any personal wrong(*m*) committed in the lands or other possessions of the crown. It differs from an information filed in the court of king's bench, of which we shall treat in the next book, in that *this* is instituted to redress a private wrong, by which the property of the crown is affected; *that* is calculated to punish some public wrong, or heinous misdemeanour in the defendant. It is grounded on no writ under seal, but merely on the intimation of the king's officer, the attorney-general, who "gives the court to understand and be informed of" the matter in question: upon which the party is put to answer, and trial is had, as in suits between subject and subject. The most usual informations are those of *intrusion* and *debt*: *intrusion*, for any trespass committed on the lands of the crown,(*n*) as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, or the like; and *debt*, upon any contract for moneys due to the king, or for any forfeiture due to the crown upon the breach of a penal statute. This is most commonly used to recover forfeitures occasioned by transgressing those laws which are enacted for the establishment *and support of the revenue; others, which regard mere matters of police and public convenience, [*262 being usually left to be enforced by common informers, in the *qui tam* informations or actions, of which we have formerly spoken.(*o*) But after the attorney-general has informed upon the breach of a penal law, no other information can be received.(*p*) There is also an information *in rem*, when any goods are supposed to become the property of the crown, and no man appears to claim them, or to dispute the title of the king. As antiently in the case of treasure-trove, wrecks, waifs, and estrays, seised by the king's officer for his use. Upon such seisure an information was usually filed in the king's exchequer, and thereupon a proclamation was made for the owner (if any) to come in and claim the effects; and at the same time there issued a commission of *appraisement* to value the goods in the officer's hands; after the return of which, and a second proclamation had, if no claimant appeared, the goods were supposed derelict, and condemned to the use of the crown.(*q*) And when, in later times, forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by act of parliament for transgressions against the laws of the customs and excise, the same process was adopted in order to secure such forfeited goods for the public use, though the offender himself had escaped the reach of justice.

5. A writ of *quo warranto* is in the nature of a writ of right for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right.(*r*) It lies also in case of non-user or long neglect of a franchise, or mis-user or abuse of it; being a writ commanding the defendant to show by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse.[2] This was originally returnable before the king's justices

(*k*) 2 Ventr. 344.
(*l*) Bro. Abr. tit. *scire facias*, 69, 185.
(*m*) Moor. 375.
(*n*) Cro. Jac. 212. 1 Leon. 48. Savil. 49.
(*o*) See page 162.
(*p*) Hardr. 201.
(*q*) Gilb. Hist. of Exch. c. 13.
(*r*) Finch, L. 322. 2 Inst. 282.

[2] It must not be forgotten that, although it is said the writ of quo warranto lies against him who claims or usurps *any* office, a limitation is implied by the fact that it is in the nature of a writ of right *for the king*. Upon this principle, when an application was made for a quo warranto information to try the validity of an election to the office of churchwarden, lord Kenyon said that this was not a usurpation on the rights or prerogatives of the crown, for which only the old writ of quo warranto lay; and that an information in nature of a quo warranto could only be granted in such cases. 4 T. R. 381. See also 2 Stra. 1196. Bott. pl. 107. And the writ was also refused in a case of forfeiture of a recorder's place. 2 Stra. 819.—CHITTY.

*263] at Westminster;(s) but afterwards only *before the justices in eyre, by virtue of the statutes of *quo warranto*, 6 Edw. I. c. 1, and 18 Edw. I. st. 2;(t) but since those justices have given place to the king's temporary commissioners of assize, the judges on the several circuits, this branch of the statutes hath lost its effect;(u) and writs of *quo warranto* (if brought at all) must now be prosecuted and determined before the king's justices at Westminster. And in case of judgment for the defendant, he shall have an allowance of his franchise; but in case of judgment for the king, for that the party is entitled to no such franchise, or hath disused or abused it, the franchise is either seised into the king's hands, to be granted out again to whomever he shall please; or, if it be not such a franchise as may subsist in the hands of the crown, there is merely judgment of *ouster*, to turn out the party who usurped it.(w)

The judgment on a writ of *quo warranto* (being in the nature of a writ of right) is final and conclusive even against the crown.(x) Which, together with the length of its process, probably occasioned that disuse into which it is now fallen, and introduced a more modern method of prosecution, by *information* filed in the court of king's bench by the attorney-general, in the nature of a writ of *quo warranto;* wherein the process is speedier, and the judgment not quite so decisive. This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seise it for the crown; but hath long been applied to the mere purposes of trying the civil right, seising the franchise, or ousting the wrongful possessor; the fine being nominal only.

During the violent proceedings that took place in the latter end of the reign of king Charles the Second, it was, among other things, thought expedient to new-model most of the corporation-towns in the kingdom; for which purpose *264] many of those *bodies were persuaded to surrender their charters, and informations in the nature of *quo warranto* were brought against others, upon a supposed, or frequently a real, forfeiture of their franchises by neglect or abuse of them. And the consequence was, that the liberties of most of them were seised into the hands of the king, who granted them fresh charters, with such alterations as were thought expedient; and, during their state of anarchy, the crown named all their magistrates. This exertion of power, though perhaps *in summo jure* it was for the most part strictly legal, gave a great and just alarm; the new-modelling of all corporations being a very large stride towards establishing arbitrary power; and therefore it was thought necessary at the revolution to bridle this branch of the prerogative, at least so far as regarded the metropolis, by statute 2 W. and M. c. 8, which enacts, that the franchises of the city of London shall never hereafter be seised or forejudged for any forfeiture or misdemeanour whatsoever.

This proceeding is, however, now applied to the decision of corporation disputes between party and party, without any intervention of the prerogative, by virtue of the statute 9 Anne, c. 20, which permits an information in nature of *quo warranto* to be brought with leave of the court, at the relation of any person desiring to prosecute the same, (who is then styled the *relator*,) against any person usurping, intruding into, or unlawfully holding any franchise or office in any city, borough, or town corporate; provides for its speedy determination; and directs that, if the defendant be convicted, judgment of ouster (as well as a fine) may be given against him, and that the relator shall pay or receive costs according to the event of the suit.[3]

(s) Old Nat. Brev. fol. 107, edit. 1534.
(t) 2 Inst. 498. Rast. Entr. 540.
(u) 2 Inst. 498.
(w) Cro. Jac. 259. 1 Show. 280.
(x) 1 Sid. 86. 2 Show. 47. 12 Mod. 225.

[3] This statute, with regard to costs, extends only to cases where the title of a person to be a corporate officer—as mayor, bailiff, or freeman—is in question; but an information to try the right of holding a court is not within it, but stands upon the common law only, and, being a prosecution in the name of the king, no costs are given. 1 Burr. 402. The court of King's Bench, having a discretionary power of granting informations in the nature of quo warranto, had long ago established a general rule to guide their discretion, --viz., not to allow in any case an information in the nature of quo warranto against any

6. The writ of *mandamus*(*y*) is also made, by the same statute 9 Anne, c. 20, a most full and effectual remedy, in the first place, for refusal of admission where a person is entitled to an office or place in any such corporation; and, secondly, for wrongful removal, when a person is legally possessed. *These are injuries, for which though redress for the party interested may be had [*265 by assize, or other means, yet as the franchises concern the public, and may affect the administration of justice, this prerogative writ also issues from the court of king's bench; commanding, upon good cause shown to the court, the party complaining to be admitted or restored to his office. And the statute requires, that a return be immediately made to the first writ of *mandamus;* which return may be pleaded to or traversed by the prosecutor, and his antagonist may reply, take issue, or demur, and the same proceedings may be had, as if an action on the case had been brought, for making a false return; and, after judgment obtained for the prosecutor, he shall have a peremptory writ of *mandamus* to compel his admission or restitution; which latter (in case of an action) is effected by a writ of restitution.(*z*) So that now the writ of *mandamus*, in cases within this statute, is in the nature of an action; whereupon the party applying and succeeding may be entitled to costs, in case it be the franchise of a citizen, burgess, or freeman;(*a*) and also, in general, a writ of error may be had thereupon.(*b*)

This writ of *mandamus* may also be issued, in pursuance of the statute 11 Geo. I. c. 4, in case within the regular time no election shall be made of the mayor or other chief officer of any city, borough, or town corporate, or (being made) it shall afterwards become void; requiring the electors to proceed to election, and proper courts to be held for admitting and swearing in the magistrates so respectively chosen.[4]

(*y*) See page 110.
(*z*) 11 Rep. 73.
(*a*) Stat. 12 Geo. III. c. 21.
(*b*) 1 P. Wms. 351.

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person who had been twenty years in the possession of his franchise, (see 4 Burr. 1962,) but, having reason to consider this too extensive a limit, they resolved upon a new rule, —viz., not to allow such an information against any person who had been six years in possession. 4 T. R. 284. The legislature, however, thinking this too sudden a change in the practice of the court, and because it did not extend to informations filed by the attorney-general, enacted, by 32 Geo. III. c. 58, that to any information in the nature of quo warranto, for the exercise of any corporate office or franchise, the defendant might plead that he had been in possession of, or had executed, the office for six years or more. And, by s. 3, no defendant shall be affected by any defect in the title of the person from whom he derived his right and title, if that person had been in the undisturbed exercise of his office or franchise six years previous to the filing of the information. A title to one office which is a qualification to hold another is not within this clause. 2 M. & S. 71.—CHITTY.

But, by statute 32 Geo. III. c. 58, no member or officer of any town corporate shall be disturbed in the enjoyment of his office or franchise which he has enjoyed for six years, whether the information in the nature of a quo warranto is exhibited by leave of the court or on behalf of the crown by virtue of the royal prerogative. And, by the recent statutes 7 W. IV. and 1 Vict. c. 78 and 6 & 7 Vict. c. 89, the application to the court for the purpose of calling upon any person to show by what warrant he claims to exercise the office of mayor, alderman, or burgess, in any borough within the Municipal Corporation Act, must be made within twelve months after the election of the defendant, or the time at which he became disqualified.—STEWART.

[4] Besides the cases arising in corporations, writs of mandamus have been granted to admit prebendaries, (Stra. 159,) an apparitor-general, (Stra. 897,) parish clerks, (Say, R. 159. Cowp. 371,) and sextons. 2 Lev. 18. 1 Ventr. 143. So to admit scavengers, &c., (ib. 2 T. R. 181;) to restore a schoolmaster of a grammar-school founded by the crown. Stra. 58. So to restore a member of a university who had been improperly suspended from his degrees. In like manner, a mandamus will lie to compel a dean and chapter to fill up a vacancy among canons-residentiary, (1 T. R. 652;) so to the ecclesiastical court, (1 Ventr. 115;) so to grant the probate of a will to an executor. 1 Ventr. 335. So a mandamus lies to the judge of the prerogative court of Canterbury to grant administration to the husband of the wife's estate when the husband has done nothing to depart from his right. Stra. 891, 1118. A mandamus will lie to justices to nominate overseers of the poor, although the time mentioned in the 43 Eliz. has expired. Stra. 1123. So to appoint a surveyor of the highways where the justices had not appointed

We have now gone through the whole circle of civil injuries, and the redress which the laws of England have anxiously provided for each. In which the student cannot but observe that the main difficulty which attends their discussion arises from their great variety, which is apt at our first acquaintance to breed a confusion of ideas, and a kind of distraction in the memory: a difficulty not a little increased *by the very immethodical arrangement in which they are delivered to us by our antient writers, and the numerous terms of art in which the language of our ancestors has obscured them. Terms of art there will unavoidably be in all sciences; the easy conception and thorough comprehension of which must depend upon frequent and familiar use; and the more subdivided any branch of science is, the more terms must be used to express the nature of these several subdivisions, and mark out with sufficient precision the ideas they are meant to convey. But I trust that this difficulty, however great it may appear at first view, will shrink to nothing upon a nearer and more frequent approach, and indeed be rather advantageous than of any disservice, by imprinting on the student's mind a clear and distinct notion of the nature of these several remedies. And, such as it is, it arises principally from the excellence of our English laws; which adapt their redress exactly to the circumstances of the injury, and do not furnish one and the same action for different wrongs, which are impossible to be brought within one and the same

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at the time mentioned in the statute 13 Geo. III. c. 78, (4 East, 132;) so to sign and allow a poor's rate, absolute in the first instance, (Say, R. 160;) so to admit a copyholder, directed to the lord of the manor, (2 T. R. 197, 484. 6 East, 431;) so also to the lord to hold and the burgesses to attend a court, to present the conveyances of burgage-tenements. 1 Wils. 283. 1 Bla. Rep. 60. Bull. N. P. 200.

Where it does not lie.—It is a general rule that a mandamus does not lie unless the party applying has no other specific legal remedy. 1 T. R. 404. 3 T. R. 652. See Doug. 526. Thus, it does not lie to a bishop to license a curate of a curacy which had been twice augmented by queen Anne's bounty, where the right of appointing was claimed by two several parties and there had been cross-nominations, because the party had another specific remedy by *quare impedit*. So a mandamus does not lie to the governor and company of the Bank of England to transfer stock, because the party has his remedy by assumpsit, (Doug. 523;) nor to insert certain persons in a poor's rate, although the commission is alleged to have been, to prevent their having votes for members of parliament. Stra. 1259. The court will not award a mandamus for the licensing of a public house, (Stra. 881. Stra. R. 217;) nor to compel admission to the degree of a barrister (Doug. 353) or doctor of civil law as an advocate of the court of arches, (8 East, 213.) (the only mode of appeal is to the twelve judges;) nor to compel any of the inns of court to admit a person as a student, or to assign reasons for refusing to admit him, (Wooler *vs.* Society of Lincoln's Inn, King's Bench, Mich. T. 1825, 4 B. & C. 5 Dowl. & Ryl.;) nor for a fellow of a college, where there is a visitor; nor to the mayor and corporation of the city of London, to admit a person to the office of auditor who had served it three years successively, because contrary to the custom of the city, (1 T. R. 423;) nor to the college of physicians, to examine a doctor of physic who has been licensed in order to his being admitted a fellow of the college, (7 T. R. 282;) nor to a visitor where he is clearly acting under a visitorial authority, (2 T. R. 345;) nor to *restore* a minister of an endowed dissenting meeting-house, for if he has been before regularly admitted he may try his right in an action for money had and received. 2 T. R. 198. A mandamus is granted only for public persons and to compel the performance of public duties. Hence the court will not grant it to a trading-corporation at the instance of one of its members, to compel the production of accounts to declare a dividend. 2 B. & A. 620. 5 B. & A. 899. The mode of burying the dead is a matter of ecclesiastical cognizance; and therefore, where the question was whether a parishioner had a right to be buried in a churchyard in an iron coffin, which was a new and unusual mode, the court refused a mandamus. 2 B. & A. 806. The court have no power to grant a mandamus to justices to compel them to come to a particular decision, as, to make an order of maintenance on a particular parish. The admission under a mandamus gives no right, but only a legal possession, to enable the party to assert his right, if he has any. Hence *non fuit electus* has been holden not to be a good return to a mandamus to swear in a church-warden, (Stra. 894, 895,) because it is directed only to a ministerial officer, who is to do his duty, and no inconvenience can follow; for if the party has a right, he ought to be admitted; if he has not, the admission will do him no good. Wherever the officer is but ministerial, he is to execute his part, let the consequence be what it will. Stra. 895.—Chitty.

description; whereby every man knows what satisfaction he is entitled to expect from the courts of justice, and as little as possible is left in the breast of the judges, whom the law appoints to administer and not to prescribe the remedy. And I may venture to affirm that there is hardly a possible injury, that can be offered either to the person or property of another, for which the party injured may not find a remedial writ, conceived in such terms as are properly and singularly adapted to his own particular grievance.

In the several personal actions which we have cursorily explained, as debt, trespass, detinue, action on the case, and the like, it is easy to observe how plain, perspicuous, and simple the remedy is, as chalked out by the antient common law. In the methods prescribed for the recovery of landed and other permanent property, as the right is more intricate, the feodal or rather Norman remedy by real actions is somewhat more complex and difficult, and attended with some delays. And since, in order to obviate those difficulties and retrench those *delays, we have permitted the rights of real property to [*267 be drawn into question in mixed or personal suits, we are (it must be owned) obliged to have recourse to such arbitrary fictions and expedients, that unless we had developed their principles, and traced out their progress and history, our present system of remedial jurisprudence (in respect of landed property) would appear the most intricate and unnatural that ever was adopted by a free and enlightened people.

But this intricacy of our legal process will be found, when attentively considered, to be one of those troublesome, but not dangerous, evils, which have their root in the frame of our constitution, and which therefore can never be cured without hazarding every thing that is dear to us. In absolute governments, when new arrangements of property and a gradual change of manners have destroyed the original ideas on which the laws were devised and established, the prince by his edict may promulge a new code, more suited to the present emergencies. But when laws are to be framed by popular assemblies, even of the representative kind, it is too herculean a task to begin the work of legislation afresh, and extract a new system from the discordant opinions of more than five hundred counsellors. A single legislator or an enterprising sovereign, a Solon or Lycurgus, a Justinian or a Frederick, may at any time form a concise, and perhaps a uniform, plan of justice: and evil betide that presumptuous subject who questions its wisdom or utility. But who that is acquainted with the difficulty of new-modelling any branch of our statute laws (though relating but to roads or to parish settlements) will conceive it ever feasible to alter any fundamental point of the common law, with all its appendages and consequents, and set up another rule in its stead? When therefore, by the gradual influence of foreign trade and domestic tranquillity, the spirit of our military tenures began to decay, and at length the whole structure was removed, the judges quickly perceived that the forms and delays of the old feodal actions (guarded with their several outworks of essoins, vouchers, aid-prayers, and a hundred other formidable intrenchments) were ill suited to that *more simple and commercial mode of property which succeeded the [*268 former, and required a more speedy decision of right, to facilitate exchange and alienation. Yet they wisely avoided soliciting any great legislative revolution in the old-established forms, which might have been productive of consequences more numerous and extensive than the most penetrating genius could foresee; but left them as they were, to languish in obscurity and oblivion, and endeavoured by a series of minute contrivances to accommodate such personal actions, as were then in use, to all the most useful purposes of remedial justice: and where, through the dread of innovation, they hesitated at going so far as perhaps their good sense would have prompted them, they left an opening for the more liberal and enterprising judges, who have sat in our courts of equity, to show them their error by supplying the omissions of the courts of law. And, since the new expedients have been refined by the practice of more than a century, and are sufficiently known and understood, they in general answer the purpose of doing speedy and substantial justice, much better than

could now be effected by any great fundamental alterations. The only difficulty that attends them arises from their fictions and circuities: but, when once we have discovered the proper clew, that labyrinth is easily pervaded. Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless, and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult.

In this part of our disquisitions I however thought it my duty to unfold, as far as intelligibly I could, the nature of these real actions, as well as of personal remedies. And this not only because they are still in force, still the law of the land, though obsolete and disused, and may perhaps, in their turn, be hereafter, with some necessary corrections, called out again into common use; but also because, as a sensible *writer has well observed,(z) "whoever considers *269] how great a coherence there is between the several parts of the law, and how much the reason of one case opens and depends upon that of another, will, I presume, be far from thinking any of the old learning useless, which will so much conduce to the perfect understanding of the modern." And, besides, I should have done great injustice to the founders of our legal constitution, had I led the student to imagine that the remedial instruments of our law were originally contrived in so complicated a form as we now present them to his view: had I, for instance, entirely passed over the direct and obvious remedies by assizes and writs of entry, and only laid before him the modern method of prosecuting a writ of ejectment.

CHAPTER XVIII.

OF THE PURSUIT OF REMEDIES BY ACTION; AND FIRST OF THE ORIGINAL WRIT.

*270] *Having, under the head of *redress by suit in courts*, pointed out in the preceding pages, in the first place, the *nature* and several *species* of courts of justice, wherein remedies are administered for all sorts of private wrongs; and, in the second place, shown to which of these courts in particular application must be made for redress, according to the distinction of injuries, or, in other words, what wrongs are *cognizable* by one court, and what by another; I proceeded, under the title of *injuries cognizable by the courts of common law*, to define and explain the specifical remedies by action provided for every possible degree of wrong or injury, as well such remedies as are dormant and out of use as those which are in every day's practice, apprehending that the reason of the one could never be clearly comprehended without some acquaintance with the other; and I am now, in the last place, to examine the *manner* in which these several remedies are *pursued* and applied by action in the courts of common law; to which I shall afterwards subjoin a brief account of the proceedings in courts of equity.

In treating of remedies by action at common law, I shall confine myself to the *modern* method of practice in our courts of judicature. For though I thought it necessary to throw out a few observations on the nature of real actions, however *at present disused, in order to demonstrate the *271] coherence and uniformity of our legal constitution, and that there was no injury so obstinate and inveterate but which might in the end be eradicated by some or other of those remedial writs; yet it would be too irksome a task to perplex both my readers and myself with explaining all the rules of pro-

(z) Hawk. Abr. Co. Litt. pref.

ceeding in those obsolete actions, which are frequently mere positive establishments, *forma et figura judicii*, and conduce very little to illustrate the reason and fundamental grounds of the law. Wherever I apprehend they may at all conduce to this end, I shall endeavour to hint at them incidentally.

What, therefore, the student may expect in this and the succeeding chapters is, an account of the method of proceeding in and prosecuting a suit upon any of the personal writs we have before spoken of, in the court of *common pleas* at Westminster, that being the court originally constituted for the prosecution of all civil actions. It is true that the courts of king's bench and exchequer, in order, without entrenching upon antient forms, to extend their remedial influence to the necessities of modern times, have now obtained a concurrent jurisdiction and cognizance of very many civil suits; but as causes are therein conducted by much the same advocates and attorneys, and the several courts and their judges have an entire communication with each other, the methods and forms of proceeding are in all material respects the same in all of them. So that in giving an abstract or history(*a*) of the progress of a suit through the court of common pleas, we *shall at the same time give a general [*272 account of the proceedings of the other two courts; taking notice, however, of any considerable difference in the local practice of each. And the same abstract will moreover afford us some general idea of the conduct of a cause in the inferior courts of common law, those in cities and boroughs, or in the court-baron, or hundred or county court; all which conform (as near as may be) to the example of the superior tribunals, to which their causes may probably be, in some stage or other, removed.

The most natural and perspicuous way of considering the subject before us will be (I apprehend) to pursue it in the order and method wherein the proceedings themselves follow each other, rather than to distract and subdivide it by any more logical analysis. The general, therefore, and orderly parts of a suit are these: 1. The original writ; 2. The process; 3. The pleadings; 4. The issue or demurrer; 5. The trial; 6. The judgment, and its incidents; 7. The proceeding in nature of appeals; 8. The execution.

First, then, of the *original*, or original writ;[2] which is the beginning or foundation of the suit. When a person hath received an injury, and thinks it worth his while to demand a satisfaction for it, he is to consider with himself, or take advice, what redress the law has given for that injury; and thereupon is to make application or suit to the crown, the fountain of all justice, for that particular specific remedy which he is determined or advised to pursue. As, for money due on bond, an action of *debt;* for goods detained without force, an action of *detinue* or *trover;* or, if taken with force, an action of *trespass vi *et armis;* or to try the title of lands, a *writ of entry*, or [*273 action of trespass in *ejectment;* or for any consequential injury re-

(*a*) In deducing this history the student must not expect authorities to be constantly cited, as practical knowledge is not so much to be learned from any books of law as from experience and attendance on the courts. The compiler must therefore be frequently obliged to rely upon his own observations,—which in general he hath been studious to avoid where those of any other might be had. To accompany and illustrate these remarks, such gentlemen as are designed for the profession will find it necessary to peruse the books of *entries*, ancient and modern, which are transcripts of proceedings that have been had in some particular actions. A book or two of technical learning will also be found very convenient, from which a man of liberal education and tolerable understanding may glean *pro re nata* as much as is sufficient for his purpose. These *books of practice*, as they are called, are all pretty much on a level in point of composition and solid instruction, so that that which bears the latest edition is usually the best. But Gilbert's History and Practice of the Court of Common Pleas is a book of a very different stamp; and though (like the rest of his posthumous works) it has suffered most grossly by ignorant or careless transcribers, yet it has traced out the reason of many parts of our modern practice, from the feodal institutions and the primitive construction of our courts, in a most clear and ingenious manner.[1]

[1] The more recent publications of Mr. Serjt. Sellon and Mr. Tidd, and those of Mr. Impey and Mr. Lee, now afford still more explicit information on the subject of Practice. —CHITTY.

[2] Before the passing the 6 Geo. IV. c. 96, one great object of proceeding by special original was to compel the defendant to bring a writ of error in parliament, if he intended to delay; but that act having restrained writs of error upon judgments, even before verdict, unless the defendant finds bail in error, proceedings are now more frequently by capias in the court of Common Pleas and by latitat in the King's Bench.—CHITTY.

ceived, a special action *on the case.* To this end he is to sue out, or purchase by paying the stated fees, an *original*, or original writ, from the court of chancery, which is the *officina justitiæ*, the shop or mint of justice, wherein all the king's writs are framed.[3] It is a mandatory letter from the king, in parchment, sealed with his great seal,(*b*) and directed to the sheriff of the county wherein the injury is committed, or supposed so to be, requiring him to command the wrong-doer or party accused either to do justice to the complainant, or else to appear in court and answer the accusation against him. Whatever the sheriff does in pursuance of this writ, he must *return* or certify to the court of common pleas, together with the writ itself; which is the foundation of the jurisdiction of that court, being the king's warrant for the judges to proceed to the determination of the cause. For it was a maxim introduced by the Normans, that there should be no proceedings in common pleas before the king's justices without his original writ; because they held it unfit that those justices, being only the substitutes of the crown, should take cognizance of any thing but what was thus expressly referred to their judgment.(*c*) However, in small actions below the value of forty shillings, which are brought in the court-baron or county-court, no royal writ is necessary; but the foundation of such suits continues to be (as in the times of the Saxons) not by original *writ*, but by *plaint*;(*d*) that is, by a private memorial tendered in open court to the judge, wherein the party injured sets forth his cause of action; and the judge is bound of common right to administer justice therein, without any special mandate from the king. Now, indeed, even the royal writs are held to be demandable of common right, on paying the usual fees; for any delay in the granting them, or setting an unusual or exorbitant price upon them, would be a breach of *magna carta*, c. 29, "*nulli vendemus, nulli negabimus aut differemus, justitiam vel rectum.*"[4]

*274] *Original writs are either *optional* or *peremptory;* or, in the language of our lawyers, they are either a *præcipe*, or a *si te fecerit securum.*(*e*) The *præcipe* is in the alternative, commanding the defendant to do the thing required, or show the reason wherefore he hath not done it.(*f*) The use of this writ is where something certain is demanded by the plaintiff, which it is incumbent on the defendant himself to perform; as, to restore the possession of land, to pay a certain liquidated debt, to perform a specific covenant, to render an account,

(*b*) Finch, L. 237.
(*c*) Flet. *l.* 2, c. 34.
(*d*) Mirr. c. 2, § 3.
(*e*) Finch, L. 257.
(*f*) Append. No. III. § 1.

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[3] But in personal actions the use of the original writ is abolished, by the statute 2 W. IV. c. 39, although, as it is still necessary in real actions, some account of it may be useful. In the old action of ejectment, which has been before described, but which is now also abolished, although its existence was supposed, it was in fact never sued out.—Stewart.

[4] But to entitle a party to proceed by original the debt must amount to 10*l.* 5 Geo. II. c. 27, s. 5,—since extended to 15*l.* by 51 Geo. III. c. 124, s. 1. 57 Geo. III. c. 101. These latter acts have indeed both expired; but it is presumed they will be revived in the present year. It is also a rule in the King's Bench, if the plaintiff, proceeding by original, recover less than 50*l.*, he will be entitled to no more costs than if he had proceeded by bill, except in cases where he could not proceed by bill, as for outlawry, &c. R. M. 23 Geo. III. But though in an action on a bond, with a penalty above 50*l.*, the plaintiff recover 20*l.*, yet he will be entitled to costs of suit by original. 2 Chit. R. 148.

This writ does not lie against an attorney or officer of the court unless sued with an unprivileged person; neither does it lie against a prisoner in the actual custody of the marshal. It is the only mode of proceeding against peers, (3 M. & S. 88,) corporations or hundredors on the statutes of hue and cry, &c., (Tyre, II. Barnes, 415,) or for the purpose of outlawing the defendant.

One advantage of proceeding by this writ is, that if a writ of error be brought for delay, it must be brought direct into parliament, instead of first into the exchequer-chamber and from thence into parliament. 1 Sid. 424.

Where the demand exceeds 40*l.* a fine is payable to the king on these writs by way of composition for the liberty of suing in his court, which fine is estimated according to the amount of the demand, paying 6*s.* 8*d.* for every hundred marks, or 10*s.* for every 100*l.* Tyre, 58, G. R. H. 6 W. & M. R. B. Tidd, 8th ed. 101.—Chitty.

and the like: in all which cases the writ is drawn up in the form of a *præcipe* or command, to do thus or show cause to the contrary; giving the defendant his choice, to redress the injury or stand the suit. The other species of original writs is called a *si fecerit te securum*, from the words of the writ; which directs the sheriff to cause the defendant to appear in court, without any option given him, provided the plaintiff gives the sheriff security effectually to prosecute his claim.(*g*) This writ is in use where nothing is specifically demanded, but only a satisfaction in general: to obtain which, and minister complete redress, the intervention of some judicature is necessary. Such are writs of trespass, or on the case, wherein no debt or other specific thing is sued for in certain, but only damages to be assessed by a jury. For this end the defendant is immediately called upon to appear in court, provided the plaintiff gives good security of prosecuting his claim. Both species of writs are *tested*, or witnessed in the king's own name; "witness ourselves at Westminster," or wherever the chancery may be held.

The security here spoken of, to be given by the plaintiff for prosecuting his claim, is common to both writs, though it gives denomination only to the latter. The whole of it is at present become a mere matter of form; and John Doe and Richard Roe are always returned as the standing pledges for this purpose. The antient use of them was to answer for the *plaintiff, who in case he brought an action without cause, or failed in the prosecution of it when [*275 brought, was liable to an amercement from the crown for raising a false accusation; and so the form of judgment still is.(*h*) In like manner, as by the Gothic constitutions no person was permitted to lay a complaint against another "*nisi sub scriptura aut specificatione trium testium, quod actionem vellet persequi*;"(*i*) and as by the laws of Sancho I., king of Portugal, damages were given against a plaintiff who prosecuted a groundless action.(*k*)

The day on which the defendant is ordered to appear in court, and on which the sheriff is to bring in the writ and report how far he has obeyed it, is called the *return* of the writ: it being then returned by him to the king's justices at Westminster. And it is always made returnable at the distance of at least fifteen days from the date or *teste*, that the defendant may have time to come up to Westminster, even from the most remote parts of the kingdom; and upon some day in one of the four *terms*, in which the court sits for the despatch of business.

These terms are supposed by Mr. Selden(*l*) to have been instituted by William the Conqueror; but Sir Henry Spelman hath clearly and learnedly shown, that they were gradually formed from the canonical constitutions of the church; being indeed no other than those leisure seasons of the year which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business. Throughout all Christendom, in very early times, the whole year was one continual term for hearing and deciding causes. For the Christian magistrates, to distinguish themselves from the heathens, who were extremely superstitious in the observation of their *dies fasti et nefasti*, went into a contrary extreme, and administered justice upon all days alike. *Till at length the church interposed and exempted certain holy seasons from [*276 being profaned by the tumult of forensic litigations. As, particularly, the time of Advent and Christmas, which gave rise to the winter vacation; the time of Lent and Easter, which created that in the spring; the time of Pentecost, which produced the third; and the long vacation between Midsummer and Michaelmas, which was allowed for the hay-time and harvest. All Sundays also, and some particular festivals, as the days of the purification, ascension, and some others, were included in the same prohibition; which was established by a canon of the church, A.D. 517, and was fortified by an imperial constitution of the younger Theodosius, comprised in the Theodosian code.(*m*)

Afterwards, when our own legal constitution came to be settled, the com-

(*g*) Append. No. II. § 1.
(*h*) Finch, L. 189. 252.
(*i*) Stiernhook *de jure Goth. l.* 3, *c.* 7.
(*k*) Mod. Un. Hist. xxii. 45.
(*l*) *Jan. Ang. l.* 2, § 9.
(*m*) Spelman of the Terms.

mencement and duration of our law-terms were appointed with an eye to those canonical prohibitions; and it was ordered by the laws of king Edward the Confessor,(*n*) that from advent to the octave of the epiphany, from *septuagesima* to the octave of Easter, from the ascension to the octave of Pentecost, and from three in the afternoon of all Saturdays till Monday morning, the peace of God and of holy church shall be kept throughout all the kingdom. And so extravagant was afterwards the regard that was paid to these holy times, that though the author of the Mirror(*o*) mentions only one vacation of any considerable length, containing the months of August and September, yet Britton is express,(*p*) that in the reign of king Edward the First no secular plea could be held, nor any man sworn on the evangelists,(*q*) in the times of advent, Lent, Pentecost, harvest, and vintage, the days of the great litanies, and all solemn festivals. But he adds, that the bishops did nevertheless grant dispensations, (of which many are preserved in Rymer's *Fœdera*,)(*r*) that assizes and juries *277] might be taken in some of these holy seasons. And soon afterwards a general *dispensation was established by statute Westm. 1, 3 Edw. I. c. 51, which declares, that "by the assent of all the prelates, assizes of *novel disseisin*, *mort d'ancestor*, and *darrein presentment* shall be taken in advent, septuagesima, and Lent; and that at the special request of the king to the bishops." The portions of time, that were not included within these prohibited seasons, fell naturally into a fourfold division, and, from some festival day that immediately preceded their commencement, were denominated the terms of St. Hilary, of Easter, of the Holy Trinity, and of St. Michael: which terms have been since regulated and abbreviated by several acts of parliament; particularly Trinity term by statute 32 Hen. VIII. c. 21, and Michaelmas term by statute 16 Car. I. c. 6, and again by statute 24 Geo. II. c. 48.[5]

There are in each of these terms stated days called *days in bank*, *dies in banco:* that is, days of appearance in the court of common bench. They are generally at the distance of about a week from each other, and have reference to some festival of the church.[6] On some one of these days in bank all original writ must be made returnable; and therefore they are generally called the *returns* of that term: whereof every term has more or less said by the Mirror (*s*) to have been originally fixed by king Alfred, but certainly settled as early as the statute of 51 Hen. III. st. 2. But though many of the return-days are fixed upon Sundays, yet the court never sits to receive these returns till the Monday after:(*t*) and therefore no proceedings can be held, or judgment can be given, or supposed to be given, on the Sunday.(*u*)

The first return in every term is, properly speaking, the first day in that term; as, for instance, the octave of St. Hilary, or the eighth day inclusive after the feast of that saint: which falling on the thirteenth of January, the octave therefore or first day of Hilary term is the twentieth of January. And thereon *278] the court sits to take *essoigns*, or excuses, for such as *do not appear according to the summons of the writ: wherefore this is usually called the *essoign day* of the term.[7] But on every return-day in the term, the person summoned has three days of grace, beyond the day named in the writ, in which to make his appearance; and if he appears on the fourth day inclusive, *quarto*

(*n*) C. 3, *de temporibus et diebus pacis.*
(*o*) C. 3, § 8.
(*p*) C. 53.
(*q*) See page 59.
(*r*) *Temp. Hen. III. passim.*
(*s*) C. 5, § 108.
(*t*) Registr. 19 Salk. 627. 6 Mod. 250.
(*u*) 1 Jon. 156. Swann & Broome, B. R. Mich. 5 Geo. III. *et in Dom. Proc.* 1766.

[5] Michaelmas and Hilary are fixed terms, and invariably begin on the same day every year; but Easter and Trinity are movable, their commencement being regulated by the Feast of Easter. Hilary and Trinity are called *issuable* terms, being the terms after which the judges go their circuits for the trial of causes wherein issues have been previously joined.—Chitty.

[6] Easter term has five return-days, the rest four. These are called *general* or *common* return-days; all the others are *particular* or *special* return-days.—Chitty.

[7] At the present day, no essoign is allowed in any personal action whatever, even though the defendant be a peer or member of parliament. See 2 Term R. 16. 16 East, 7, (a.)—Chitty.

die post, it is sufficient.[8] For our sturdy ancestors held it beneath the condition of a freeman to appear, or to do any other act, at the precise time appointed. The feodal law therefore always allowed three distinct days of citation, before the defendant was adjudged contumacious for not appearing;(*v*) preserving in this respect the German custom, of which Tacitus thus speaks:(*w*) "*illud ex libertate vitium, quod non simul nec jussi conveniunt; sed et alter et* tertius *dies cunctatione cocuntium absumitur.*" And a similar indulgence prevailed in the Gothic constitution: "*illud enim nimiæ libertatis indicium, concessa toties impunitas non parendi; nec enim* trinis *judicii concessibus pœnam perditæ causæ contumax meruit.*"(*x*) Therefore, at the beginning of each term, the court does not usually(*y*) sit for despatch of business till the *fourth* or *appearance* day, as in Hilary term on the twenty-third of January,[9] and in Trinity term, by statute 32 Hen. VIII. c. 21, not till the *fifth* day, the *fourth* happening on the great popish festival of *Corpus Christi*;(*z*) which days are therefore called and set down in the almanacs as the first days of the term, and the court also sits till the *quarto die post* or appearance-day of the last return, which is therefore the end, of each of them.[10]

(*v*) Feud. *l.* 2, *t.* 22.
(*w*) *De Mor. Germ.* c. 11.
(*x*) Stiernhook *de jure Goth. l.* 1, c. 6.
(*y*) See 1 Bulstr. 35.
(*z*) See Spelman on the Terms, ch. 17. Note, that if the Feast of St. John the Baptist, or midsummer-day, falls on the morrow of *Corpus Christi* day, (as it did A.D. 1614, 1698, and 1709, and will again A.D. 1791,) Trinity full term then *commences*, and the courts sit on that day, though in other years it is no juridical day. Yet in 1702, 1713, and 1724, when midsummer-day fell upon what was regularly the *last* day of the term, the courts did not then sit, but it was regarded like a Sunday, and the term was prolonged to the twenty-fifth of June. Rot. C. B. Bunb. 176.

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[8] But the appearance need not be entered until eight days after the quarto die post. 3 Bar. & Cres. 110.—CHITTY.

[9] Michaelmas Term always begins on the 6th of November and ends on the 28th of the same month. Hilary Term always begins on the 23d of January and ends on the 12th of February,—unless either of those four days falls on a Sunday, and then the term begins or ends on the day following. Easter Term begins always on the Wednesday fortnight after Easter Sunday, and ends on the Monday three weeks afterwards. Trinity Term begins always on the Friday after Trinity Sunday, and ends on the Wednesday fortnight after it begins. 1 Cromp. Prac. 1. Tidd, 8th ed. 101, 102.—CHRISTIAN.

By the 11 Geo. IV. and 1 W. IV. c. 70, s. 6, amended by 1 W. IV. sess. 2, c. 3, s. 2, it is enacted that Hilary Term shall begin on the 11th and end on the 31st day of January; Easter Term shall begin on the 15th day of April, and end on the 8th day of May; Trinity Term shall begin on the 22d day of May and end on the 12th day of June; and Michaelmas Term shall begin on the 2d and end on the 25th day of November; so that there is now no uncertainty in this matter.—STEWART.

[10] But these rules are now altered, and the whole law on this subject much simplified, by the statute 11 Geo. IV., and 1 W. IV. c. 70, s. 6, by which it is enacted that the first *essoign* or general return-day, for every term, shall be the fourth day before the day of the commencement of the term, both days being included in the computation; the second *essoign* day shall be the fifth day of the term; the third shall be the fifteenth day of the term,—the first day of the term being already included in the computation.

Until lately, matters of law were disposed of in the courts during term,—only the judges, indeed, in their chambers exercise an ancillary jurisdiction: but their orders are not acts of the court, and if disobeyed can only be enforced by turning them into rules of court, and then obtaining an attachment, which can only be had during term. It is true that great part of the vacation is occupied in the trial of causes at the sittings and assizes: but these trials are not supposed to take place before the court, but before the individual judge who tries them. In consequence, however, of the press of business during term, the courts have now received the power of appointing sittings in banc, to be held during the vacation. 1 & 2 Vict. c. 32.—STEWART.

But *essoigns* have been practically abolished, (Price *vs.* Hayes, 1 Dowl. 448;) and the sittings of the courts are now exclusively on the days of the term, or on such days after term as may be fixed for sittings *in banco*.—KERR.

CHAPTER XIX.

OF PROCESS.

*279] *The next step for carrying on the suit, after suing out the original, is called the *process;* being the means of compelling the defendant to appear in court. This is sometimes called *original* process, being founded upon the original writ; and also to distinguish it from *mesne* or intermediate process, which issues, pending the suit, upon some collateral interlocutory matter; as to summon juries, witnesses, and the like.(*a*) *Mesne* process is also sometimes put in contradistinction to *final* process, or process *of execution;* and then it signifies all such process as intervenes between the beginning and end of a suit.

But process, as we are now to consider it, is the method taken by the law to compel a compliance with the original writ, of which the primary step is by giving the party notice to obey it. This notice is given upon all real *præcipes*, and also upon all personal writs for injuries not against the peace, by *summons;* which is a warning to appear in court at the return of the original writ, given to the defendant by two of the sheriff's messengers, called *summoners*, either in person or left at his house or land;(*b*) in like manner as in the civil law the first process is by personal citation, *in jus vocando.*(*c*) This warning on the land is given, in real actions, by erecting a white stick or wand on the defendant's grounds,(*d*) (which stick or wand among the northern nations is called *280] the *baculus* **nunciatorius*;) (*e*) and by statute 31 Eliz. c. 3., the notice must also be proclaimed on some Sunday before the door of the parish church.

If the defendant disobeys this verbal monition, the next process is by writ of *attachment* or *pone*, so called from the words of the writ,(*f*) "*pone per vadium et salvos plegios*, put by gage and safe pledges A. B. the defendant, &c." This is a writ not issuing out of chancery, but out of the court of common pleas, being grounded on the non-appearance of the defendant at the return of the original writ; and thereby the sheriff is commanded to attach him, by taking *gage*, that is, certain of his goods, which he shall forfeit if he doth not appear;(*g*) or by making him find *safe pledges* or sureties who shall be amerced in case of his non-appearance.(*h*) This is also the first and immediate process, without any previous summons, upon actions of trespass *vi et armis*, or for other injuries, which, though not forcible, are yet trespasses against the peace, as *deceit* and *conspiracy*;(*i*) where the violence of the wrong requires a more speedy remedy, and therefore the original writ commands the defendant to be at once attached, without any precedent warning.(*j*)[1]

(*a*) Finch, L. 436.
(*b*) Ibid. 344, 352.
(*c*) *Ff.* 2, 4, 1.
(*d*) Dalt. of Sher. c. 31.
(*e*) Stiernh. *de jure Sueon. l.* 1, c. 6.
(*f*) Appendix, No. III. § 2.
(*g*) Finch. L. 345. Lord Raym. 278.
(*h*) Dalt. of Sher. c. 32.
(*i*) Finch, L. 305, 352.
(*j*) Appendix, No. II. § 1.

[1] Upon this writ the sheriff cannot justify entering the defendant's house and continuing there till the defendant pay him a sum of money for surety for his appearance. 6 T. R. 137.—Chitty.

A considerable change was made by stat. 2 W. IV. c. 39 in the mode of commencing personal actions. In these the use of the original writ was abolished, and the process in all such actions, in cases where it was not intended to hold the defendant to bail or to proceed against a member of parliament, according to the provisions of the bankrupt-laws, it was enacted, should be according to the form contained in a schedule to the act, and which process was thenceforth to issue from either of the superior courts, and to be called a writ of summons. In every such writ and copy thereof the place and county of the residence or supposed residence of the party defendant was to be mentioned, and every such writ was to be served in the manner heretofore and in the county therein mentioned; and the person serving the same was required to endorse on the writ the day of the month and week of the service thereof. The provisions as to writs of summons of the statute 2 W. IV. c. 39 were extended, by stat. 1 & 2 Vict. c. 110, to all personal actions in her majesty's superior courts of law at Westminster; but the process

If, after *attachment*, the defendant neglects to appear, he not only forfeits this security, but is moreover to be further compelled by writ of *distringas*(*k*) or *distress infinite;* which is a subsequent process issuing from the court of common pleas, commanding the sheriff to distrain the defendant from time to time, and continually afterwards by taking his goods and the profits of his lands, which are called *issues*, and which by the common law he forfeits to the king if he doth not appear.(*l*) But now the issues may be sold, if the court shall so direct, in order to defray the reasonable costs of the plaintiff.(*m*)[2] In like *manner, by the civil law, if the defendant absconds, so that the citation is of no effect, "*mittitur adversarius in possessionem bonorum ejus.*"(*n*) [*281

And here, by the common as well as the civil law, the process ended in case of injuries without force; the defendant, if he had any substance, being gradually stripped of it all by repeated distresses, till he rendered obedience to the king's writ; and, if he had no substance, the law held him incapable of making satisfaction, and therefore looked upon all further process as nugatory. And besides, upon feodal principles, the person of a feudatory was not liable to be attached for injuries merely civil, lest thereby his lord should be deprived of his personal services. But, in case of injury accompanied with force, the law, to punish the breach of the peace, and prevent its disturbance for the future, provided also a process against the defendant's *person* in case he neglected to appear upon the former process of attachment, or had no substance whereby to be attached; subjecting his body to imprisonment by the writ of *capias ad respondendum*.(*o*) But this immunity of the defendant's person, in case of

(*k*) Append. No. III. § 2.
(*l*) Finch, L. 325.
(*m*) Stat. 10 Geo. III. c. 50.
(*n*) *Ff.* 2, 4, 19.
(*o*) 3 Rep. 12.

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or writ of summons in personal actions is now regulated by "The Common-Law Procedure Act, 1852," which provides a form of writ similar to that given by the statute 2 W. IV. c. 49, except that no *county* need be mentioned therein, while it is specially provided that the defendant may be served in any county. The writ is directed to the defendant, whom it commands that within eight days after the service of the writ on him, inclusive of the day of such service, he do cause an appearance to be entered for him in the court in which the action is brought, in an action at the suit of the plaintiff, and requires the defendant to take notice that in default of his so doing the plaintiff may proceed to judgment and execution. The writ is *teste*'d,—*i.e.*, witnessed in the name of the chief-justice or chief-baron, or, in case of vacancy, of a senior puisne judge of the court out of which it issues, and dated on the day on which it issued. A memorandum is subscribed to it, directing its execution within six months from the day of its date, after which period it ceases to be of force unless renewed. The defendant may apply to set it aside, if served after the six months; if it cannot be served within that period, the plaintiff may have it renewed from time to time, until service be effected.—STEWART.

[2] Now, by 51 Geo. III. c. 124, s. 2, continued by 57 Geo. III. c. 101, a *distringas* cannot be issued; but at the foot of the summons or attachment notice as therein directed is to be given to defendant to appear, or, in default of an appearance, that plaintiff will enter one for him, and proceed thereon as if he had appeared. If, however, the summons or attachment cannot be personally served on defendant, and it be left for him at his house or place of abode, the court or a judge in vacation may grant leave to sue out a *distringas*, with a notice thereon as pointed out in the act, and plaintiff may levy 40*s*.; and if defendant still make default in appearing, an appearance may be entered for him, and plaintiff may proceed as usual. These acts have expired.

These provisions seem to extend to the process by *distringas* in the exchequer. 5 Taunt. 71, a.; but see 3 Price, 263, 266. 5 Price, 522, 639. They do not extend to persons having privilege of parliament, nor to the process by attachment on a *justicies* in a county palatine. 5 Taunt. 69.—CHITTY.

The proceeding by *distringas* and outlawry is abolished by the "Common-Law Procedure Act, 1852;" and now, if the defendant keeps out of the way, or personal service of the writ cannot be effected, the plaintiff must still use reasonable efforts to serve the defendant; and upon an affidavit showing such efforts to have been made, and either that the writ has come to the defendant's knowledge, or that he wilfully evades service of it, and that he has not appeared to the writ, the plaintiff may obtain an order from the court or a judge authorizing him to proceed as if personal service had been effected. —STEWART.

peaceable though fraudulent injuries, producing great contempt of the law in indigent wrong-doers, a *capias* was also allowed to arrest the person, in actions of *account*, though no breach of the peace be suggested, by the statutes of Marlberge, 52 Hen. III. c. 23, and Westm. 2, 13 Edw. I. c. 11, in actions of *debt* and *detinue*, by statute 25 Edw. III. c. 17, and in all actions *on the case*, by statute 19 Hen. VII. c. 9. Before which last statute a practice had been introduced of commencing the suit by bringing an original writ of trespass *quare clausum fregit*, for breaking the plaintiff's close *vi et armis;* which by the old common law subjected the defendant's person to be arrested by writ of *capias:* and then, afterwards, by connivance of the court, the plaintiff might proceed to prosecute for any other less forcible injury. This practice (through custom rather than necessity, and for saving some trouble and expense, in suing out a special original *adapted to the particular injury) still continues in almost all cases, except in actions of debt; though now, by virtue of the statutes above cited and others, a *capias* might be had upon almost every species of complaint. *282]

If therefore the defendant being summoned or attached makes default, and neglects to appear; or if the sheriff returns a *nihil*, or that the defendant hath nothing whereby he may be summoned, attached, or distrained; the *capias* now usually issues:(*p*) being a writ commanding the sheriff to *take* the body of the defendant if he may be found in his bailiwick or county, and him safely to keep, so that he may have him in court on the day of the return, to answer to the plaintiff of a plea of debt or trespass, &c., as the case may be. This writ, and all others subsequent to the original writ, not issuing out of chancery, but from the court into which the original was returnable, and being grounded on what has passed in that court in consequence of the sheriff's return, are called *judicial*, not *original* writs; they issue under the private seal of that court, and not under the great seal of England; and are *teste*'d, not in the king's name, but in that of the chief (or, if there be no chief, of the senior) justice only. And these several writs, being grounded on the sheriff's return, must respectively bear date the same day on which the writ immediately preceding was returnable.[3]

This is the regular and ordinary method of process. But it is now usual in practice to sue out the *capias* in the first instance, upon a supposed return of the sheriff; especially if it be suspected that the defendant, upon notice of the action, will abscond; and afterwards a fictitious original is drawn up, if the party is called upon so to do, with a proper return thereupon, in order to give the proceedings a colour of regularity. When this *capias* is delivered to the sheriff, he by his under-sheriff grants a warrant to his inferior officers or bailiffs, to execute it on the defendant. And, if the sheriff of Oxfordshire (in which county the injury is supposed to be committed and the action is laid) cannot find the defendant in his jurisdiction, *he returns that he is not found, *non est inventus*, in his bailiwick; whereupon another writ issues, called a *testatum capias*,(*q*) directed to the sheriff of the county where the defendant is supposed to reside, as of Berkshire, reciting the former writ, and that it is *testified, testatum est*, that the defendant lurks or wanders in *his* bailiwick, wherefore he is commanded to take him, as in the former *capias*. But here also, when the action is brought in one county and the defendant lives in another, it is usual, for saving trouble, time, and expense, to make out a *testatum capias* at the first; supposing not only an original, but also a former *capias*, to have been granted, which in fact never was. And this fiction, being beneficial to all parties, is readily acquiesced in and is now become the settled practice; being one among *283]

(*p*) Append. No. III. § 2. (*q*) Ibid.

[3] Or rather on the quarto die post, and then only where the plaintiff means to proceed to outlawry; in which case there must be fifteen days at least between the *teste* and the return of each writ, (Trye, 60. 2 Wils. 117:) but the cursitor will expedite the process. Dyer, 175. Tidd, 8th ed. 103. Unless the plaintiff mean to proceed to outlawry, the *capias* may be *teste*'d before the original, and even before the cause of action accrued, provided it be actually taken out afterwards. See Tidd, 8th ed. 125. 3 Wils. 454.—Chitty.

many instances to illustrate that maxim of law, that *in fictione juris consistit æquitas.*[4]

But where a defendant absconds, and the plaintiff would proceed to an outlawry against him, an original writ must then be sued out regularly, and after that a *capias.*[5] And if the sheriff cannot find the defendant upon the first writ of *capias*, and return a *non est inventus*, there issues out an *alias* writ, and after that a *pluries*, to the same effect as the former;(*r*) only after these words, "we command you," this clause is inserted, "as we have *formerly*," or, "as we have *often* commanded you:"—"*sicut* alias," or "*sicut* pluries, *præcepimus.*" And, if a *non est inventus* is returned upon all of them, then a writ of *exigent* or *exigi facias* may be sued out,(*s*) which requires the sheriff to cause the defendant to be proclaimed, required, or exacted, in five county courts successively, to render himself; and if he does, then to take him as in a *capias;* but if he does not appear, and is returned *quinto exactus*, he shall then be outlawed by the coroners of the county. Also by statutes 6 Hen. VIII. c. 4, and 31 Eliz. c. 3, whether the defendant dwells within the same or another county than that wherein the *exigent* is sued out, *a *writ of proclamation*(*t*) shall issue out at the same time with the *exigent*, commanding the sheriff of the county, wherein the [*284 defendant dwells, to make three proclamations thereof in places the most notorious, and most likely to come to his knowledge, a month before the outlawry shall take place. Such *outlawry* is putting a man out of the protection of the law, so that he is incapable to bring an action for redress of injuries; and it is also attended with a forfeiture of all one's goods and chattels to the king. And therefore, till some time after the conquest, no man could be outlawed but for felony; but in Bracton's time, and somewhat earlier, process of outlawry was ordained to lie in all actions for trespasses *vi et armis.*(*u*) And since his days, by a variety of statutes, (the same which allow the writ of *capias* before mentioned,) process of outlawry doth lie in divers actions that are merely civil; provided they be commenced by original and not by bill.(*v*) If after outlawry the defendant appears publicly, he may be arrested by a writ of *capias utlagatum.*(*w*)[6] and committed till the outlawry be reversed. Which reversal may be had by the defendant's appearing personally in court or by attorney,(*x*) (though in the king's bench he could not appear by attorney,(*y*) till permitted by statute

(*r*) Append. No. III. § 2.
(*s*) Ibid.
(*t*) Ibid.
(*u*) Co. Litt. 128.
(*v*) 1 Sid. 159.
(*w*) Append. No. III. § 2.
(*x*) 2 Roll. Rep. 490. Regul. C. B. A.D. 1654, c. 13.
(*y*) Cro. Jac. 616. Salk. 496.

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[4] By stat. 1 & 2 Vict. c. 110, arrest on mesne process in civil actions is almost entirely abolished. Where it can be shown to the satisfaction of a judge of one of the superior courts that a plaintiff has a cause of action against a defendant to the amount of 20*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant is about to quit England unless he shall be apprehended, the judge may direct that such defendant may be held to bail, and that a writ or writs of *capias* may be sued out.—STEWART.

[5] And if in a joint action against several defendants one of them keep out of the way, the plaintiff may have a writ of *exigi facias* against that defendant, (Trye, 155.) and must proceed to outlawry against him before he can go on against the others. 1 Stra. 473. 1 Wils. 78. 1 Bla. Rep. 20. Tidd, 8th ed. 126.

If the defendant be a woman, the proceeding is called a waiver. Litt. 186. Co. Litt. 122. b. An infant under twelve years cannot be outlawed. Co. Litt. 128, a.—CHITTY.

[6] Upon a special *capias utlagatum*, the sheriff is commanded to summon a jury to appraise the chattels and value the lands, &c. of the outlaw. The sheriff then takes possession of the chattels and of the profits of the land, &c., and returns the writ. Upon a transcript of the proceedings being returned to the exchequer, there issues to the sheriff a *venditioni exponas* to all the goods, a *scire facias* to recover the debts, and a *levari facias* to levy the issues and profits of the lands extended. The money raised under these writs belongs to the crown; but the plaintiff, either by application to the court of exchequer or by petition to the lords of the treasury, according to circumstances, may have it paid to him, and may obtain a grant of the king's right to levy the profits of the land extended. See Tidd's Practice, 137, 138. Should the outlawry, however, be reversed, the property of the outlaw, if in the king's hands, shall be restored to him by writ of *amoveas manus*, &c.—ARCHBOLD.

4 & 5 W. and M. c. 18;) and any plausible cause, however slight, will in general be sufficient to reverse it, it being considered only as a process to compel an appearance. But then the defendant must pay full costs, and put the plaintiff in the same condition as if he had appeared before the writ of *exigi facias* was awarded.[7]

Such is the first process in the court of *common pleas*. In the *king's bench* they *may* also (and frequently *do*) proceed in certain causes, particularly in actions of ejectment and trespass, by *original* writ, with *attachment* and *capias* thereon;(*y*) returnable, not at Westminster, where the common pleas are now fixed in consequence of *magna carta*, but "*ubicunque fuerimus in Anglia*," wheresoever the king shall then be in *England; the king's bench being removable into any part of England at the pleasure and discretion of the crown. But the more usual method of proceeding therein is without any original, but by a peculiar species of process entitled a *bill of Middlesex:* and therefore so entitled, because the court now sits in that county; for if it sat in *Kent*, it would then be a *bill of Kent*.(*z*) For though, as the justices of this court have, by its fundamental constitution, power to determine all offences and trespasses, by the common law and custom of the realm,(*a*) it needed no original writ from the crown to give it cognizance of any misdemeanour in the county wherein it resides; yet, as by this court's coming into any county it immediately superseded the ordinary administration of justice by the general commissions of *eyre* and of *oyer and terminer*,(*b*) a process of its own became necessary within the county where it sat, to bring in such persons as were accused of committing any *forcible* injury. The bill of Middlesex(*c*) (which was formerly always founded on a *plaint* of trespass *quare clausum fregit*, entered on the records of the court)(*d*) is a kind of *capias*, directed to the sheriff of that county, and commanding him to take the defendant and have him before our lord the king at Westminster on a day prefixed, to answer to the plaintiff of a plea of trespass. For this accusation of trespass it is, that gives the court of king's bench jurisdiction in other civil causes, as was formerly observed; since when once the defendant is taken into custody of the marshal, or prison-keeper of this court, for the supposed trespass, he being then a prisoner of this court, may here be prosecuted for any other species of injury. Yet, in order to found this jurisdiction, it is not necessary that the defendant be actually the marshal's prisoner; for, as soon as he appears, or puts in bail, to the process, he is deemed by so doing to be in such custody of the marshal as will give the court a jurisdiction to proceed.(*e*) And, upon these accounts, *in the bill or process a complaint of trespass is always suggested, whatever else may be the real cause of action. This bill of Middlesex must be served on the defendant by the sheriff, if he finds him in that county; but, if he returns "*non est inventus*," then there issues out a writ of *latitat*(*f*) to the sheriff of another county, as Berks; which is similar to the *testatum capias* in the common pleas, and recites the bill of Middlesex and the proceedings thereon, and that it is testified that the defendant "*latitat et discurrit*," lurks and wanders about in Berks; and therefore commands the sheriff to take him, and have his body in court on the day of the return.[8] But, as in

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(*y*) Append. No. II. § 1.

(*z*) Thus, when the court sat at Oxford by reason of the plague, Mich. 1665, the process was by *bill of Oxfordshire*. Trye's *Jus Filizar*. 101.

(*a*) Bro. Abr. tit. *Oyer and Terminer*, 8.

(*b*) Bro. Abr. tit. *Jurisdiction*, 66. 3 Inst. 27.

(*c*) Append. No. III. § 5.

(*d*) Trye's *Jus Filizar*. 98.

(*e*) 4 Inst. 72.

(*f*) Append. No. III. § 3.

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[7] Unless where the outlawry was obtained for the purpose of oppression, as where defendant was already in prison at plaintiff's suit, &c. 2 Ventr. 46. 2 Salk. 495. The absence of the defendant beyond sea at the time the exigent is promulgated is, at common law, ground for a writ of error to reverse the outlawry; but if defendant went abroad purposely for delay, that fact may effectually be replied. 2 Roll. R. 11. 12 East, 625.—Chitty.

[8] If the *latitat* prove ineffectual, an *alias*, and after that a *pluries latitat*, or, more properly speaking, an *alias* or *pluries capias*, may be sued out. Tidd, 8th ed. 145. When it is doubtful in what county the defendant is to be found, there may be several writs at the same time into different counties. Id. 1 Chitt. Rep. 544. In any of these writs there may be a

the common pleas the *testatum capias* may be sued out upon only a supposed, and not an actual, preceding *capias;* so in the king's bench a *latitat* is usually sued out upon only a supposed, and not an actual, *bill of Middlesex* So that, in fact, a *latitat* may be called the first process in the court of king's bench, as the *testatum capias* is in the common pleas. Yet, as in the common pleas, if the defendant lives in the county wherein the action is laid, a common *capias* suffices; so in the king's bench, likewise, if he lives in Middlesex, the process must still be by *bill of Middlesex* only.[9]

In the exchequer the first process is by writ of *quo minus*, in order to give the court a jurisdiction over pleas between party and party. In which writ(*g*) the plaintiff is alleged to be the king's farmer or debtor, and that the defendant hath done him the injury complained of; *quo minus sufficiens existit*, by which he is the less able to pay the king his rent, or debt. And upon this the defendant may be arrested as upon a *capias* from the common pleas.[10]

Thus differently do the three courts set out at first, in the commencement of a suit, in order to entitle the two courts of king's bench and exchequer to hold plea in causes between subject and subject, which by the original constitution of Westminster hall they were not empowered to do. Afterwards, when the cause is once drawn into the respective courts, the method of pursuing it is pretty much the same in all of them.

*If the sheriff has found the defendant upon any of the former writs, the *capias*, *latitat*, &c., he was antiently obliged to take him into custody, [*287 in order to produce him in court upon the return, however small and minute the cause of action might be. For, not having obeyed the original summons, he had shown a contempt of the court, and was no longer to be trusted at large. But when the summons fell into disuse, and the *capias* became in fact the first process, it was thought hard to imprison a man for a contempt which was only supposed: and therefore in common cases, by the gradual indulgence of the courts, (at length authorized by statute 12 Geo. I. c. 29, which was amended by 5 Geo. II. c. 27, made perpetual by 21 Geo. II. c. 3, and extended to all inferior courts by 19 Geo. III. c. 70,) the sheriff or proper officer can now only personally serve the defendant with the copy of the writ or process, and with notice in writing to appear by his attorney in court to defend this action; which in effect reduces it to a mere summons.[11] And if the defendant thinks

(*g*) Append. No. III. § 4.

clause of *non omittas*, commanding the sheriff that he do not *omit* on account of any liberty in his county, but that he enter the same, &c., and take the defendant, &c., which *non omittas* writ may be issued in the first instance. Tidd, 8th ed. 145, 146.—CHITTY.

[9] And a *latitat* cannot be served out of the proper county, though when a person has been served on the confines of a county, though out of it, the court will not in general set aside the service. 4 M. & S. 412. 1 Chitty's R. 15; and see id. 233.—CHITTY.

[10] In the Exchequer an action may also be commenced by a *venire facias ad respondendum*, which is in the nature of an original writ, and is the process used in this court against peers and members of the house of commons. On this writ the defendant is summoned; and if he do not appear, a *distringas* issues, and after that, if necessary, an *alias*, *pluries*, or *testatum distringas*. Tidd's Practice, 67. An action *by* an attorney or officer of this court is commenced by a *capias* of privilege, and *against* attorneys, officers, or prisoners by bill. Ibid. 68.—ARCHBOLD.

[11] But in this court the defendant cannot be outlawed, as the plaintiff cannot proceed therein by original writ. 1 Price, 309. Besides, the writ of *quo minus* is a *venire facias* and subpœna *ad respondendum*. For the process in this court, see Tidd, 8th ed. 154 to 157.

As to the form of the notice, see Tidd, 8th ed. 166. If there be no notice to appear, when necessary, or the notice be not properly directed, &c., the defendant may move the court to set aside the proceedings; but any trifling informality in the notice, as setting down the day of the month on which the defendant is to appear, without saying *instant*, *next*, or specifying the *year*, or mentioning an impossible day, will not invalidate it. Tidd, 8th ed. 167. As to the service of the process, see id. 167 to 169.

If there be no process, or if it be defective in point of form, or in its direction, *teste*, or return, or the attorney's name be not endorsed upon it, the defendant may move the court to set aside the proceedings for irregularity; and a writ having a wrong return will not be aided by a correct day being mentioned in the notice to appear. But he cannot take advantage of any error or defect in the process after he has appeared to it or taken

proper to appear upon this notice, his appearance is recorded, and he puts in sureties for his future attendance and obedience; which sureties are called *common bail*, being the same two imaginary persons that were pledges for the plaintiff's prosecution, John Doe and Richard Roe. Or, if the defendant does not appear upon the return of the writ, or within four (or, in some cases, eight) days after,[12] the plaintiff may enter an appearance to him, as if he had really appeared; and may file common bail in the defendant's name, and proceed thereupon as if the defendant had done it himself.

But if the plaintiff will make *affidavit*, or assert upon oath, that the cause of action amounts to ten pounds or upwards,[13] then he may arrest the defend-

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the declaration out of the office; for it is the universal practice of the courts that the application to set aside proceedings for irregularity should be made as early as possible, or, as it is commonly said, in the first instance; and where there has been an irregularity, if the party overlook it and take subsequent steps in the cause, he cannot afterwards revert back and object to it. In the Common Pleas the court will not quash a writ on the ground of its having been served in a wrong county. And it is said that a mistake in the process is cured by the plaintiff's entering an appearance for the defendant, which has been always looked upon as effectual for that purpose as if he had done it himself; but it is otherwise where the defendant has not been served with a copy of the process, or the notice subscribed thereto is defective. It is also said that no advantage can be taken of the irregularity of process without having it returned, and before the court; and where the irregularity complained of is not in the process, but in the notice to appear thereto, or in the service of it, the rule should be to set aside such service, and not the process itself. See Tidd, 8th ed. 159, and the various cases there collected.

The process may in general be amended where there is any thing to amend by; and it has been amended in the name of the defendant where he was a prisoner in custody under it. But the court of King's Bench would not grant a rule for amending the writ, under which the defendant had been arrested by a wrong name, after actions of false imprisonment had been brought for such arrest; so an amendment cannot be made of mesne process by adding the name of another person as plaintiff. A writ returnable on a *dies non* is altogether void, and cannot be amended by the court; and the courts, we have seen, will not in general allow a writ to be amended to the prejudice of the bail. Tidd, 8th ed. 160, and cases there collected.—Chitty.

[12] In all cases where the defendant is served with a copy of the process, he has eight days to file common bail in the King's Bench, or to enter a common appearance in the Common Pleas, exclusive of the return-day; and if the last of the eight days be a Sunday, he has all the next day. 1 Cromp. Prac. 48. 1 Burr. 56.

As to what *cause of action* will justify an arrest, it is a rule that where a debt is certain, or damages may be reduced to a certainty, as in assumpsit or covenant for the payment of money, (Barnes, 79, 80, 108,) the defendant may be arrested as a matter of course, on an affidavit stating the cause of action. Tidd, 170. But where damages are altogether uncertain, as in assumpsit, or covenant, to indemnify, &c., or in actions for a tort or trespass, there can be no arrest without a special order of the court, or a judge, on a full affidavit of the circumstances, (id. 171;) and, by rule of H. T. 48 Geo. III., a person cannot be held to special bail in trover or detinue without an order. And there are other cases where an arrest is not allowed, even though the action be brought for a sum certain. Thus, a defendant cannot be arrested on a penal statute, (Yelv. 53,) though he may on a remedial one, (7 T. R. 259,) or where the act expressly authorizes an arrest. The defendant cannot be arrested on a bail-bond, (R. M. 8 Anne,) or replevin-bond, (1 Salk. 99. 6 T. R. 336. 8 T. R. 450,) or on a recognizance of bail, (Tidd, 8th ed. 172;) nor for goods bargained and sold, or sold without stating a delivery, (12 East, 398. 1 Bingh. 357;) nor on a policy of insurance without an adjustment, or an express promise to pay the amount, (5 Taunt. 201. 1 Marsh. 19, S. C.;) but he may be on a guarantee. 9 Price, 155. So defendant cannot be arrested for more than is equitably due. Thus, he cannot be arrested on the penalty of a bond, (6 T. R. 217. 2 East, 409;) but he may if the sum is agreed to be for liquidated damages. Tidd, 8th ed. 173. He cannot be arrested for more than the balance due where there is a set-off. 3 B. & C. 139. 5 B. & A. 513. 1 D. & R. 67, S. C.

[13] Now, by stat. 7 & 8 Geo. IV. c. 71, the debt must amount to 20*l.*, and in Wales and the counties palatine to 50*l.* Intermediate statutes—viz., 51 Geo. III. c. 124, and 27 Geo. III. c. 101—extended the sum from 10*l.* to 15*l.*, except upon bills of exchange and promissory-notes. The statute of the present king contains no such exemption.—Chitty.

This affidavit must be certain and positive; for an affidavit made upon belief, or with

ant, and make him put in substantial sureties for his appearance, called *special bail*. In order to which, it is required by statute 13 Car. II. st. 2, c. 2, that the true cause of action should be expressed in the body of the writ or process: else no security can be taken in a greater sum than 40*l*. This statute (without any such intention in the makers) had like to have ousted the king's bench of *all its jurisdiction over civil injuries without force; for, as the bill of Middlesex was framed only for actions of trespass, a defendant could not be arrested and held to bail thereupon for breaches of civil contracts. But to remedy this inconvenience, the officers of the king's bench devised a method of adding what is called a clause of *ac etiam* to the usual complaint of trespass: the bill of Middlesex commanding the defendant to be brought in to answer the plaintiff of a plea of trespass, *and also* to a bill of debt;(*f*) the complaint of trespass giving cognizance to the court, and that of debt authorizing the arrest. In imitation of which, lord chief justice North, a few years afterwards, in order to save the suitors of his court the trouble and expense of suing out special originals, directed that in the common pleas, besides the usual complaint of breaking the plaintiff's close, a clause of *ac etiam* might be also added to the writ of *capias*, containing the true cause of action; as, "that the said Charles, the defendant, may answer to the plaintiff of a plea of trespass in breaking his close; and also, *ac etiam*, may answer him, according to the custom of the court, in a certain plea of trespass upon the case, upon promises, to the value of twenty pounds, &c."(*g*) The sum sworn to by the plaintiff is marked upon the back of the writ, and the sheriff, or his officer the bailiff, is then obliged actually to arrest or take into custody the body of the defendant, and, having so done, to return the writ with a *cepi corpus* endorsed thereon. [*288

An *arrest* must be by corporal seizing or touching the defendant's body,[14] after which the bailiff may justify breaking open the house in which he is[15] to take him; otherwise he has no such power, but must watch his opportunity to arrest him; for every man's house is looked upon by the law to be his castle of defence and asylum, wherein he should suffer no violence:[16] which principle

(*f*) Trye's *Jus Filizar.* 102. Append. No. III. § 3.
(*g*) Lilly's Pract. Reg. tit. *ac etiam*. North's Life of Lord Guildford, 99. This work is strongly recommended to the student's perusal.

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a reference to something else,—as where the plaintiff swears the defendant is indebted to him in ten pounds or upwards, as appears by his books or by a bill delivered,—will not be sufficient unless the plaintiff is an executor, administrator, or assignee; for then, from the nature of his situation, he cannot swear more positively than from belief or from a reference to the accounts of others. 1 Sellon's Practice, 112.—CHRISTIAN.

[14] But this does not seem to be absolutely necessary; for if a bailiff come into a room and tell the defendant he arrests him, and lock the door, it is sufficient. C. T. Hardw. 301. 2 New Rep. 211. Bull. N. P. 82. Bare words, however, will not constitute an arrest. 1 Ry. & M. C. N. P. 26. It is sufficient that the officer have the authority, be near, and acting in the arrest, without being the person who actually arrests. Cowp. 65.

If the defendant be wrongfully taken without process, (2 Anst. 461. 1 N. R. 135.) or after it is returnable, (2 H. Bla. 29.) he cannot be lawfully detained in custody under subsequent process at the suit of the same plaintiff, though he may at the suit of third persons. 2 B. & A. 743. 1 Chit. Rep. 579, S. C.—CHITTY.

It is not necessary that the arrest should be made by the hand of the bailiff, nor that he should be actually in sight: yet when an arrest is made by his assistant or follower, the bailiff ought to be so near as to be considered as acting in it. Cowp. 65.—CHRISTIAN.

[15] This appears to be stated too extensively: it is the defendant's own dwelling which by law is said to be his castle; for if he be in the house of another, the bailiff or sheriff may break and enter it to effect his purpose, but he ought to be very certain that the defendant be, at the time of such forcible entry, in the house. See Johnson *vs.* Leigh, 6 Taunt. 246.—CHITTY.

[16] A bailiff, before he has made the arrest, cannot break open an outer door of a house; but if he enter the outer door peaceably, he may then break open the inner door, though it be the apartment of a lodger, if the owner himself occupies part of the house. Cowp. 1. 2 Moore, 207. 8 Taunt. 250, S. C. But if the whole house be let in lodgings, as each lodging is then considered a dwelling-house, in which burglary may be stated to have been committed, it has been supposed that the door of each apartment would be considered an outer door, which could not be legally broken open to execute an arrest. Cowp. 2.—CHRISTIAN.

is carried so far in the civil law, that, for the most part, not so much as a common citation or summons, much less an arrest, can be executed upon a man within his own walls.(*h*) Peers of the realm, members *of parliament, and corporations, are privileged from arrests; and of course from outlawries.(*i*) And against them the process to enforce an appearance must be by summons and distress infinite,(*j*) instead of a *capias*. Also clerks, attorneys, and all other persons attending the courts of justice, (for attorneys, being officers of the court, are always supposed to be there attending,) are not liable to be arrested by the ordinary process of the court, but must be sued by *bill*, (called usually a *bill of privilege*,) as being personally present in court.(*k*)[17] Clergymen performing divine service, and not merely staying in the church with a fraudulent design, are for the time privileged from arrests, by stat. 50 Edw. III. c. 5, and 1 Ric. II. c. 16, as likewise members of convocation actually attending thereon, by statute 8 Hen. VI. c. 1. Suitors, witnesses, and other persons, necessarily attending any courts of record on business, are not to be arrested during their actual attendance, which includes their necessary coming and returning.[18] And no arrest can be made in the king's presence, nor within the

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(*h*) *Ff.* 2, 4, 18–21.
(*i*) Whitelock of Parl. 206, 207.
(*j*) See page 280.
(*k*) Bro. Abr. tit. *bille*, 29. 12 Mod. 163.

But to justify breaking open an inner door belonging to a lodger, admittance must be first demanded, unless defendant is in the room. 3 B. & P. 223. 4 Taunt. 619. And the breaking open an inner door of a stranger cannot be justified on a suspicion that defendant is in the room. 5 Taunt. 765, 6th ed. 246.—Chitty.

[17] These privileges are allowed not so much for the benefit of attorneys as their clients, (2 Wils. 44. 4 Burr. 211. 3 Doug. 381,) and are therefore confined to attorneys who practise, (2 Wils. 232. 4 Burr. 2113. 2 Bla. Rep. 1086. 1 Bos. & Pul. 4. 2 Lutw. 1667, contra,) or at least have practised within a year; for it is a rule that such attorneys as have not been attending their employment in the King's Bench for the space of a year, unless hindered by sickness, be not allowed their privilege of attorneys. R. M. 1654, S. 1. K. B. & C. P. 2 M. & S. 605.—Chitty.

[18] See, further as to the privileges from arrest, Tidd, 8th ed. 193 to 214. Lee's Dict. tit. Arrest, 90, 92. In addition to those named in the text are the following, viz.: *Administrator*, as such, (Yelv. 53;) but not if he has personally promised to pay. 1 T. R. 716. *Aliens* for debt beyond seas. 38 Geo. III. c. 50, s. 9. *Ambassadors and servants.* 7 Anne, c. 12. 1 B. & C. 554. 3 D. & R. 833, 25. *Bail*, being about to justify, or otherwise attending court as bail. 1 H. Bla. 636. 1 M. & S. 638. *Bankrupt* for forty-two days, unless before in prison, and after forty-two days, if the time for surrender be enlarged, (8 T. R. 475:) also if summoned before the commissioners relative to his estate, though several years after his last examination. Id. 534. See the 6 Geo. IV. c. 16, ss. 117, 118. *Barristers* attending court or on circuit. 1 H. Bla. 636. *Bishops. Consul-general.* 9 East, 447; *sed vid.* 1 Taunt. 106. 3 M. & S. 284. *Executor*, as such. *Feme-covert*, (1 T. R. 486. 2 H. B. 17;) but if she obtain credit, pretending to be single, she may be arrested, (1 N. R. 54; and see 1 Bing. 344. 2 Marsh. 40. 7 Taunt. 55. Tidd, 8th ed. 197;) though if a foreigner and her husband be abroad, she is liable for her debts, though neither separated by deed nor having a separate maintenance. (2 N. R. 380;) but if plaintiff knew her to be married, she will be discharged, (6 T. R. 451. 1 East, 17, n. 7 East, 582:) and in such case plaintiff will be ruled to pay costs of motion, (3 Taunt. 307;) but if she cohabit with another man, and trade on her own account, she will not be discharged, (1 B. & P. 8;) if she, by mistake, misrepresent her husband to be dead, she will be discharged. 1 East, 16. *Heir*, sued as such. *Hundredors*, as such. *Insolvent debtor* discharged, (3 M. & S. 595,) unless on a subsequent express promise. 6 Taunt. 563; *sed vid.* 1 Chit. R. 274, n. *Irish peer*, whether a representative or not. 39 & 40 Geo. III. c. 67, art. 4. *Marshal* of King's Bench. *Officers*, non-commissioned, (4 Taunt. 557:) but volunteer drill sergeants are not exempt. 8 T. R. 105. *Plaintiff* attending execution of inquiry, &c. 4 Moore, 34. *Sailors*, under 20*l.* 1 Geo. II. st. 2, c. 14, s. 15. 32 Geo. III. c. 33, s. 22. *Serjeants* at law. 6 T. R. 686. *Suitors* attending court, (11 East, 439,) and insolvent court is such a court. 2 Marsh. 57. 6 Taunt. 336. *Warden* of the Fleet. *Witnesses* subpœnaed, or summoned before commissioners under great seal, or attending an arbitrator appointed by the court. 1 Chit. Rep. 679. 3 B. & A. 252, S. C. 3 Anst. 941. 3 East, 189. A creditor attending commissioners of bankrupt to prove a debt. 7 Ves. 312. 1 Ves. & B. 316. 2 Rose, 24. By mutiny act, witnesses attending court-martial are privileged. But witnesses are not privileged if they delay by the way. 1 Chit. Rep. 679. 3 B. & A, 252. S. C; *sed vid.* 7 Price, 699. A reasonable time is allowed for going and returning. 2 Bla. Rep. 1113. 2 Marsh. 57.—Chitty.

verge of his royal palace,(*l*)[19] nor in any place where the king's justices are actually sitting.[20] The king hath moreover a special prerogative, (which, indeed, is very seldom exerted,)(*m*) that he may by his *writ of protection* privilege a defendant from all personal, and many real, suits for one year at a time, and no longer; in respect of his being engaged in his service out of the realm.(*n*) And the king also, by the common law, might take his debtor into his protection, so that no one might sue or arrest him till the king's debt be paid;(*o*) but by the statute 25 Edw. III. st. 5, c. 19, notwithstanding such protection, another creditor may proceed to judgment against *him, with a stay of execution, till the king's debt be paid; unless such creditor [*290 will undertake for the king's debt, and then he shall have execution for both. And lastly, by statute 29 Car. II. c. 7, no arrest can be made, nor process served, upon a Sunday, except for treason, felony, or breach of the peace.[21]

When the defendant is regularly arrested he must either go to prison for safe custody, or put in *special bail* to the sheriff.[22] For, the intent of the arrest being only to compel an appearance in court at the return of the writ, that purpose is equally answered whether the sheriff detains his person, or takes sufficient security for his appearance, called *bail*, (from the French word *bailler*, to deliver,) because the defendant is bailed or delivered to his sureties, upon their giving security for his appearance, and is supposed to continue in their friendly custody instead of going to gaol. The method of putting in bail to the sheriff is by entering into a bond or obligation, with one or more sureties, not fictitious persons, as in the former case of common bail, but real, substantial, responsible bondsmen, to insure the defendant's appearance at the return of the writ; which obligation is called the *bail-bond*.(*p*)[23] The sheriff, if he pleases, *may* let the defendant go without any sureties; but that is at his own peril: for, after once taking him, the sheriff is bound to keep him safely, so as to be forthcoming in court; otherwise an action lies against him for an escape.[24]

(*l*) See book iv. 276. The verge of the palace of Westminster extends, by stat. 28 Hen. VIII. c. 12, from Charing Cross to Westminster hall.

(*m*) Sir Edward Coke informs us (1 Inst. 131) that herein "he could say nothing of his own experience; for albeit queen Elizabeth maintained many wars, yet she granted few or no protections: and her reason was that he was no fit subject to be employed in her service, that was subject to other men's actions, lest she might be thought to delay justice." But king William, in 1692, granted one to lord Cutts, to protect him from being outlawed by his tailor, (3 Lev. 882:) which is the last that appears upon our books.

(*n*) Finch, L. 464. 3 Lev. 332.

(*o*) F. N. B. 28. Co. Litt. 131.

(*p*) Append. No. III. § 5.

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[19] Except by an order of the board of green cloth, or unless the process issue out of the palace court. 3 T. R. 735. But an arrest within the verge of the palace has been holden in the Common Pleas to be no ground for discharging the defendant out of custody. 7 Taunt. 311; and see 1 Chit. Rep. 375. 3 B. & A. 502.—CHITTY.

[20] *Sed vide* 1 Lev. 106. Process cannot be executed in Kensington palace, (10 East. 578. 1 Camp. 475,) or within the Tower without leave from the governor. 2 Chit. Rep. 48, 51.—CHITTY.

[21] See construction of this act, Tidd, 8th ed. 216. After a negligent escape, the defendant may be taken on a Sunday. 2 Lord Raym. 1028.

The arrest must be made in the county into which the process is issued; an arrest on the verge of a county into which the writ is issued is bad, unless there be a dispute as to boundaries. 3 B. & A. 408.—CHITTY.

[22] Or, by 43 Geo. III. c. 46, deposit in the sheriff's hands the sum endorsed on the writ, with 10*l.* in addition to answer costs, &c., and the fine paid, if proceeding by original; and this deposit is paid into court, and repaid to the defendant on his perfecting bail, or rendering himself to prison, (4 Taunt. 669. 1 Bing. 103. Chitty R. 145. 3 M. & S. 283;) but, if neither of these measures be taken, it is to be paid over to the plaintiff by order of the court. See cases on construction of this act, Tidd, 8th ed. 226, 227. Quære if depositing goods instead of money will do. 7 Moore, 432.—CHITTY.

[23] An agreement by a third person with a sheriff's officer to put in good bail, &c., (1 T. R. 418,) or an attorney's undertaking to the office for defendant's appearance (7 T. R. 109) or to give bail-bond in due time, are void, and no action lies on it; but if given to the plaintiff in the action, it is valid. 4 East, 568.—CHITTY.

[24] But the action may be defeated by putting in bail in the original action, of the term in which the writ is returnable, though after the expiration of the time allowed for putting it in, and even after the action for the escape is brought. 1 Esp. Rep. 87. 2 B. & P. 35, 246. 1 Taunt. 25. 1 Chit. Rep. 575, a.; *sed vide* 7 T. R. 109. 4 East, 568. To prevent this, plaintiff should oppose justification of bail, (Tidd, 8th ed. 235,) or render. 7 T. R. 109. 2 Marsh. 261. 1 Price, 103. 4 M. & S. 397.

But, on the other hand, he is obliged, by statute 23 Hen. VI. c. 10, to take (if it be tendered) a sufficient bail-bond;[25] and by statute 12 Geo. I. c. 29, the sheriff shall take bail for no other sum than such as is sworn to by the plaintiff and endorsed on the back of the writ.

Upon the return of the writ, or within four days after, the defendant must *appear* according to the exigency of the writ. This *appearance* is effected by *291] putting in and justifying bail **to the action;* which is commonly called putting in bail *above.*[26] If this be not done, and the bail that were taken by the sheriff *below* are responsible persons, the plaintiff may take an assignment from the sheriff of the bail-bond (under the statute 4 & 5 Anne, c. 16) and bring an action thereupon against the sheriff's bail. But if the bail so accepted by the sheriff be insolvent persons, the plaintiff may proceed against the sheriff himself by calling upon him, first to return the writ, (if not already done,) and afterwards to bring in the body of the defendant. And, if the sheriff does not then cause sufficient bail to be put in and perfected *above,* he will himself be responsible to the plaintiff.

The bail *above,* or bail *to the action,* must be put in either in open court or before one of the judges thereof, or else, in the country, before a commissioner appointed for that purpose by virtue of the statute 4 W. and M. c. 4, which must be transmitted to the court. These bail, who must at least be two in number, must enter into a recognizance(*q*) in court or before the judge or commissioner in a sum equal (or in some cases double) to that which the plaintiff hath sworn to, whereby they do jointly and severally undertake that if the defendant be condemned in the action he shall pay the costs and condemnation or render himself a prisoner, or that they will pay it for him; which recognizance is transmitted to the court in a slip of parchment entitled a *bail-piece.*(*r*) And, if excepted to, the bail must be *perfected;* that is, they must *justify* themselves in court, or before the commissioner in the country, by swearing themselves housekeepers,[27] and each of them to be worth the full sum for which they are bail, after payment of all their debts.[28] This answers in some measure to

(*q*) Append. No. III. § 5. (*r*) Ibid.

Sheriff cannot sue defendant for money paid when he has discharged him out of custody on mesne process without a bail-bond, and has, in consequence of his non-appearance, been obliged to pay debt and costs. 8 East, 171.—Chitty.

[25] If he so refuse, he is liable to a special action on the case, (Gilb. C. P. 20. Cro. Car. 196. 6 T. R. 355;) but, to maintain such action, the parties offered as bail must have had sufficient property in the county where the arrest was made. 15 East, 320.—Chitty.

[26] In proceedings in the King's Bench by *bill,* whenever *special bail is not necessary* or has been dispensed with by the court, *common bail* (which are merely nominal) must be filed, or in proceedings in the *common pleas* of King's Bench by *original,* a common appearance must be entered. In the King's Bench, where defendant has been served with a copy of a bill of Middlesex, or other process therein, common bail should be filed at the return, or in eight days, exclusive (not including Sunday, if the last) after it. 5 Geo. II. c. 27, s. 1. 1 Burr. 56. Tidd, 8th ed. 240.

In proceedings by original in the King's Bench, the appearance must be entered with the filacer of the county in which the action is laid, within eight days after appearance-day or quarto die post of return of process. 3 B. & C. 110. 4 D. & R. 713, S. C. In the Common Pleas the eight days are reckoned from the return-day, and not from the quarto die post of the return of the writ. Id. Ibid. Impey, C. P. 216, 217.

By 5 Geo. II. c. 27, to expedite the plaintiff's proceedings, if the defendant, having been served with process, shall not appear at the return thereof or within eight days after such return, the plaintiff, upon affidavit of the service of such process, may enter a common appearance or file common bail for the defendant, and proceed therein as if such defendant had entered his appearance or filed common bail. The plaintiff cannot enter such appearance or file common bail till the ninth day. Tidd, 242.—Chitty.

[27] Or a freeholder, or copyholder, or a long leaseholder. 8 Taunt. 148. 1 Chitty R. 7, 88, 144. 2 Chitty R. 96, 97.—Chitty.

[28] Upon special bail being put in, a *notice* thereof must be given to the plaintiff's attorney or agent, whereupon the latter may *except* to the bail within twenty days after notice given, by entering such exception, (4 D. & R. 385:) and *notice of the exception* must be given to the defendant's attorney before the sheriff is ruled. Alexander *vs.* Miller, 24 Nov., 1825, K. B. But where bail is not put in, at the time of ruling the sheriff to re-

the *stipulatio* or *satisdatio* of the Roman laws,(*s*) which is mutually given by each litigant party to the other: by the plaintiff that he will prosecute his suit, and pay the costs if he loses his cause; in like manner as our law still requires nominal pledges of prosecution from the plaintiff: by the defendant, that he shall continue in court and abide the sentence of the judge, much like our special bail, but with this difference, that the *fidejussores* were there absolutely bound *judicatum solvere*, to see the costs and condemnation *paid [*292 at all events; whereas our special bail may be discharged, by surrendering the defendant into custody within the time allowed by law; for which purpose they are at all times entitled to a warrant to apprehend him.(*t*)[29]

(*s*) Inst. *l.* 4, t. 11. *Ff. l.* 2, *t.* 8. (*t*) Show. 202. 6 Mod. 231.

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turn the writ or bring in the body, he must put in and perfect of bail at his peril, or render the defendant within *four* days in a town cause, or six days in a country cause, without any exception. 2 Bla. R. 1206. 2 Chit. R. 82, 108. Tidd, 8th ed. 256.

Within a particular time (in general, four days) after the exception entered and notice given, the bail must *justify*. See Tidd, 257, 258, 259. If they do not mean to do so, others should be added.

Previous to the bail justifying, there should be a *notice* setting forth that the bail already put in will on a certain day justify themselves in open court, (2 Chit. R. 103. Tidd, 259:) or that one or more persons will be added, and justify themselves as good bail for the defendant. Id.

In the King's Bench, bail are added and *justified* before one of the judges sitting in the bail court, by virtue of the 57 Geo. III. c. 11. The bail must be in Westminster hall by half-past nine in the morning; and if the bail are not ready, and the papers delivered to counsel, before ten o'clock, they cannot be taken after that hour. Rul. H. T. 59 Geo. III. K. B. When there are but few bail, it is necessary that they should be very punctual in the time of their attendance, for if they are not ready when the judge takes his seat, he will not wait for them till ten o'clock; but when the bail are numerous, the exact time of their attendance is not so material; and on the last day of term they are still allowed to justify, as formerly, in full court, at its rising. Tidd, 262.

In the Common Pleas the bail must justify at the sitting of the court only, except on the last day of term, when bail who may have been prevented from attending at the sitting of the court shall be permitted to justify at the *rising* of the court. R. M. 51 Geo. III. C. P. 3 Taunt. 569; *sed vide* 8 Taunt. 56. In the Exchequer, the junior baron attends in court alone, a few minutes before ten o'clock every morning during term; and it is expected justifications of bail be then made: and no justification can take place after half-past ten o'clock. 8 Price, 612, R. E. 56 Geo. III. 2 Chit. 381. 9 Price, 57. Tidd, 263.

To justify themselves, each must swear that he is worth double the amount of the debt, *after payment* of his own debts. But if the sum exceed 1000*l.*, each is only required to justify himself in 1000*l.* more than that sum. M. 51 Geo. III. It is not sufficient for bail to swear they are worth a certain sum *exclusive* of their debts. 4 Taunt. 704. There must also be an affidavit made of the service of the notice of justification, which must state the mode of service of such notice. Tidd, 264.—CHITTY.

[29] And the bail may render the defendant in their discharge, even after judgment; and they may take him on a Sunday, (6 Mod. 231; but see 2 Bla. R. 1273,) or during his examination before commissioners of bankrupt, (1 Atk. 238. 5 T. R. 210;) or going into a court of justice, (1 Selw. Prac. 180. 3 Stark. 132. 1 D. & R. M. P. C. 20;) and they may justify entering the house of a stranger (the outer door being open) to take the defendant, though he be not in the house, (2 Hen. Bla. 120;) and if the defendant is in custody, either in a civil action or upon a criminal charge, they may in King's Bench have a writ of *habeas corpus* to bring him up to the court, to be surrendered in their discharge. 7 T. R. 226. When the principal is taken, one of the bail, it is said, must always remain with him, (1 Selw. Pr. 189;) but a third person may assist in the taking and detaining defendant, though the bail do not continue present. 3 Taunt. 425.

Besides the mode of discharging the bail by rendering their principal, there are various other causes for discharging them, such as the death of the defendant, (Tidd, 293, 1183;) his bankruptcy and certificate, (1 Burr. 244. Cowp. 824;) his being made a peer, or member of parliament, (Dougl. 45. Tidd, 293;) or being sent abroad under the alien act, (6 T. R. 50, 52. 7 T. R. 517,) or under sentence of transportation, (6 T. R. 247;) or his being impressed or discharged on the 48 Geo. III. c. 123; or by the act of the plaintiff in not declaring in due time; by making a material variance in the declaration from the process or affidavit in the cause of action, (2 East, 305. 2 B. & P. 358. 6 T. R. 363;) or a variance between the affidavit and judgment in Common Pleas; or in declaring in a different county by original in King's Bench; or recovering under a bailable amount; or in giving time to the defendant on a cognovit, &c.; or removing the cause from an

Special bail is required (as of course) only upon actions of debt, or actions on the case in trover or for money due, where the plaintiff can swear that the cause of action amounts to ten pounds:[30] but in actions where the damages are precarious, being to be assessed *ad libitum* by a jury, as in actions for words, ejectment, or trespass, it is very seldom possible for a plaintiff to swear to the amount of his cause of action; and therefore no special bail is taken thereon, unless by a judge's order or the particular directions of the court, in some peculiar species of injuries, as in cases of mayhem or atrocious battery; or upon such special circumstances as make it absolutely necessary that the defendant should be kept within the reach of justice. Also in actions against heirs, executors, and administrators, for debts of the deceased, special bail is not demandable; for the action is not so properly against them in person, as against the effects of the deceased in their possession. But special bail is required even of them, in actions for a *devastavit*, or wasting the goods of the deceased; that wrong being of their own committing.

Thus much for *process;* which is only meant to bring the defendant into court, in order to contest the suit and abide the determination of the law. When he appears either in person as a prisoner, or out upon bail, then follow the *pleadings* between the parties, which we shall consider at large in the next chapter.

CHAPTER XX.

OF PLEADING

*293] *Pleadings are the mutual altercations between the plaintiff and defendant; which at present are set down and delivered into the proper office in writing, though formerly they were usually put in by their counsel *ore tenus*, or *viva voce*, in court, and then minuted down by the chief clerks, or prothonotaries; whence in our old law-French the pleadings are frequently denominated the *parol*.[1]

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inferior court, or referring to arbitration, or taking principal in execution, (Cro. Jac. 320,) or any other irregularity in proceeding against the principal. Tidd, 1182. See the various cases on these points and other qualifications in Tidd's Prac. 8th ed. 290 to 295, 403, 1147, 1182, 1187.—Chitty.

[30] Several extensions of the sum have taken place; and now, by the last statute, viz., 7 & 8 Geo. IV. c. 71, the cause of action must amount to 20*l*.—Chitty.

[1] By stat. 3 & 4 W. IV. c. 42, power was given to the judges of the superior courts to make such alterations in the mode of pleading then in use in the said courts as they might deem expedient. By stat. 13 & 14 Vict. c. 16, this power was extended; and by "The Common-Law Procedure Act, 1852," renewed powers were again given to the judges for this purpose. The rules of pleading framed under the first statute have been repealed under the powers given by the last, but to a great extent also re-enacted, and many alterations have been made in the forms of pleadings.—Stewart.

Pleading is the statement in a logical and *legal form* of the *facts* which constitute the plaintiff's cause of action or the defendant's ground of defence: it is the formal mode of alleging on the record that which would be the support or the defence of the party in evidence. Per Buller, J., 3 T. R. 159. Dougl. 278. "It is [as also observed by the same learned judge, in Dougl. Rep. 159] one of the first principles of pleading, that there is only occasion to state *facts*, which must be done for the purpose of informing the court, whose duty it is to declare the *law* arising upon those facts, and of apprizing the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it." And see the observations of lord C. J. De Grey, Cowp. 682. From this it will be seen that the science of special pleading may be considered under two heads: 1st. The facts necessary to be stated. 2d. The mode of stating them. In these considerations, the reader must be contented with a general outline of the law upon the subject.

1st. The Facts necessary to be stated.—No more should be stated than is essential to constitute the cause of complaint or the ground of defence. Cowp. 683. 1 Lord Raym. 171.

The first of these is the *declaration*, *narratio*, or *count*, antiently called the *tale*; (*a*) in which the plaintiff sets forth his cause of complaint at length; being, indeed, only an amplification or exposition of the original writ upon which his action is founded, with the additional circumstances of time and place when and where the injury was committed. But we may remember, (*b*) that in the

(*a*) Append. No. II. § 2; No. III. § 6. (*b*) See pages 285, 288.

And facts only should be stated, and not arguments or inferences, or matter of law. Cowp. 684. 5 East, 275. The party can only succeed on the facts as they are alleged and proved.

There are various facts which need not be stated, though it may be essential that they should be established in evidence, to entitle the party pleading to succeed.

Thus, there are facts of which the court will, from the nature of its *office*, take notice without their being stated: as when the king came to the throne, (2 Lord Raym. 794,) his privileges, (id. 980,) proclamations, &c., (1 Lord Raym. 282. 2 Camp. 44. 4 M. & S. 532;) but private orders of council, pardons, and declarations of war, &c. must be stated. 2 Litt. Bac. Reg. 303. 3 M. & S. 67. 11 Ves. 292. 3 Camp. 61, 67. The time and place of holding parliaments, and their course of proceedings, need not be stated, (1 Lord Raym. 343, 210. 1 Saund. 131;) but their journals must. Lord Raym. 15. Cowp. 17. *Public* statutes, and the facts they ascertain, (1 T. R. 145. Com. Dig. Pleader, c. 76,) the ecclesiastical, civil, and marine laws, (Bro. Quare Impedit, pl. 12. Lord Raym. 338,) need not be stated: but *private* acts, (Lord Raym. 381. 2 Dougl. 97,) and foreign (2 Carth. 273. Cowp. 174) and plantation and forest (2 Leon. 209) laws, must. Common-law rights, duties, and *general* customs, customs of gavelkind, and borough-English, (Doug. 150. Lord Raym. 175, 1542. Carth. 83. Co. Litt. 175. Lord Raym. 1025. Cro. Car. 561,) need not be stated; but particular local customs must. 1 Roll. Rep. 509. 9 East, 185. Stra. 187. 1287. Dougl. 387. The almanac is part of the law of the land, and the courts take notice thereof, and the days of the week, and of the movable feasts, and terms. Dougl. 380. Salk. 269. 1 Roll. Abr. 524, c. pl. 4. 6 Mod. 81. Salk. 626. So the division of *England* into *counties* will be noticed without pleading, (2 Inst. 557. Marsh, 124,) but not so of a less division (id.) nor of Ireland. 1 Chit. Rep. 28, 32. 3 B. & A. 301, S. C. 2 D. & R. 15. 1 B. & C. 16, S. C. The court will take judicial notice of the incorporated towns, of the extent of ports, and the river Thames. Stra. 469. 1 H. Bla. 356. So it will take notice of the meaning of English words and terms of art, according to their ordinary acceptation, (1 Roll. Abr. 86, 525;) also of the names and quantities of legal weights and measures, (1 Roll. Abr. 525;) also courts will take notice of their own course of proceedings, (1 T. R. 118. 2 Lev. 176,) and of those of the superior courts, (2 Co. Rep. 18. Cro. Jac. 67,) the privileges they confer on their officers, (Lord Raym. 869, 898,) of courts of general jurisdiction, and the course of proceedings therein; as the court of Exchequer in Wales and the counties palatine, (1 Lord Raym. 154. 1 Saund. 73;) but the courts are not bound, ex officio, to take notice who were or are the judges of another court at Westminster, (2 Andr. 74. Stra. 1226;) nor are the superior courts, ex officio, bound to notice the customs, laws, or proceedings of inferior courts of limited jurisdiction, (1 Roll. Rep. 105. Lord Raym. 1334. Cro. Eliz. 502,) unless indeed in courts of error. Cro. Car. 179.

Where the law presumes a fact, as that a person is innocent of a fraud or crime, or that a transaction is illegal, it need not be stated. 4 M. & S. 105. 2 Wils. 147. Co. Litt. 78, b. 1 B. & A. 463.

Matter which should come more properly from the other side, as it is presumed to lie more in the knowledge of the other party, or is an answer to the charge of the party pleading, need not be stated, unless in pleas of estoppel and alien enemy: but this rule must be acted upon with caution: for if the fact in any way constitutes a condition precedent, to enable the party to avail himself of the charge stated in his pleading, such fact should be stated. Com. Dig. Pleader, c. 81. 1 Leon. 18. 2 Saund. 62, b. 4 Camp. 20. 11 East, 638; and see cases, 1 Chit. on Pl. 206. Stephen, 354.

Though the facts of a case must be stated in pleading, it is not necessary to state that which is a mere matter of evidence of such fact. 9 Rep. 9, b. 9 Edw. III. 5, b., 6, a. Willes, 130. Raym. 8.

And though the general rule is that facts only are to be stated, yet there are some instances in which the statement in the pleading is proper, though it does not accord with the real facts, the law allowing a fiction, as in ejectment, trover, detinue, &c. 2 Burr. 667. 1 N. R. 140.

No fact that is not essential to substantiate the pleading should be stated. The statement of immaterial or irrelevant matter is not only censurable on the ground of expense, but frequently affords an advantage to the opposite party, either as the ground of a variance, or as rendering it incumbent on the party pleading to adduce more evidence than would otherwise have been necessary; though, indeed, if the matter unnecessarily

king's bench, when the defendant is brought into court by bill of Middlesex, upon a supposed trespass, in order to give the court a jurisdiction, the plaintiff may declare in whatever action, or charge him with whatever injury, he thinks proper; unless he has held him to bail by a special *ac etiam*, which the plaintiff is then bound to pursue. And so also, in order to have the benefit of a *capias* to secure the defendant's person, it was the antient practice, and is therefore still warrantable in the common pleas, to sue out a writ of trespass *quare clausum fregit*, for breaking the plaintiff's close: and when the defendant is once *294] brought in upon this *writ, the plaintiff declares in whatever action the nature of his true injury may require; as in an action of covenant, or on the case for breach of contract, or other less forcible transgression:(c) unless, by holding the defendant to bail on a special *ac etiam*, he has bound himself to declare accordingly.[2]

In *local* actions, where possession of land is to be recovered, or damages for an actual trespass, or for waste, &c. affecting land, the plaintiff must lay his

(c) 2 Ventr. 259.

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stated be wholly foreign and impertinent to the cause, so that no allegation whatever on the subject was necessary, it will be rejected as surplusage, it being a maxim that *utile per inutile non vitiatur*. See cases, &c. in Chit. on Pl. 208, 209, 210. Besides this, the pleading must not state two or more facts either of which would of itself, independently of the other, constitute a sufficient ground of action or defence. Co. Litt. 304, a. Com. Dig. Pleader, C. 33, E. 2. 1 Chit. on Pl. 208.

2d. The Mode of stating Facts.—The facts should be stated logically, in their natural order; as, on the part of the plaintiff, his right, the injury and consequent damage; and these with certainty, precision, and brevity. The facts, as stated, must not be insensible or repugnant, nor ambiguous or doubtful in meaning, nor argumentative, nor in the alternative, nor by way of recital, but positive, and according to their legal effect and operation. Dougl. 666, 667. 1 Chit. on Pl. 211. Stephen, 378 to 405.

Certainty signifies a clear and distinct statement, so that it may be understood by the opposite party, by the jury, who are to ascertain the truth of such statement, and by the court, who are to give judgment. Cowp. 682. Com. Dig. Pleader, C. 17. Less certainty is requisite when the law presumes that the knowledge of the facts is peculiarly in the opposite party; and so when it is to be presumed that the party pleading is not acquainted with minute circumstances. 13 East, 112. Com. Dig. Pleader, C. 26. 8 East, 85. General statements of facts admitting of almost any proof are objectionable, (1 M. & S. 441. 3 M. & S. 114;) but where a subject comprehends multiplicity of matter, there, in order to avoid prolixity, general pleading is allowed. 2 Saund. 411, n. 4. 8 T. R. 462.

In the *construction* of facts stated in pleading, it is a general rule that every thing shall be taken most strongly against the party pleading, (1 Saund. 259, n. 8;) or rather, if the meaning of the words be equivocal, they shall be construed most strongly against the party pleading them, (2 H. Bla. 530;) for it is to be intended that every person states his case as favourably to himself as possible, (Co. Litt. 30, 36;) but the language is to have a reasonable intendment and construction, (Com. Dig. Pleader, C. 25;) and if the sense be clear, mere exceptions ought not to be regarded, (5 East, 529;) and where an expression is *capable* of different meanings, that shall be taken which will support the averment, and not the other which would defeat it. 4 Taunt. 492. 5 East, 257. After verdict, an expression should be construed in such sense as would sustain the verdict. 1 B. & C. 297.—Chitty.

[2] And even then the plaintiff will only lose the benefit of the bail, and the court will not set aside the proceedings. 7 T. R. 80. 8 T. R. 27. 5 Moore, 483. 6 T. R. 363. So in the King's Bench, where the proceedings are by original, the venue must be laid in the county into which the original was issued; or in bailable cases the defendant will be discharged; but it would be otherwise in Common Pleas, (Imp. C. P. 159;) and this would be the only advantage gained by the defendant.

The declaration should in other respects correspond with the process, as in the names and numbers of the parties, the character or right in which they sue or are sued; but as, according to the present practice of the courts, oyer of the writ cannot be craved, and a variance between the writ and declaration cannot in any case be pleaded in abatement, (1 Saund. 318. 3 B. & P. 395,) and as there are several instances in which the court will not set aside the proceedings on account of a variance between the writ and declaration, (6 T. R. 364,) many of the older decisions are no longer applicable in practice. But if the defect appear on the face of the declaration, the plaintiff may plead in abatement, or demur accordingly. As to these general requisites, see 1 Chit. on Pl. 222 to 229.—Chitty.

declaration or declare his injury to have happened in the very county and place that it really did happen;[3] but in *transitory* actions, for injuries that might have happened anywhere, as debt, detinue, slander, and the like, the plaintiff may declare in what county he pleases, and then the trial must be had in that county in which the declaration is laid. Though if the defendant will make affidavit that the cause of action, if any, arose not in that but in another county, the court will direct a change of the *venue* or *visne*, (that is, the *vicinia* or neighbourhood in which the injury is declared to be done,) and will oblige the plaintiff to declare in the other county; unless he will undertake to give material evidence in the first. For the statutes 6 Ric. II. c. 2, and 4 Hen. IV. c. 18, having ordered *all* writs to be laid in their proper counties, this, as the judges conceived, empowered them to change the *venue*, if required, and not to insist rigidly on abating the writ: which practice began in the reign of James the First.(*d*) And this power is discretionally exercised, so as to prevent and not to cause a defect of justice. Therefore the court will not change the *venue* to any of the four northern counties, previous to the spring circuit; because there the assizes are holden only once a year, at the time of the summer circuit. And it will sometimes remove the *venue* from the proper jurisdiction, (especially of a narrow and limited kind,) upon a suggestion, duly supported, that a fair and impartial trial cannot be had therein.(*e*)[4]

*It is generally usual in actions upon the case to set forth several cases by different *counts* in the same declaration; so that if the plaintiff fails in the proof of one, he may succeed in another. As, in an action on the case upon an *assumpsit* for goods sold and delivered, the plaintiff usually counts or declares, first, upon a settled and agreed price between him and the defendant; as that they bargained for twenty pounds: and lest he should fail in the proof of this, he counts likewise upon a *quantum valebant;* that the defendant bought other goods, and agreed to pay him so much as they were reasonably [*295

(*d*) Rastall, tit. *Dette*, 184, b. Fitz. Abr. tit. *Briefe*, 18. Salk. 670. Trye's *Jus. Filiz.* 251. Styl. Pract. Reg. (edit. 1657) 331.

(*e*) Stra. 874, Mylock *vs.* Saladine. Trin. 4 Geo. III. B. R.

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[3] Actions for every kind of injury to real property are local, as for nuisances, waste, &c., unless there be some contract between the parties, on which to ground the action. 1 Taunt. 379. 11 East, 226. And if the land be out of this kingdom, the plaintiff has no remedy in the English courts, if there be a court of justice to resort to where the land is situate. 4 T. R. 503. 1 Stra. 645. Cowp. 180. 6 East, 598. Where an injury has been caused in one county, to land, &c. in another, or when the action is founded upon two or more material facts which took place in different counties, the venue may be laid in either. 2 Taunt. 252, overruling 2 Camp. 266. 7 Co. 1. 3 Leon. 141. 7 T. R. 583. 1 Chitty on Pl. 242.

In an action upon a lease for the non-payment of rent, or other breach of covenant, when the action is founded on the *privity of contract*, it is *transitory;* but not so when the action is founded on the *privity of estate*. 3 T. R. 394. 3 Co. 23. 1 Saund. 237. Tidd, 431. 1 Chit. 244 to 246.

In some cases the action, though of a transitory nature, must, by act of parliament, be brought in a particular county, as by 31 Eliz. c. 5, s. 2. 21 Jac. I. c. 4, s. 2. In actions or informations on penal statutes, the venue must be laid where the offence was committed. Tidd, 432. 1 Chit. 246. So actions of case or trespass are local when against justices of the peace, mayors, bailiffs of cities or towns corporate, headboroughs, portreves, constables, tithing-men, church-wardens, &c., or other persons acting in their aid and assistance or by their command, for any thing done in their official capacity, (21 Jac. I. c. 12, s. 5,) or against any person or persons for any thing done by an officer of the excise, (23 Geo. III. c. 70, s. 34,) or customs, (24 Geo. III. sess. 2, c. 47, s. 35, 39; and see 28 Geo. III. c. 37, s. 23,) or others acting in his aid, in execution or by reason of his office, or for any thing done in pursuance of the act relating to taxes, &c. 43 Geo. III. c. 99, s. 70. And the 42 Geo. III. c. 85, s. 6 extends the above provisions of the 21 Jac I. to all persons in any public employment, or any office, station, or capacity, anywhere, with a proviso that the action may be brought in Westminster, or where the defendant resides. There are also various other provisions in other acts, requiring that the venue shall be local, as in the highway, turnpike, militia acts, &c. Attorneys may lay and retain the venue in Middlesex.—CHITTY.

[4] This power of changing the *venue* was extended, by stat. 3 & 4 W. IV. c. 42, s. 22, to local actions.—STEWART.

worth; and then avers that they were worth other twenty pounds; and so on, in three or four different shapes;[5] and at last concludes with declaring that the defendant had refused to fulfil any of these agreements, whereby he is endamaged to such a value. And if he proves the case laid in any one of his counts, though he fails in the rest, he shall recover proportionable damages. This declaration always concludes with these words, "and thereupon he brings *suit*, &c.," "*inde producit sectam, &c.*"[6] By which words *suit* or *secta* (*a sequendo*) were antiently understood the witnesses or followers of the plaintiff.(*f*) For in former times the law would not put the defendant to the trouble of answering the charge till the plaintiff had made out at least a probable case.(*g*) But the actual production of the *suit*, the *secta*, or *followers*, is now antiquated, and hath been totally disused, at least ever since the reign of Edward the Third, though the form of it still continues.

At the end of the declaration are added also the plaintiff's common pledges of prosecution, John Doe and Richard Roe,[7] which as we before observed,(*h*) are now mere names of form, though formerly they were of use to answer to the king for the amercement of the plaintiff in case he were nonsuited, barred of his action, or had a verdict or judgment against him.(*i*) For if the plaintiff neglects to deliver a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against the rules of law in any subsequent *296] *stage of the action, he is adjudged *not to follow* or pursue his remedy as he ought to do, and thereupon a *nonsuit* or *non prosequitur* is entered, and he is said to be *nonpros'd*.[8] And for thus deserting his complaint, after making a false claim or complaint, (*pro falso clamore suo*,) he shall not only pay costs to the defendant, but is liable to be amerced to the king. A *retraxit* differs from a nonsuit in that the one is negative and the other positive; the nonsuit

(*f*) Seld. on Fortesc. c. 21.
(*g*) Bract. 400. Flet. l. 2, c. 6.
(*h*) See page 274.
(*i*) 3 Bulstr. 275. 4 Inst. 189.

[5] The variations should be substantial; for if the different counts be so similar that the same evidence would support each of them, and be of any considerable length, and vexatiously inserted, the court would on application refer it to the master for examination and to strike out the redundant counts, and in gross cases direct the costs to be paid by the attorney. 1 N. R. 289. Rep. T. Hardw. 129. And as to striking out superfluous counts, see Tidd, 8th ed. 667, 648. In 2 Bingh. 412, nine counts were allowed in an action for slander, though the words used were very few. See 1 Chitt. on Pl. 350, 351, 352, as to the insertion of several counts. There must be no misjoinder of different counts; and, in order to prevent the confusion which might ensue if different forms of action, requiring different pleas and different judgments, were allowed to be found in one action, it is a general rule that actions in form *ex contractu* cannot be joined with those in form *ex delicto*. Thus, assumpsit and debt, (2 Smith, 618. 3 ib. 114,) or assumpsit and an action on the case, as for a tort, cannot be joined, (1 T. R. 276, 277. 1 Ventr. 366. Carth. 189;) nor assumpsit with trover, (2 Lev. 101. 3 Lev. 99. 1 Salk. 10. 3 Wils. 354. 6 East, 335. 2 Chitty R. 343;) nor trover with detinue. Willes, 118. 1 Chitty on Plead. 182. Debt and detinue may, however, be joined, although the judgments be different. 2 Saund. 117. And see further, as to what is a misjoinder, 1 Chitty on Pl. 199. Unless the subsequent count expressly refers to the preceding, no defect therein will be aided by such preceding count. Bac. Abr. Pleas and Pleader, 16, 1.—Chitty.

[6] It does not so conclude in actions against attorneys and other officers of the court, but thus:—"and therefore he prays relief, &c." Andr. 247. Barnes, 3, 167.

In actions at the suit of an executor or administrator, immediately after the conclusion to the damage, &c., and before the pledges, a profert of the letters testamentary, or letters of administration, should be made. Bac. Abr. Executor, C. Doug. 5, in notes. But omission is added unless defendant demur specially. 4 Anne, c. 16, s. 1.—Chitty.

[7] But these pledges need not be stated in proceedings by original, or in the Common Pleas, unless in proceedings against attorneys, &c. Summary on Pl. 42. Barnes, 163. Nor are they necessary in an action at the suit of the king or queen. 8 Co. 61. Cro. Car. 161. And no advantage can be taken of the omission in any case, even on special demurrer. 3 T. R. 157, 158.—Chitty.

[8] But unless the defendant take advantage of the plaintiff's neglect, by signing such judgment, the plaintiff may deliver his declaration at any time within a year next after the return of the writ. 3 T. R. 123. 5 id. 35. 7 id. 7; *sed vide* 2 N. R. 404. As to when the defendant is entitled to, and how he should sign a judgment of, and the costs on, a non pros., see Tidd, 8th ed. Index, tit. Non Pros.—Chitty.

is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open and voluntary renunciation of his suit in court, and by this he forever loses his action. A *discontinuance* is somewhat similar to a nonsuit; for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day and time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend; but the plaintiff must begin again by suing out a new original, usually paying costs to his antagonist. Antiently, by the demise of the king, all suits depending in his courts were at once discontinued, and the plaintiff was obliged to renew the process by suing out a fresh writ from the successor, the virtue of the former writ being totally gone, and the defendant no longer bound to attend in consequence thereof; but, to prevent the expense as well as delay attending this rule of law, the statute 1 Edw. VI. c. 7 enacts that by the death of the king no action shall be discontinued, but all proceedings shall stand good as if the same king had been living.

When the plaintiff hath stated his case in the declaration, it is incumbent on the defendant within a reasonable time to make his *defence* and to put in a *plea;* else the plaintiff will at once recover judgment by *default* or *nihil dicit* of the defendant.

Defence, in its true legal sense, signifies not a justification, protection, or guard, which is now its popular signification, but merely an *opposing* or *denial* (from the French verb *defender*) of the truth or validity of the complaint. It is the *contestatio litis* of the civilians, a general assertion that the plaintiff hath no ground of action, which assertion is afterwards extended *and maintained in his plea. For it would be ridiculous to suppose that the [*297 defendant comes and *defends* (or, in the vulgar acceptation, justifies) the force and injury in one line, and pleads that he is *not guilty* of the trespass complained of, in the next. And therefore, in actions of dower, where the demandant doth not count of any injury done, but merely demands her endowment,(*k*) and in assizes of land, where also there is no injury alleged, but merely a question of right stated for the determination of the recognitors or jury, the tenant makes no such defence.(*l*) In writs of entry,(*m*) where no injury is stated in the count, but merely the right of the demandant and the defective title of the tenant, the tenant comes and defends or denies *his* right, *jus suum;* that is, (as I understand it, though with a small grammatical inaccuracy,) the right of the demandant, the only one expressly mentioned in the pleadings, or else denies his own right to be such as is suggested by the count of the demandant. And in writs of right(*n*) the tenant always comes and defends the right of the demandant and his seisin, *jus prædicti S. et seisinam ipsius,*(*o*)(or else the seisin of his ancestor upon which he counts, as the case may be,) and the demandant may reply that the tenant unjustly defends his, the demandant's, right, and the seisin on which he counts.(*p*) All which is extremely clear if we understand by *defence* an *opposition* or *denial,* but it is otherwise inexplicably difficult.(*q*)

The courts were formerly very nice and curious with respect to the nature of the defence; so that if no defence was made, though a sufficient plea was pleaded, the plaintiff should recover judgment;(*r*) and therefore the book entitled *novæ narrationes* or the *new talys,*(*s*) at the end of almost every count, *narratio,* or tale, subjoins such defence as is proper for the defendant to make. For a general defence or denial was not prudent in every situation, since thereby the propriety of the writ, the competency of the plaintiff, and the cognizance of the court, were allowed. By defending the force and injury, *the defendant waived all pleas of misnomer;(*t*) by defending the [*298 damages, all exceptions to the person of the plaintiff; and by defending

(*k*) Rastal. Ent. 134.
(*l*) Booth of Real Actions, 118.
(*m*) Book II. Append. No. V. § 2.
(*n*) Append. No. I. § 5.
(*o*) Co. Entr. 182.
(*p*) *Nov. Nar.* 230, edit. 1534.
(*q*) The true reason of this, says Booth, (on Real Actions, 94. 112.) I could never yet find; so little did he understand of principles!
(*r*) Co. Litt. 127.
(*s*) Edit. 1534.
(*t*) Theloal. *dig. l.* 14, c. 1, pag. 357.

either one or the other *when and where* it should behoove him, he acknowledged the jurisdiction of the court.(*u*) But of late years these niceties have been very deservedly discountenanced,(*w*) though they still seem to be law, if insisted on.(*x*)

Before defence made, if at all, *cognizance* of the suit must be *claimed* or demanded; when any person or body corporate hath the franchise, not only of *holding pleas* within a particular limited jurisdiction, but also of the *cognizance of pleas:* and that, either *without* any words exclusive of other courts, which entitles the lord of the franchise, whenever any suit that belongs to his jurisdiction is commenced in the courts at Westminster, to demand the cognizance thereof; or *with* such exclusive words, which also entitle the defendant to plead to the jurisdiction of the court.(*y*) Upon this claim of cognizance, if allowed, all proceedings shall cease in the superior court, and the plaintiff is left at liberty to pursue his remedy in the special jurisdiction. As when a scholar, or other privileged person, of the universities of Oxford or Cambridge, is impleaded in the courts at Westminster for any cause of action whatsoever, unless upon a question of freehold.(*z*)[9] In these cases, by the charter of those learned bodies, confirmed by act of parliament, the chancellor or vice-chancellor may put in a claim of cognizance; which, if made in due time and form and with due proof of the facts alleged, is regularly allowed by the courts.(*a*) It must be demanded before full defence is made(*b*) or imparlance prayed; for these are a submission to the jurisdiction of the superior court, and the delay *299] is a *laches* in the lord of the franchise, and it will not be *allowed if it occasions a failure of justice,(*c*) or if an action be brought against the person himself who claims the franchise, unless he hath also a power in such cases of making another judge.(*d*)[10]

After defence made, the defendant must put in his *plea*. But before he defends, if the suit is commenced by *capias* or *latitat*, without any special *original*, he is entitled to demand one *imparlance*,(*e*) or *licentia loquendi*, and may before he pleads have more time granted by consent of the court, to see if he can end the matter amicably without further suit, by talking with the plaintiff; a practice which is(*f*) supposed to have arisen from a principle of religion in obedience to that precept of the gospel, "Agree with thine adversary quickly, whilst thou art *in the way* with him."(*g*) And it may be observed that this gospel precept has a plain reference to the Roman law of the twelve

(*u*) *En la defence sont iij choses entendantz: per tant quil defende tort et force, home doyt entendre quil se excuse de tort a luy surmys per counte, et fuit se partie al ple: et per tant quil defende les damages, il affirm le parte able destre respondu; et per tant quil defende ou et quant il devera, il accepte la poiar de court de conustre ou trier lour ple. Mod. tenend. cur.* 408, edit. 1534. See also Co. Litt. 127.
(*w*) Salk. 217. Lord Raym. 282.
(*x*) Carth. 230. Lord Raym. 217.
(*y*) 2 Lord Raym. 836. 10 Mod. 126.
(*z*) See page 83.
(*a*) Hardr. 505.
(*b*) Rast. 128, &c. 1 Chitty on Pl. 364.
(*c*) 2 Ventr. 303.
(*d*) Hob. 87. Year-book, M. 8 Hen. VI. 20. In this latter case the chancellor of Oxford claimed cognizance of an action of trespass brought against himself, which was disallowed, because he should not be judge in his own cause. The argument used by serjeant Rolfe on behalf of the cognizance is curious and worth transcribing:—*Jeo vous dirai un fable. En ascun temps fuit un pape, et avoit fait un grand offence, et le cardinals vindrent a luy et disoyent a luy, "peccasti:" et il dit, "judica me;" et ils disoyent, "non possumus, quia caput es ecclesiæ: judica teipsum:" et l'apostol dit, "judicame cremari;" et fuit combustus: et apres fuit un sainct. Et in ceo cas il fuit son juge demene, et issint n'est pas inconvenient que un home soit juge demene.*
(*e*) Append. No. III. § 6.
(*f*) Gilb. Hist. Com. Pl. 35.
(*g*) Matt. v. 25.

[9] But only *resident* members of either university are entitled to this privilege, it being local as well as personal. 2 Wils. 310.—Chitty.

[10] But a party may waive and preclude himself from taking any objection to a decision on this account; for if a defendant agree to refer the matter to the plaintiff, he cannot object to the award that the plaintiff was a judge in his own cause. Thus, in Matthew *vs.* Ollerton, (4 Mod. 226. Comb. 218. Hardr. 44,) which was an action of debt upon an award, and a verdict for the plaintiff: and, upon its being moved in arrest of judgment, the exception taken was that the matter in difference was referred to the plaintiff himself, who made an award. *Sed non allocatur.* And the case of serjeant Hards was remembered by Dolben, Justice,—viz.:—The serjeant took a horse from my lord of Canterbury's bailiff for a deodand, and the archbishop brought his action: and, it coming to a trial at the assizes in Kent, the serjeant, by rule of court, referred it to the archbishop, to set the price of the horse, which was done accordingly; and the serjeant afterwards moved the court to set aside the award for the reason now offered; but it was denied by lord Hale and *per totam curiam.*—Chitty.

tables, which expressly directed the plaintiff and defendant to make up the matter while they were *in the way*, or going to the prætor,—*tu via, rem uti pacunt orato*. There are also many other previous steps which may be taken by a defendant before he puts in his plea. He may, in real actions, demand a *view* of the thing in question, in order to ascertain its identity and other circumstances. He may crave *oyer*(*h*) of the writ, or of the bond, or other specialty upon which the action is brought; that is, to *hear* it read to him; the generality of defendants in the times of antient simplicity being supposed incapable to read it themselves, whereupon the whole is entered *verbatim* upon the record, and the defendant may take advantage of any condition or other part of it, not stated in the plaintiff's declaration.[11] *In real [*300 actions also the tenant may pray in *aid*, or call for assistance of another, to help him to plead, because of the feebleness or imbecility of his own estate. Thus, a tenant for life may pray in aid of him that hath the inheritance in remainder or reversion; and an incumbent may pray in aid of the patron and ordinary; that is, that they shall be joined in the action and help to defend the title. *Voucher* also is the calling in of some person to answer the action that hath warranted the title to the tenant or defendant. This we still make use of in the form of common recoveries,(*i*) which are grounded on a writ of entry; a species of action that we may remember relies chiefly on the weakness of the tenant's title, who therefore vouches another person to warrant it. If the vouchee appears, he is made defendant instead of the voucher; but if he afterwards makes default, recovery shall be had against the original defendant, and he shall recover over an equivalent in value against the deficient vouchee. In assizes, indeed, where the principal question is, whether the demandant or his ancestors were or were not in possession till the ouster happened, and the title of the tenant is little (if at all) discussed, there no voucher is allowed; but the tenant may bring a writ of *warrantia chartæ* against the warrantor, to compel him to assist him with a good plea or defence, or else to render damages and the value of the land, if recovered against the tenant.(*k*) In many real actions also,(*l*) brought by or against an infant under the age of twenty-one years, and also in actions of debt brought against him, as heir to any deceased ancestor, either party may suggest the nonage of the infant, and pray that the proceedings may be deferred till his full age; or (in our legal phrase) that the infant may have his age and that the *parol may demur*, that is, that the pleadings may be stayed; and then they shall not proceed till his full age, unless it be apparent that he cannot be prejudiced thereby.(*m*) But, by the statutes of Westm. 1, 3 Edw. I. c. 46, and of Gloucester, 6 Edw. I. c. 2, in writs of entry *sur disseisin* in some particular cases, and in actions ancestrel brought by *an infant, the [*301 parol shall not demur: otherwise he might be deforced of his whole property, and even want a maintenance till he came of age. So likewise in a writ of dower the heir shall not have his age, for it is necessary that the widow's claim be immediately determined, else she may want a present subsistence.(*n*) Nor shall an infant patron have it in a *quare impedit*,(*o*) since the law holds it necessary and expedient that the church be immediately filled.[12]

When these proceedings are over, the defendant must then put in his excuse or plea. Pleas are of two sorts; *dilatory* pleas, and pleas *to the action*. Dilatory pleas are such as tend merely to delay or put off the suit, by questioning the

(*h*) Append. No. III. § 6.
(*i*) Book II. Append. No. V. § 2.
(*k*) F. N. B. 135.
(*l*) Dyer, 137.
(*m*) Finch, L. 360.
(*n*) 1 Roll. Abr. 137.
(*o*) Ibid. 138.

[11] But now a defendant is not allowed oyer of the *writ*. 1 B. & P. 646. 3 B. & P. 395. 7 East, 383. As to the demand and giving of oyer, and the manner of setting out deeds, &c. therein, see 1 Saund. 9, (1,) 289, (2.) 2 Saund. 9, (12,) (13,) 46, (7,) 366, (1,) 405, (1,) 410, (2.) Tidd, 8th ed. 635 to 638, and Index, tit. Oyer. 1 Chitt. on Pl. 369 to 375.—CHITTY.

[12] And now, indeed, by statute 11 Geo. IV. and 1 W. IV. c. 47, s. 10, the parol shall not demur in any action.—KERR.

propriety of the remedy, rather than by denying the injury: pleas to the action are such as dispute the very cause of suit. The former cannot be pleaded after a general imparlance, which is an acknowledgment of the propriety of the action. For imparlances are either *general*, of which we have before spoken, and which are granted of course; or *special*, with a saving of all exceptions to the writ or count, which may be granted by the prothonotary; or they may be still *more special*, with a saving of all exceptions whatsoever which are granted at the discretion of the court.(*p*)

1. Dilatory pleas are,[13] 1. To the *jurisdiction* of the court: alleging, that it ought not to hold plea of this injury, it arising in Wales or beyond sea; or because the land in question is of antient demesne, and ought only to be demanded in the lord's court, &c. 2. To the *disability* of the plaintiff, by reason whereof he is incapable to commence or continue the suit; as, that he is an alien enemy, outlawed, excommunicated, attainted of treason or felony, under a *præmunire*, not *in rerum natura*, (being only a fictitious person,) an infant, a feme-covert, or a monk professed.[14] In *abatement*, which abatement is *302] either of the *writ or the count, for some defect in one of them; as by misnaming the defendant, which is called a *misnómer;* giving him a wrong addition, as *esquire* instead of *knight;* or other want of form in any material respect.[15] Or it may be that the plaintiff is dead; for the death of either party is at once an abatement of the suit.[16] And in actions merely personal,

(*p*) 12 Mod. 529.

[13] These pleas are not favored by the courts; and they must be filed within four days after the day upon which the declaration is delivered, both days being inclusive. 1 T. R. 277. 5 T. R. 210.—Chitty.

[14] As to this plea, see 1 Chit. on Pl. 387, 388. Whenever the subject-matter of the plea or defence is that the plaintiff cannot maintain *any* action *at any time*, in respect of the supposed cause of action, it may, and usually should, be pleaded in *bar;* but matter which usually defeats the present proceeding and does not show that the plaintiff is forever precluded should in general be pleaded in *abatement*. 4 T. R. 227. Some matters may be pleaded either in abatement or bar; as outlawry for felony, alien enemy, or attainder, &c. Bac. Abr. Abatement, N. Com. Dig. Abatement, K.

The defendant may also plead in abatement his or her own personal disability; as in case of coverture, when the husband ought to have been joined. 3 T. R. 627. Bac. Abr. Abatement, G.—Chitty.

[15] Pleas in abatement to the writ are so termed rather from their *effects* than from their being strictly such pleas: for, as oyer of the writ can no longer be craved, no objection can be taken by plea to matter which is merely contained in the *writ*. 3 B. & P. 399. 1 B. & P. 645. But if the mistake in the writ be carried also into the declaration, or, rather, if the declaration, which is presumed to correspond with the writ or bill, be incorrect in respect of some extrinsic matter, it is then open to the defendant to plead in abatement to the writ or bill, (1 B. & P. 648;) and as to such pleas, see 1 Chit. on Pl. 390 to 394. Consequently, a misnomer of the defendant, or giving him a wrong addition, or other want of form, in the *writ*, unless it be contained in the declaration, is not now pleadable in abatement. See 1 Saund. 318, n. 3. 3 B. & P. 395. And the defendant, to take advantage of any defect in the writ, should, in general, before appearance move to set it aside for irregularity. 1 B. & P. 647. 5 Moore, 168.—Chitty.

But now the writ itself may be amended; and further restrictions have, by the Common-Law Procedure Act, 1852, been imposed on pleas in abatement in addition to those previously imposed by statute 3 & 4 W. IV. c. 42. By that statute (s. 8) no plea in abatement for the non-joinder of any person as a co-defendant shall be allowed unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with certainty in an affidavit verifying the plea. And, by s. 11, no plea in abatement for a misnomer shall be allowed in any personal action; but, in all cases in which a misnomer would but for that act have been pleadable, the defendant may cause the declaration to be amended at the cost of the plaintiff, by inserting the right name upon a judge's summons founded on an affidavit of the right name. And, by s. 12, in all actions upon bills of exchange or promissory notes or other written instruments, the parties to which are designated by the initials or some contraction of the Christian or first name, it is sufficient in every affidavit to hold to bail, and in the process or declaration to designate such persons by the same initial letter or contraction of the Christian or first name.—Stewart.

[16] But now, by the Common-Law Procedure Act, 1852, an action shall no longer abate

arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that *actio personalis moritur cum persona*;(q) and it never shall be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury.[17] But in actions arising *ex contractu*, by breach of promise, and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against or by the executors:(r) being indeed rather actions against the property than the person, in which the executors have now the same interest that their testator had before.

These pleas to the jurisdiction, to the disability, or in abatement, were formerly very often used as mere dilatory pleas, without any foundation of truth, and calculated only for delay; but now, by statute 4 & 5 Anne, c. 16, no dilatory plea is to be admitted without affidavit made of the truth thereof, or some probable matter shown to the court to induce them to believe it true.[18] And with respect to the pleas themselves, it is a rule, that no exception shall be admitted against a declaration or writ, unless the defendant will in the same plea give the plaintiff a better;(s) that is, show him how it might be amended, that there may not be two objections upon the same account. Neither, by statute 8 & 9 W. III. c. 31, shall any plea in abatement be admitted in any suit for partition of lands; nor shall the same be abated by reason of the death of any tenant.

*All pleas to the jurisdiction conclude to the cognizance of the court: praying "judgment, whether the court will have further cognizance of the suit:" pleas to the disability conclude to the person; by praying "judgment, if the said A. the plaintiff ought to be answered:" and pleas in abatement (when the suit is by original) conclude to the writ or declaration; by praying "judgment of the writ, or declaration, and that the same may be quashed," *cassetur*, made void, or abated; but, if the action be by bill, the plea must pray "judgment of the bill," and not of the declaration; the bill being here the original, and the declaration only a copy of the bill. [*303

When these dilatory pleas are allowed, the cause is either dismissed from that jurisdiction; or the plaintiff is stayed till his disability be removed; or he is obliged to sue out a new writ, by leave obtained from the court:(t) or to amend and new-frame his declaration. But when on the other hand they are overruled as frivolous, the defendant has judgment of *respondeat ouster*, or to *answer over* in some better manner. It is then incumbent on him to plead.

2. A plea *to the action;* that is, to answer to the merits of the complaint. This is done by confessing or denying it.

A confession of the whole complaint is not very usual, for then the defendant would probably end the matter sooner, or not plead at all, but suffer judgment

(q) 4 Inst. 315.
(r) March. 14.
(s) Brownl. 139.
(t) Co. Entr. 271.

by the death of either party, but may be continued by the legal representative of sole plaintiff on his entering (by leave of the court) a suggestion of the plaintiff's death on the record; or by a surviving plaintiff when the cause of action survives; or against the legal representative of a defendant.—STEWART.

[17] By statute 3 & 4 W. IV. c. 42, s. 2, an action of trespass, or trespass on the case, may be maintained by the executors or administrators of any deceased person for injury to his real estate in his lifetime, if such injury were committed within six calendar months before death and the action brought within one year after the time of the death: and an action of trespass, or trespass on the case, may also be maintained against executors or administrators for wrongs committed by the deceased to another's property, real or personal, such injury having been committed within six months of the death and the action brought within six months after administration taken.—STEWART.

[18] Sham pleas are not dilatory pleas within the statute, and an affidavit is not necessary in all cases: thus, a plea of privilege as an attorney of the same court, to be sued by bill, it is supposed does not require an affidavit. 3 B. & P. 397. 1 Chit. on Pl. 401. As to the form of the affidavit, see 1 Chit on Pl. 402. Tidd, 8th ed. 693.—CHITTY.

to go by default. Yet sometimes, after tender and refusal of a debt, if the creditor harasses his debtor with an action, it then becomes necessary for the defendant to acknowledge the debt, and plead the tender; adding, that he has always been ready, *tout temps prist*, and still is ready, *uncore prist*, to discharge it: for a tender by the debtor and refusal by the creditor will in all cases discharge the costs,(*u*) but not the debt itself; though in some particular cases the creditor will totally lose his money.(*v*)[19] *But frequently the defendant confesses one *part* of the complaint, (by a *cognovit actionem* in respect

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(*u*) 1 Ventr. 21. (*v*) Litt. § 338. Co. Litt. 209.

[19] That is to say, if the only right which A. has to the money arise from the offer which B. makes to him of it, and he once refuse to accept that offer, he thereby loses all right, and of course can bring no action. The case put by lord Coke is, "If A., *without any loane, debt, or dutie preceding* infeoff B. of land, upon condition for the payment of a hundred pounds to B., *in nature of a gratuitie or gift*, in that case if he (A.) tender the hundred pounds to him (B.) according to the condition, and he refuseth it, B. hath no remedie therefor." Here B. had primarily no title to the land or the money: if he does not accept it, therefore, when offered, no debt is due to him, but A. by the offer has discharged his land from that burden which he had voluntarily imposed on it. But supposing the land to have been mortgaged by A. to B. for money lent, which A. is to repay on a certain day, then if the money is duly tendered on the day and refused, A. shall have his land again, because he has performed the condition; but still B. may bring an action for his money.

The plea of tender must always, except in the case above supposed, be accompanied by a bringing of the sum tendered into court, or the plea is a mere nullity; and though the plaintiff denies that the tender was made before he commenced the action, or disputes the sufficiency of the sum tendered, and therefore goes on with the action, still he is entitled to take that sum out of court at once, which the defendant by the tender has admitted to be his due. If, however, he neglects to do so, and a verdict on either point should pass for the defendant, the court will then lay hold of the money as a security for the defendant's costs. Le Grew *vs.* Cook, 1 B. & P. 332. See also Birks *vs.* Trippet, 1 Saund. Rep. 33, a., note.—Coleridge.

As to the form and requisites of this plea in assumpsit, see 3 Chit. on Pl. 4th ed. 992; in debt, id. 955, and Lee, Prac. Dict. tit. "Tender;" and as to the payment of money into court on, see Tidd, 8th ed. Index, tit. "Money;" Lee, Dict. tit. "Payment of Money into Court." As to the replication, &c., see also 3 Chit. on Pl. 1151 to 1156, and Lee, Dict. tit. "Tender."

As questions relative to the *tender* of a debt or money are of so frequent occurrence, we will consider the respective rules and decisions under the following heads: 1st. What is a good tender. 2d. In what cases it may be made. And *lastly*, the effect and advantages gained by it, and how these may be superseded.

1. What is a Good Tender.—It is a general rule, that, in order to constitute a good legal tender, the party should not only be ready to pay, and make an *actual* offer of the sum due, but actually produce the same, unless such production be dispensed with by the express declaration of the creditor that he will not accept it, or by some equivalent act. 10 East, 101. 5 Esp. R. 48. 3 T. R. 684. Peake, C. N. P. 88. 1 Cromp. 152. 2 M. & S. 86. 7 Moore, 59. If the plaintiff do not object to receive the money, it is not sufficient for the defendant to prove that he had the money with him and held it in a bag under his arm: he ought to have laid it down for him. Id. ibid. Bull. N. P. 157. 6 Esp. 46. If A. says, "I am not aware of the exact balance, but if any be due I am ready to pay it," this is no tender. 15 East, 428.

With respect to the *nature* of the money tendered, it should be in the current coin of the realm, and not in bank-notes; and see the 56 Geo. III. c. 68, s. 11, by which gold coin is declared to be the only legal tender. But a tender in bank-notes is good unless particularly objected to on that account at the time. 3 T. R. 554. 2 B. & P. 526. So is a tender of foreign coin made current here by royal proclamation. 5 Rep. 114, b. So is a tender of provincial bank-notes, or a draft on a banker, unless so objected to. Peake N. P. 3d ed,239. Tidd, 8th ed. 187, n. f. It seems that as any money coined at the mint upon which there is the king's stamp is good, and that all such money is good in proportion to its value, without a proclamation, such money would be a good tender. 2 Salk. 446.

With respect to the *amount* of the sum tendered, it should in general be *an offer of the specific sum due, unqualified by any circumstance whatever;* and therefore tendering a larger sum, and making cross-demand, is insufficient. 2 D. & R. 305. A tender of 20*l.* in bank-notes, with a request to pay over the difference of fifteen guineas, is not a good tender as to the fifteen guineas, though it would have been otherwise if the tender had been in

thereof,) and traverses or denies the rest: in order to avoid the expense of carrying that part to a formal trial, which he has no ground to litigate. A species of this sort of confession is the *payment of money into court:*(*w*) which

(*w*) Styl. Pract. Reg. (edit. 1657) 201. 2 Keb. 555 Salk. 596.

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guineas. 3 Camp. 70. 1 Camp. 181. 6 Taunt. 336. But a tender of a larger sum generally is good. 5 Rep. 114. 8 T. R. 683; *sed vide* 2 Esp. 711. And a tender of a larger sum, and asking change, is good, provided the creditor do not object to it on that account, but only demands a larger sum. 6 Taunt. 336. Peake C. N. P. 88. 2 Esp. C. 711. 3 Camp. 70; and see 1 Gow. C. N. P. 121. A tender of a sum to A., including both a debt due to A., B., and C. and also a debt due to C., is a good tender of the debt due to the three, (3 T. R. 683:) and if several creditors, to whom money is due in the same right, assemble for the purpose of demanding payment, a tender of the gross sum, which they all refuse on account of the insufficiency of the amount, is good. Peake C. 88. 2 T. R. 414.

To constitute a good tender, it must be an unconditional one in payment of the debt; and therefore where a tender of payment was made, accompanied with a protestation against the right of the party to receive it, it was held insufficient. 3 Esp. C. 91. So is a tender accompanied with the demand of a receipt in full, (5 Esp. Rep. 48. 2 Camp. 21; *sed vide* Peake C. 179. Stark. on Evid. part 4, 1392, n. (g),) or upon condition that it shall be received as the whole of the balance due, (4 Camp. 156,) or that a particular document shall be given up to be cancelled. 2 Camp. 21. To constitute a good tender of stock, the buyer must be called on opening the books, (1 Stra. 533,) and the defendant must do all in his power to make it good. 1 Stra. 504.

With respect to the *time* of the tender, it should be observed that, in order to avoid the defendant's liability to damages for the non-performance of the contract, it should be made in the very time agreed upon for the performance of such contract: a tender after such time only goes in mitigation of damages for the breach of the contract, and not even then if the tender be not made before the writ sued out. 7 Taunt. 487. See 21 Jac. I. c. 16. s. 5. It is said to have been decided by Buller, J., that a tender on the day the bill is filed is not available, there being no fraction of a day, (Imp. K. B. 324:) consequently, if payment of a bill has been demanded on the day it was due, and the acceptor plead a subsequent tender, it will not avail. 8 East, 168. 5 Taunt. 240. 1 Marsh Rep. 36. 1 Saund. 33, a., note 2. But that doctrine is not law; and it is no answer to a plea of tender that the plaintiff had, before the tender, instructed his attorney to sue out the writ, and that the attorney had applied before the tender for the writ which was afterwards sued out, (8 T. R. 629:) and if the plaintiff brings his action, and discontinues it and commences another, a tender before the latter action is good. 1 Moore, 200. To constitute a good tender of stock, it should be made on the very day, (1 Stra. 579;) and at the last part of the day it can be accepted. 2 id. 777, 832. Any party, being an agent of the debtor, may tender the money. 2 M. &. S. 86.

With respect to the persons to *whom* the tender should be made, it will suffice if it be to the creditor or any authorized agent. 1 Camp. 477. Tender to an attorney, authorized to issue out a writ, &c., is good. Dougl. 623. And a tender to an agent has been held good although the principal had previously prohibited the agent from receiving the money if offered, the principal having put his business into the hands of his attorney. 5 Taunt. 307. 1 Marsh. 55 S. C. A bailiff, who makes a distress, cannot delegate his authority: therefore a tender to his agent is insufficient, (6 Esp. 95;) and a tender to one of several creditors is a tender to all. 3 T. R. 683.

2dly. IN WHAT CASES A TENDER MAY BE MADE WITH EFFECT.—In general, a tender can only be made with effect in cases where the demand is of a liquidated sum, or of a sum capable of liquidation by computation. See 2 Burr. 1120. Therefore a tender cannot be pleaded to an action for general damages upon a contract, (1 Vent. 356. 2 Bla. Rep. 837. 2 B. & P. 234. 3 B. & P. 14:) or in covenant, unless for the payment of money, (7 Taunt. 486. 1 Moore, 200, S. C. 5 Mod. 18. 1 Lord Raym. 566. 12 Mod. 376. 2 H. Bla. 837;) or for a tort, (2 Stra. 787, 906. 7 T. R. 335,) or trespass. 2 Wils. 115. It cannot be pleaded to an action for dilapidations, (8 T. R. 47. Stra. 906;) or for not repairing, (2 Salk. 596;) or against a carrier for goods spoiled, though the tender should be of the invoice-price, (2 B. & P. 234:) or for not delivering goods at a certain price per ton, (3 B. & P. 14;) or in an action for a false return, (7 T. R. 335;) or for mesne profits 2 Wils. 115. But in assumpsit against a carrier for not delivering goods, the defendant having advertised that he would not be answerable for any goods beyond the value of 20*l.* unless they were entered and paid for accordingly, a tender of the 20*l.* would, it seems, be available. 1 H. Bla. 299. So a tender may be made with effect to a demand for navigation, (Calls. 7 T. R. 36. 1 Stra. 142,) or in an action for principal and interest due on bonds for payment of moneys by instalments. 3 Burr. 1370. So the penalty of

is for the most part necessary upon pleading a tender, and is itself a kind of tender to the plaintiff;[20] by paying into the hands of the proper officer of the

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a bond may with effect be tendered. 2 Bla. 1190. So the arrears of a bond for 40*l.* payable by 5*l.* per annum. 2 Stra. 814. So a tender may with effect be made in covenant for rent, or for the advanced rent of 5*l.* per acre for ploughing meadow-grounds. 2 H. Bla. 837. 7 Taunt. 486. 1 Moore, 200, S. C.; and *vide* 2 Salk. 596. So also on a policy of insurance, (19 Geo. II. c. 37, s. 7. 2 Taunt. 317;) or in debt for penalty for exercising trade contrary to 5 Eliz. c. 4, (1 Burr. 431;) or for penalty on game-laws, being actions popular, and not *qui tam.* 2 H. Bla. 1052. 2 Stra. 1217. Where a party has wrongfully possessed himself of goods, no tender of freight is necessary in order to enable the party to maintain the action. 2 T. R. 285.

Justices of the peace, and in like manner excise and custom-house officers, and surveyors of highways, are enabled by several statutes to tender amends for any thing done by them in the execution of their offices. See *ante*, 1 book, 354, n. 37, *et seq.* Also by the 21 Jac. I. c. 16, s. 5, in case of involuntary trespasses, tender of amends may be made. See *ante*, 16.

Lastly, As to the Effect of a Tender, and the Advantages acquired by it.—It should in the first place be observed that the debtor is liable for the non-performance of his contract if the money be not paid at the time agreed upon: the mere tendering the money afterwards is not sufficient to discharge him from such liability; it goes only *in mitigation of damages;* though, indeed, if a jury should find that no damages were sustained by reason of the defendant not tendering the money at the time agreed upon, the defendant would defeat the action by the tender afterwards. See Salk. 622. 8 East, 168. 1 Lord Raym. 254. 7 Taunt. 486. The tender of money due on a promissory note, accompanied with a demand of the note, stops the running of interest. 3 Camp. 296. 8 East, 168, 4 Leon. 209. The tender, if pleaded, admits the contract and facts stated in the declaration. 3 Taunt. 95. Peake, 15. 2 T. R. 275. 4 T. R. 579. If, therefore, the defendant's liability is to be disputed, a tender should not be pleaded. So if there be a special count, and the defendant mean to deny it, the tender should be pleaded to the other counts only, (and see Tidd, 8th ed. 676;) and if there be any doubt as to the sufficiency of the tender, it is not advisable to plead it, but more expedient to pay the amount into court upon the common rule; for if the defendant should not succeed in proving the tender he will have to pay all the costs of the trial; whereas, if the money be paid into court, and the plaintiff cannot prove more due, he will be liable to pay all costs subsequent to the time of paying the money into court. If the sum tendered be not sufficient, and the plaintiff should succeed on the general issue, the plaintiff would still be entitled to the costs of the issue on the plea of tender. 5 East, 282. 5 Taunt. 660. If the defendant bring money into court on a plea of tender, the plaintiff may take it out, though he deny the tender. 1 B. & P. 332. The plaintiff, it seems, can gain no advantage by not taking the money out of court; and it has been said that if the plaintiff will not take the money, but takes issue on the tender and it is found against him, the defendant shall have it. 1 B. & P. 334, note a. Lord Raym. 642. 2 Stra. 1027. If the plaintiff should succeed on the trial in proving a larger sum to be due than that tendered, though that sum be below 40*s.*, yet the plaintiff will be entitled to costs. Doug. 448. But where the debt originally was under 5*l.* the defendant is, it seems, entitled to the benefit of the Court of Requests' Act for London, though he has pleaded a tender (5 M. & S. 196) or paid money into court. 5 East. 194.

A tender not being equivalent to payment itself, and only suspending the plaintiff's remedy, (2 T. R. 27,) its effect may be superseded by prior or a *subsequent* demand and refusal to pay the *precise* sum tendered. 1 Camp. 181. 5 B. & A. 630. A subsequent demand of a larger sum will not suffice, (id.,) nor a subsequent demand accompanied by another demand of another sum not due. 1 Esp. 115. 7 Taunt. 213. Such demand should be made by a person authorized to give the debtor a discharge. 1 Camp. 478, n. 1 Esp. 115. A demand made by the clerk of the plaintiff's attorney, who was an entire stranger to defendant, is insufficient. 1 Camp. 478. A subsequent application to one of two joint debtors, and a refusal, is sufficient. 1 Stark. 323. 4 Esp. 93. Noy, 135. Vin. Abr. Evid. T. b. 97. Delivering a letter at defendant's house to a clerk, who returned with an answer that the debt should be settled, is *prima facie* evidence of a demand. 1 Stark. 323. A *prior* demand, and refusal, is an answer to the plea of tender. 8 East, 168. 1 Saund. 33, n. 2. Bull. N. P. 156. 1 Camp. 478.—Chitty.

[20] The allowing the defendant to pay money into court was introduced for the purpose of avoiding the hazard of proving a tender; and in all cases where there has been no tender, or the tender cannot be proved, it should not be pleaded, but the defendant should merely pay the admitted claim into court. The cases in which the proceeding is allowed are similar to those in which a tender may be pleaded, and which will be found *supra*, note (19). One case, however, should be noticed, viz., where the goods have been taken

court as much as the defendant acknowledges to be due, together with the costs hitherto incurred, in order to prevent the expense of any further proceedings. This may be done upon what is called a *motion;* which is an occasional application to the court by the parties or their counsel, in order to obtain some rule or order of court, which becomes necessary in the progress of a cause; and it is usually grounded upon an *affidavit*, (the perfect tense of the verb *affido*,) being a voluntary oath before some judge or officer of the court, to evince the truth of certain facts, upon which the motion is grounded: though no such *affidavit* is necessary for payment of money into court.[21] If, after the money paid in, the plaintiff proceeds in his suit, it is at his own peril: for, if he does not prove more due than is so paid into court, he shall be non-suited and pay the defendant costs; but he shall still have the money so paid in; for that the defendant has acknowledged to be his due.[22] In the French law the rule of practice is grounded upon principles somewhat similar to this; for there, if a person be sued for more than he owes, yet he loses his cause if he doth not tender so much as he really does owe.(*w*) To this head may also be referred the practice of what is called a *set-off:* whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand, but on the other sets up a demand of his own, to counterbalance that of the plaintiff, either in the whole or in part: as, if the plaintiff sues for ten pounds due on a note of hand, the defendant may set off nine pounds due to himself for merchandise sold to the plaintiff, and, in case he *pleads* such set-off, must pay the remaining balance into court. This answers *very nearly to the *compensatio*, or *stoppage*, of the civil law,(*x*) [*305 and depends on the statutes 2 Geo. II. c. 22, and 8 Geo. II. c. 24, which enact, that where there are mutual debts between the plaintiff and defendant, one debt may be set against the other, and either pleaded in bar or given in evidence upon the general issue at the trial; which shall operate as payment, and extinguish so much of the plaintiff's demand.[23]

(*w*) Sp. L. b. 6, c. 4. (*x*) *Ff.* 16, 2, 1.

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under a mistake without any loss to the owner, the court, upon motion, will stay the proceedings in an action of trespass against a public officer, upon the defendant's undertaking to restore them or to pay their full value with the costs of the action. 7 T. R. 53.—CHITTY.

[21] By statute 3 & 4 W. IV. c. 42, s. 21, and now by the Common-Law Procedure Act, 1852, the defendant in all actions (except actions for assault and battery, and false imprisonment, libel, slander, malicious arrest or prosecution, crim. con., or debauching the plaintiff's daughter or servant) may, by leave of the court or a judge, pay into court a sum of money by way of compensation or award.—STEWART.

[22] The effect of the payment of money into court is nearly similar to that of a tender. See *supra*, note (19). Lee's P. Dict. 2d ed. 1013. Tidd, 8th ed. 676. This is the only case where a party is bound by the payment of money, (2 T. R. 645;) and, though paid in by mistake, the court will not order it to be restored to defendant, though perhaps in a case of fraud they would. 2 B. & P. 392.—CHITTY.

[23] But in such case notice must be given at the time of pleading the general issue; and as to the mode of setting off, see 1 Chitt. on Pl. 4th ed. 494 to 497.

In some cases this plea or notice is unnecessary, as where the defendant's demand is more in the nature of a *deduction* than a set-off. Thus, a defendant is in all cases entitled to retain or claim by way of deduction all just allowances or demands accruing to him, or payments made by him, in respect of the *same* transaction or account which forms the ground of action: this is not a set-off, but rather a deduction. See 1 Bla. Rep. 651. 4 Burr. 2133, 2221. And where demands originally cross, and not arising out of the same transaction, have by subsequent express agreement been connected and stipulated to be deducted or set off against each other, the balance is the debt, and the only sum recoverable by suit without any special plea of set-off, though it is advisable in most cases, and necessary when the action is on a specialty, to plead it. 5 T. R. 135. 3 T. R. 599. 3 Taunt. 76. 2 Taunt. 170. In actions at the suit of assignees of bankrupts, a set-off need not be pleaded or given notice of, (1 T. R. 115, 116. 6 T. R. 58, 59,) though the practice is so to plead, or give notice of such set-off.

It may be important here also to observe that these acts were passed more for the benefit of the defendants than the plaintiffs, and are not imperative; so that a defendant may have his right to set off and bring a cross-action for the debt due to him from the plaintiff, (2 Camp. 594. 5 Taunt. 148,) though he cannot safely arrest. 3 B. & Cres.

Pleas that totally deny the cause of complaint are either the *general* issue, or a *special* plea, in bar.

1. The *general* issue, or general plea, is what traverses, thwarts, and denies at once the whole declaration; without offering any special matter whereby to evade it. As in trespass either *vi et armis*, or on the case, *non culpabilis*, not

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139. And where the defendant is not prepared at the time the plaintiff sues him to prove the set-off, it is best not to avail himself of it, for if the defendant should attempt but not succeed on the trial in proving the set-off, he could not afterwards sue for the amount; and a party cannot bring an action for what he has succeeded in setting off in a former suit against him; though if the set-off were more than sufficient to cover the plaintiff's demand in the former action, the defendant therein might then maintain an action for the surplus. 3 Esp. Rep. 104. Though the defendant does not avail himself of the set-off, intending to bring a cross-action, the plaintiff may defeat it by taking a verdict for the whole sum he proves to be due to him, subject to be reduced to the sum really due on the balance of accounts, if the defendant will afterwards enter into a rule not to sue for the debt intended to be set off; or he may take a verdict for the smaller sum, with a special endorsement on the postea, as a foundation for the court to order a stay of proceedings, if an action should be brought for the amount of the set-off. 1 Camp. 252.

The demand, as well of the plaintiff as of the defendant, must be a *debt*. A set-off is not allowed in an action for uncertain damages, whether in assumpsit, covenant, or for a tort, trover, detinue, replevin, or trespass. Bull. N. P. 181. 3 Camp. 329. 4 T. R. 512. 1 Bla. Rep. 394. 2 Bla. Rep. 910.

The only cases in which a set-off is allowed are in assumpsit, debt, and covenant for the non-payment of money, and for which an action of debt or indebitatus might be sustained, (2 Bla. Rep. 911;) or where a bond in a penalty is given for securing the payment of money on an annuity, (2 Burr. 820;) or at least stipulated damages. 2 T. R. 32. The demand to be set off, also, must not be for unliquidated damages, although incurred by a penalty. 1 Bla. Rep. 394. 6 T. R. 488. 1 Taunt. 137. 2 Burr. 1024. 2 Bla. Rep. 910. 1 Taunt. 137. 5 B. & A. 92. 3 Camp. 329. Peake's Rep. 41. 6 Taunt. 162. 1 Marsh. 514, S. C. 2 Brod. & B. 89. 1 M. & S. 499. 5 M. & S. 539, &c. See cases in 1 Chitt. on Pl. 4th ed. 486, 487. Stark. on Evid. 1312, part 4. The defendant's bringing an action or obtaining a verdict for a debt is no waiver of the right to set off the debt. 2 Burr. 1229. 3 T. R. 186. And a judgment may be pleaded by way of set-off, though a writ of error be depending upon it, (3 T. R. 188, in notes;) but not so after plaintiff be taken in execution. 5 M. & S. 103. The debt to be set off must be a *legal* and *subsisting* demand: an equitable debt will not suffice. See 16 East, 36, 136. 7 East, 173. A demand barred by the statute of limitations cannot be set off. 2 Stra. 1271. Peake's Rep. 121. Bull. N. P. 180. An attorney cannot set off his bill for business done in court unless he has previously, and in a reasonable time to be taxed, delivered a bill signed. 1 Esp. C. 449. But it is not necessary that a month should intervene between the delivery of the bill and the trial. Id.

The debt sought to be recovered and that to be set off must be mutual and due in the same right: therefore a joint debt cannot be set off against a separate demand, nor a separate debt against a joint one, (2 Taunt. 173. Montague, 23. 5 M. & S. 439,) unless it be so expressly agreed between all the parties, (2 Taunt. 170;) and a debt on a joint and several bond of several persons may be set off to an action brought by only one of the obligors. 2 T. R. 32. A defendant sued for his own debt may set off a debt due to him as surviving partner, (5 T. R. 493. 6 T. R. 582;) and in an action brought by an ostensible and a dormant partner, the defendant may set off a debt due from the ostensible partner alone. 2 Esp. C. 469. 7 T. R. 361, n. c., S. C. See Peake, 197. 12 Ves. 346. 11 Ves. 27. Id. 517. 16 East, 130. A debt due to a man in right of his wife cannot be set off in an action against him on his own bond. Bull. N. P. 179. A debt due from a wife *dum sola* cannot be set off in an action brought by the husband alone, unless the defendant has made himself individually liable. 2 Esp. C. 594. A debt from an executor in his own right cannot be set off against a debt to the testator, (3 Atk. 691,) though the executor is residuary legatee. Id. So a debt which accrued to the defendant in the lifetime of the testator cannot be set off against a debt that accrued to the executor even in that character after the testator's death. Bull. N. P. 180. Willes, 103, 106.

Questions of difficulty frequently arise in cases of set-off, where the agent of a party deals as principal. The rule in these cases is, that if an agent dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him as the principal; and though the real principal may appear and sue, yet the purchasor may in such case set off any claim he has against the agent. 7 T. R. 360. 1 M. & S. 576. 2 Marsh. 501. Holt, C. N. P. 124. But a debt due from a *broker* cannot be set off in an action by the principal against the purchasor

guilty;(*y*) in debt upon contract, *nihil debet*, he owes nothing; in debt on bond, *non est factum*, it is not his deed; on an *assumpsit*, *non assumpsit*, he made no such promise. Or in real actions, *nul tort*, no wrong done; *nul disseisin*, no disseisin; and in a writ of right, the mise or issue is, that the tenant has more right to hold than the demandant has to demand. These pleas are called the general issue, because, by importing an absolute and general denial of what is alleged in the declaration, they amount at once to an issue: by which we mean a fact affirmed on one side and denied on the other.

Formerly the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him. But when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a *special* plea; which was originally intended to apprize the court and the adverse party of the nature and circumstances of the defence, and to keep the law and the fact distinct. And it is an invariable rule, that every defence which cannot be thus specially pleaded may be given in evidence upon the general issue at the trial. But the science *of special [*306 pleading having been frequently perverted to the purposes of chicane and delay, the courts have of late in some instances, and the legislature in many more, permitted the general issue to be pleaded, which leaves every thing open, the fact, the law, and the equity of the case, and have allowed special matter to be given in evidence at the trial. And, though it should seem as if much confusion and uncertainty would follow from so great a relaxation of the strictness antiently observed, yet experience has shown it to be otherwise; especially with the aid of a new trial, in case either party be unfairly surprised by the other.

2. Special pleas, *in bar* of the plaintiff's demand, are very various, according to the circumstances of the defendant's case. As, in real actions, a general release or a fine, both of which may destroy and bar the plaintiff's title. Or, in personal actions, an accord, arbitration, conditions performed, nonage of the defendant, or some other fact which precludes the plaintiff from his action.(*z*) A *justification* is likewise a special plea in bar; as in actions of assault and battery, *son assault demesne*, that it was the plaintiff's own original assault; in trespass, that the defendant did the thing complained of in right of some office which warranted him so to do; or, in an action of slander, that the plaintiff is really as bad a man as the defendant said he was.

Also a man may plead the statutes of limitation(*a*) in bar;[24] or the time

(*y*) Appendix, No. II. § 4. (*z*) Appendix, No. III. § 6. (*a*) See pages 188, 196.

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to recover the price of goods sold by the broker, not disclosing his name. 2 B. & A. 137. And if an agent sells goods as his own, or has a lien upon them, and does not part with the goods unless the purchasor expressly agrees to pay him, the purchasor in an action brought against him by such agent for the price of the goods cannot set off a debt due from the owner to the purchasor. 2 Chitt. R. 387. 7 T. R. 359. But if an agent deliver goods without payment, and thereby parts with his lien, the purchasor may, in an action by the agent, set off a debt due from the principal. 7 Taunt. 243. And where an auctioneer had sold to the defendant the goods of A. as the goods of B., it was held that this was such a fraud that defendant might set off a debt due to him from B. against the price of the goods of A. Id. ibid. 1 J. B. Moore, 178. As to set-off in actions, by or against assignees of bankrupts, see 1 Chitt. on Pl. 492 to 494. Stark. on Evid. part 4, 106, *ante*, 2 book, 472, k., (n.) And 6 Geo. IV. c. 16, § 50.—CHITTY.

[24] As questions on the statute of limitations (21 Jac. I. c. 16) so frequently occur, we will consider this subject more fully in the following order, viz., First, as to what cases the statute extends, and herein in what cases payment of a debt may be presumed at common law. Secondly, when the statute begins to take effect; and herein of the exceptions contained in the statute. Thirdly, what is a good commencement of an action to take the case out of the statute; and, Lastly, what acts or admissions will revive the claim.

First. TO WHAT CASES THE STATUTE EXTENDS.—The statute does not extend to actions of account, or of covenant, or debt on specialty, or other matter of a higher nature, but only to actions of debt upon a lending, or contract without specialty, or for arrearages of rent reserved on parol leases. Hut. 109. 1 Saund. 38. 2 Saund. 66. Tidd, Pr. 8th ed. 15. It does not extend to warrants of attorney. 2 Stark. 234. It extends to bills of

limited by certain acts of parliament, beyond which no plaintiff can lay his cause of action. This, by the statute of 32 Hen. VIII. c. 2, in a writ of right, is *sixty* years; in assizes, writs of entry, or other possessory actions real, of the seisin of one's ancestors, in lands; and either of their seisin, or one's own, in rents, suits, and services, *fifty* years: and in actions real for lands grounded

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exchange, (Carth. 3,) attorneys' fees, (3 Lev. 367,) and to a demand for rent on a parol demise. 1 B. & A. 625.

It does not extend to *debt* on a bond, (Cowp. 109;) but where the bond has been given more than twenty years before the commencement of the action, and no interest has been paid upon it, nor any acknowledgment by the obligor of the existence of the debt during that period, the law will in general presume it to have been satisfied, (6 Mod. 22. 1 Bla. Rep. 532. 1 T. R. 270. 3 P. Wms. 395,) particularly if the debt be large and the obligor has been all along in good circumstances, (1 T. R. 271;) and in some cases, where a bond has been given and interest paid on it within twenty years, the law will presume it to have been satisfied; as where it has been given eighteen or nineteen years, and in the mean time an account has been settled between the parties without taking any notice of the demand, (1 Burr. 434. 1 T. R. 271;) but in such case the presumption must be fortified by evidence of some auxiliary circumstances. Cowp. 214. 1 T. R. 271. 1 Camp. 27. After a considerable length of time, slight evidence is sufficient. 1 T. R. 271; and see Tidd, 8th ed. 17, 18. In *assumpsit*, though the statute be not pleaded, the jury may presume, from the length of time and other circumstances, that the debt has been satisfied. 2 Stark. C. N. P. 497; and see 5 Esp. 52. 3 Camp. 13. 1 Taunt. 572; *sed vide* 1 D. & R. 16.

This presumption may be repelled by proof of the recent admission of the debt, or of the payment of interest on the bond within twenty years, (1 T. R. 270;) or that the obligee has resided abroad for the last twenty years, (1 Stark. 101; *sed vide* 1 D. & R. 16;) or that the obligor was in insolvent circumstances, and had not the means of payment, (19 Ves. 196. Cowp. 109. 1 Stark. 101;) or that the demand was trifling, (Cowp. 214;) or other circumstances, explaining satisfactorily why an earlier demand has not been made. 1 Stark. 101. The fluctuation of credit, together with the circumstance of the security remaining with the obligee, is of great weight to rebut presumption of payment thereof, (19 Ves. 199. 1 Stark. 374;) an endorsement by the obligee, purporting that part of the principal sum has been received, if made after the presumption of payment has arisen, is inadmissible. 2 Stra. 827. 2 Ves. 42; *sed vide* 1 Barnard, 432. And further, if the defendant produce direct evidence of the payment of the principal sum and interest at a certain time within twenty years, the plaintiff will not be allowed to encounter that evidence by an endorsement in the handwriting of the obligee, purporting that interest was paid at a subsequent time. 2 Camp. 322.

Secondly. When the Statute begins to take Effect.—It does not do so till the cause of action is complete and the party is capable of suing on it. Cro. Car. 139. 1 Lev. 48. Salk. 442. 1 Bla. Rep. 354. No action lies against a consignee of goods for sale, for not accounting and returning the goods undisposed of until demand; and therefore the statute does not begin to run until the time when demand is made. 1 Taunt. 572. The statute begins to operate only from the time when a bill of exchange or promissory note, &c. is due, and not from the date, (1 H. B. 631. 5 B. & A. 212;) and no debt accrues on a bill payable at *sight* until it be presented for payment. 2 Taunt. 323. The statute of limitations begins to run from the date of a note payable on demand. 1 Ves. 344. 2 Selw. 4th ed. 131, 339. Cro. Eliz. 548; and see Chitty on Bills, 6th ed. 373; *sed quære*, see Hard. 36. 14 East, 500. 1 Taunt. 575, 576. Sir W. Jones, 194. 12 Mod. 444. 15 Ves. 487. Where a payee of a bill of exchange was dead at the time the bill became due, it was held that the statute did not begin to run until letters of administration were taken out, (5 B. & A. 212. Skin. 555;) but where the cause of action is complete in the lifetime of the testator, then the statute begins to run from that time, and not from the granting of the probate. Willes, 27. Where a breach of a contract is attended with special damage, the statute runs from the time of the breach, which is the gist of the action, and not from the time it was discovered (3 B. & A. 628, 288. 4 Moore, 508. 2 Brod. & B. 73, S. C.) or the damage arose. 5 B. & A. 204. If there is mutual credit between two parties, though the items on both sides are above six years old, with the exception of one item on each side, which are just within the period, this is sufficient to take the whole out of the statute; for every new item and credit in an account given by one party to the other is an admission of there being some unsettled account between them. 6 T. R. 189. 2 Saund. 127, a., n. (6). But where all the items are on one side, so that the account is not mutual, as, for instance, in an account between a tradesman and his customer, the last item which happens to be within six years will not draw after it those which are of a longer standing. Bull. N. P. 149.

upon one's own seisin or possession, such possession must have been within *thirty* years. By statute 1 Mar. st. 2, c. 5, this limitation does not extend to *any suit for advowsons, upon reasons given in a former chapter.(b) But by the statute 21 Jac. I. c. 2, a time of limitation was extended to the [*307

(b) See page 250.

The exception in the statute respecting merchants' accounts extends only to those cases where there are mutual and reciprocal accounts and demands between two persons, and where such accounts are current and open, and not to accounts stated between them, (2 Ves. 400. Bull. N. P. 149. Sir W. Jones, 401. 1 Sid. 465. 1 Ventr. 89;) for no other actions are excepted but actions of account. Carth. 226. 1 Show. 341, S. C. 2 Saund. 127, a. 2 Mod. 312, and 1 Mod. 70. 1 Lev. 298. 4 Mod. 105. Peake, 121. 1 Vern. 456. 2 Vern. 276. It has been considered that by the effect of the above exception there can be no limitation to a merchant's open and unsettled account. This opinion, however, appears erroneous; and if there is no item in the account or acknowledgment of the debt within six years, the statute will take effect; but, as we have before seen, if even the last item of the account is within six years, that preserves all the preceding items of debt and credit from the operation of the statute, (6 Ves. 580. 15 Ves. 198. 18 Ves. 286. 2 Ves. 200, acc.; *sed vide* opinion of lord Hardwicke mentioned in 19 Ves. 185. 6 T. R. 189, 192, *cont.*:) and from these decisions it appears that merchants' accounts stand not upon better grounds in regard to the statute than other parties. The exception extends to all merchants, as well inland as to those trading beyond sea, (Peake. C. N. P. 121. 2 Saund. 127. B. acc. Chanc. Ca. 152, *cont.*:) and the effect of the exception has also been extended to other tradesmen and persons having mutual dealings. 6 T. R. 189. Peake, N. P. 127, overruling; *sed vide* 7 Mod. 270, *cont.* But in all these cases the accounts must be mutual, together with reciprocal demands on each side, and not, as in the case of a tradesman and his customer, where the items of credit are all on one side. Bull. N. P. 149.

The exception in the act respecting infants, &c. only extends to plaintiffs, (Carth. 136, 226. 6 Show. 99. Salk. 420. 2 Stra. 836;) but, by 4 & 5 Anne, c. 16, s. 19, it is extended to defendants beyond seas at the time of the cause of action accruing. If the plaintiff be in England when the cause of action accrues, though he afterwards go abroad, the time of limitation begins to run from the accruing of the action, (1 Wils. 134;) and so though one of several plaintiffs be abroad when the cause of action accrues. 4 T. R. 516. It extends to persons absent in Scotland, (1 Bla. R. 286. 1 D. & R. 16,) and the plaintiff, though absent there, must sue within the limited time; but it does not extend to persons in Ireland, (1 Show. 91,) the latter being considered as beyond the sea, within the meaning of the above provision. Foreigners living beyond the sea have the same advantage of the proviso as natives residing here. 2 Bla. R. 723. 3 Wils. 145, S. C. Though the demand be on a bill of exchange, the plaintiff's absence beyond sea saves the statute Strange, 836. Where the cause of action accrues within the jurisdiction of the supreme court at Bengal, whilst the parties are resident there, the statute of limitations, as far as respects a suit in this country, begins to run only from the time of their concurrent presence here. 13 East, 439.

When once the statute has begun to run, nothing stops its course; as where a tenant in tail leaves two sons infants, and the eldest, having attained the age of twenty-one, dies without issue, the statute begins to run against his brother, though a minor. 4 Taunt. 826. And see the cases (1 Wils. 134. 4 T. R. 516) just cited.

Thirdly, WHAT IS A GOOD COMMENCEMENT OF AN ACTION TO TAKE THE CASE OUT OF THE STATUTE. See Tidd, 8th ed. 24, 25. 144, 152, 161.

If the plaintiff, having commenced a suit in due time, die, or, being a feme-sole at the commencement of the action, marry, the representative in the one case, or husband and wife in the other, if they commence a new action within a reasonable time afterwards, it will suffice. See Willes, 259, N. E. 2 Salk. 425. Bull. N. P. 150. A year seems to be a reasonable time within this rule. (1 Lord Raym. 434. 1 Lutw. 256, S. C. 2 Stra. 907. Cro. Car. 294; *sed vide* 1 Lord Raym. 283. 1 Salk. 393, S. C.:) at all events, half a year would be. Cowp. 738, 740.

Lastly, WHAT ACTS OR ADMISSIONS WILL REVIVE THE CLAIM.—The object of this statute was to protect individuals against forgotten claims of so obsolete a nature that the evidence relating to the contract might probably be no longer to be found, and thereby might lead to perjury. It proceeds, also, upon the supposition that the debtor has paid, but after a lapse of time may have lost his voucher. See 5 M. & S. 76, *per* Bayley, J. 3 B. & A. 142, *per* Abbott, J. In cases, therefore, where there is an acknowledgment of the debtor or contractor to prove the existence of the debt or obligation, or an express promise to pay or perform the same, the statute will not operate to protect him, notwithstanding the lapse of six years or more since the cause of the action may have accrued. But if a cause of action arising from the breach of a contract to do an act at

case of the king; viz., *sixty* years precedent to 19 Feb. 1623;(c) but, this becoming ineffectual by efflux of time, the same date of limitation was fixed by statute 9 Geo. III. c. 16, to commence and be reckoned backwards, from the time of bringing any suit or other process, to recover the thing in question; so

(c) Inst. 189.

a specific time be once barred by the statute, a subsequent acknowledgment by the party that he broke the contract will not, it seems, take the case out of the statute, (2 Camp. 160; and see Peake's Evid. 205. 5 Moore, 105. 2 B. & C. 372, S. C. 5 B. & A. 204. 3 B. & A. 288;) and a subsequent acknowledgment of a trespass will not take the case out of the act. 1 B. & A. 92. 2 Chit. Rep. 249, S. C. The sufficiency of an acknowledgment to take the case out of the statute will be considered, *first*, where it directly acknowledges the debt; *secondly*, where it acknowledges the debt having existed, but is accompanied by a declaration of its being discharged; and *thirdly*, with reference to the party making the admission.

In the *first* case, the slightest acknowledgment has been held sufficient, (2 Burr. 1099. Bull. N. P. 149. Cowp. 548;) as where the debtor exclaimed to the plaintiff, "What an extravagant bill you have delivered me!" Peake N. P. 93. So, where the defendant met a man in a fair and said that he went there to avoid the plaintiff, to whom he was indebted, this was held to save the statute. Loft. 86. In an action by an administrator, an agreement for a compromise executed between intestate and defendant, wherein the existence of the debt sued for was admitted, was deemed sufficient to take the case out of the statute. 9 Price, 122. It is sufficient to prove that, a demand being made by a seaman on the owner of a ship for wages which had accrued during an embargo, he said, "if others paid, he should do the same." 4 Camp. 185. A promise, "if there should be any mistake it should be rectified," referring to payments actually made, is sufficient. 2 B. & C. 149. 3. D. & R. 522, S. C.; *sed quære*. And it makes no difference whether the acknowledgment be accompanied with a promise or refusal to pay: a bare acknowledgment is sufficient. 16 East, 420. 2 Burr. 1099. 5 M. & S. 75. 2 B. & Cres. 154. The construction of an ambiguous letter or declaration of a defendant on being served with a writ or requested to pay a debt, neither admitting or denying it, is strong intimation that it is an acknowledgment; since if the defendant knew he owed nothing he would have declared so. 2 T. R. 760. 1 Bing. 266. A conditional promise to pay when able, or by instalments, &c., is sufficient, without proof of ability or waiting till instalment become due. 16 East, 420. 2 Stark. 98, 99. 5 M. & S. 75: *sed vide* 3 D. & R. 267. Where the original agreement is in writing, in order to take the case out of the statute of frauds, a subsequent promise, or admission of the liability to perform such agreement, need not be in writing to take the case out of the statute of limitations. 1 B. & A. 690. An acknowledgment after action brought is good. Selw. N. P. tit. Limitations. Burr. 1099. The admission to a third person is sufficient. 3 B. & A. 141. Loft. 86. 2 B. & C. 154.

On the other hand, where the defendant said, "The testator always promised not to distress me," this was held no evidence of a promise to the testator to take the case out of the statute, (6 Taunt. 210;) so a declaration, "I cannot afford to pay my new debts, much more my old ones," is insufficient, (4 D. & R. 179;) and so where, in assumpsit by an attorney to recover his charges relative to the grant of an annuity, evidence that the defendant said "he thought it had been settled when the annuity was granted, but that he had been in so much trouble since that he could not recollect any thing about it," is not a sufficient acknowledgment of the debt to save the statute, notwithstanding proof that plaintiff's bill was not paid when the annuity was granted. 1 J. B. Moore, 340. 7 Taunt. 608, S. C. The referring plaintiff to the defendant's attorney, who, he added, was in possession of his determination and ability, is not an admission that any thing is due, (1 New Rep. 20;) and where a defendant, on being applied to by the plaintiff's attorney for the payment of the debt, wrote in answer "that he would wait on the plaintiff when he should be able to satisfy him respecting the misunderstanding which had occurred between them," this was holden not sufficient to take the case out of the statute. Holt, C. N. P. 380; and see 4 Esp. 184. 5 Esp. 81. A declaration, "I will see my attorney and tell him to do what is right," is insufficient. 3 D. & R. 267. Payment of money into court on a special count will not save the operation of the statute, (3 B. & C. 10. 4 D. & R. 632, S. C.:) it only admits the debt to the amount paid in. Id. Bunb. 100.

In the *second* place, where the defendant makes no express acknowledgment of the debt, but says he is not liable, because it is more than six years since, this will not take the case out of the statute. 3 Taunt. 380. 5 Esp. 81. 4 M. & S. 457. 5 Price, 636. But an acknowledgment that the defendant had been liable, but was not at the time of acknowledgment, because the demand was out of date, and that he would not then pay, as it was not then due, takes the case out of the act. 16 East, 420. 2 Stark. 98, 99.

that a possession for *sixty* years is now a bar even against the prerogative, in derogation of the antient maxim "*nullum tempus occurrit regi.*" By another statute, 21 Jac. I. c. 16, *twenty* years is the time of limitation in any writ of formedon; and, by a consequence, *twenty* years is also the limitation in every action of ejectment; for no ejectment can be brought unless where the lessor of the plaintiff is entitled to enter on the lands,(*d*) and by the statute 21 Jac.

(*d*) See page 206.

If a debtor admit that he was once liable, but that he was discharged by a particular mode of performance, to which he with precision referred himself, and where he has designated that time and mode of performance so strictly that he can say it is impossible it had been discharged in any other mode, there the courts have said, that if the plaintiff can disprove that mode, he lets himself in to recover, by striking from under the defendant the only ground on which he professes to rely. 7 Taunt. 608. 4 B. & A. 568. 1 Salk. 29. Cowp. 548. Peake, N. P. C. 93. So where a party acknowledges but refuses to pay the debt, relying on the deficiency of his legal liability to pay, this will take the case out of the statute, upon proof of liability. 5 M. & S. 75. 6 Rep. 66. But a qualified admission by a party who relies on an objection which would at any time have been a good defence to the action does not take the case out of the statute, as if the defendant had said, "If you had presented the protest the same as the rest, it would have been paid: I had then funds in the acceptor's hands," (1 Stark. 7: see 3 Esp. N. P. C. 155. 2 Camp. 161. 2 B. & A. 759. 4 B. & A. 568. 4 East, 599, and cases there cited:) this was held no sufficient acknowledgment. Where the defendant,—an executor,—who was sued for money had and received from his testator, was proved to have said, "I acknowledge the receipt of the money, but the testatrix gave it me," it was held insufficient, (Bull. N. P. 148;) and so where the defendant, on being applied to for payment of a debt, said, "You owe me more money: I have a set-off against it." 2 B. & A. 759. Where a party, on being asked for the payment of his attorney's bill, admitted that there had been such a bill, but stated that it had been paid to the deceased partner of the attorney, who had retained the amount out of the floating balance in his hands, it seems that, in order to take the case out of the statute, evidence is inadmissible to show that the bill had never, in fact, been paid in this manner. 4 B. & A. 568. In all cases, unless the defendant actually acknowledge that the debt or obligation did originally exist, the statute will not be avoided. 4 Maule & S. 457. 2 Camp. 160.

In the *third* case, with respect to the party from whom the acknowledgment should come to render it sufficient, an acknowledgment by an agent or servant intrusted by the defendant to transact his business for him will suffice, (5 Esp. 145;) and so will the admission of the wife who was accustomed to conduct her husband's business. Holt's Ca. Ni. Pri. 591. In an action against a husband for goods supplied to his wife for her accommodation while he occasionally visited her, a letter written by the wife, acknowledging the debt within six years, is admissible evidence to take the case out of the statute. 1 Camp. 394; and see 2 Esp. N. P. C. 511. 5 Esp. N. P. C. 145. If a demand is owing from two parties, an acknowledgment by one will avoid the statute. 4 T. R. 516. So an acknowledgment by one of several makers of a joint and several promissory-note will take the case out of the statute, as against any one of the other makers, in a separate action on the note against him, (Doug. 652:) and this though against a surety, (2 Bingh. 306;) and in an action against A. on the joint and several promissory-note of himself and B. to take case out of the statute, it is enough to give in evidence a letter written by A. to B. within six years, desiring him to settle the debt. 3 Camp. 32; and see 11 East, 585. 1 Stark. 81. But the acknowledgment of one partner to bind the other must in such case be clear and explicit; and therefore it is not sufficient in order to take a case out of the statute, in an action on a promissory-note, to show a payment by a joint maker of a note to the payee within six years, so as to throw it upon the defendant, to show that the payment was not made on account of the note. 1 Stark. 488. It has been held that when, one of two drawers of a joint and several promissory-note having become bankrupt, the payee received a dividend under the commission on account of the note, this will prevent the other drawer from availing himself of the statute in an action brought against him for the remainder of the money due on the note, the dividend having been received within six years before the action brought. 2 H. Bla. 340. But in a more recent case, where one of two joint drawers of a bill of exchange became bankrupt, and under his commission the endorsees proved a debt (beyond the amount of the bill) for goods sold, &c., and they exhibited the bill as a security, they then held for their debt, and afterwards received a dividend: it was held that in an action by the endorsees of the bill against the solvent partner, the statute of limitations was a good defence, although the dividend had been paid by the assignees of the bankrupt partner within six years. 1 B. & A. 463; and see 1 B. & C. 248. 2 D. & R. 363, S. C. So where A. & B. made a joint and several promissory-note, and A. died,

I. c. 26, no entry can be made by any man, unless within twenty years after his right shall accrue.[25] Also all actions of trespass, (*quare clausum fregit*, or otherwise,) detinue, trover, replevin, account, and case, (except upon accounts between merchants,) debt on simple contract, or for arrears of rent, are limited

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and ten years after his death B. paid interest on the note, it was holden, in an action thereon against the executors of A., that the payment of interest by B. did not take the case out of the statute, so as to make the executors liable. 2 B. & C. 23. 3 D. & R. 200, S. C. An acknowledgment by an accommodation acceptor, within six years, of his liability to the payee, is not sufficient to take the case out of the statute for the drawer. 3 Stark. 186.

It is enacted, by 9 Geo. IV. c. 14, that in actions of debt or upon the case, grounded upon any simple contract, no acknowledgments or promise by words only should be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the enactments of the statutes of limitations, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby. And that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them. The act not to alter the effect of any payment of any principal or interest made by any person whatsoever. And in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited acts, or this act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

By sect. 2, that if defendant in action on simple contract shall plead in abatement to the effect that any other person ought to be jointly sued, and issue be joined on such plea, and it should appear at the trial that the action could not, by reason of the said recited acts, or the present act, be maintained against the other person named in such plea, the issue joined on such plea should be found against the party pleading the same.

By sect. 3, no endorsement or memorandum of payment made after the 1st of January, 1829, upon any promissory-note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes.

By sect. 4, said recited acts and the present act shall apply to the case of any debt on simple contracts by way of set-off on the part of any defendant, either by plea, notice, or otherwise.

By sect. 8, no memorandum or other writing made necessary by the act shall be deemed to be an agreement within the meaning of the Stamp Acts.—Chitty.

[25] Some important alterations have been made by two recent statutes as to the limitation of actions and suits. By one of these statutes, (3 & 4 W. IV. c. 27, s. 2,) one period of limitation is established for bringing suits and actions relating to lands and rents, it being enacted that after the 31st day of December, 1833, no person shall bring an action to recover any land or rent but within *twenty* years next after the time at which the right to bring such action shall have first accrued, except in cases of disability, when *ten* years longer is allowed, (s. 16;) but no action or suit shall be brought beyond *forty* years after the right of action accrued. S. 17. By s. 41, no arrears of dower shall be recovered for more than six years; and (s. 42) no arrears of rent or interest are to be recovered for more than six years. By the other of these statutes, (3 & 4 W. IV. c. 42, s. 3, an action of debt for rent upon an indenture, actions of covenant or debt upon bond or other specialty, action of debt or *scire facias* upon recognizance, action of debt upon awards, where the submission is not by specialty or for fines in respect of copyhold estates, or for an escape, or for money levied on *fieri facias*, and actions for penalties, damages, or sums of money given to the party grieved by any statute, shall be commenced within the following times:—Actions of debt for rent or covenant, or debt upon bond or other specialty, actions of debt or *scire facias* upon recognizance, within *twenty* years after the cause of action; actions by the party grieved, two years after the cause of such actions; and other actions within six years after the cause of action. But it is provided that nothing herein enacted shall extend to any action by statute specially limited.—Stewart.

by the statute last mentioned to *six* years after the cause of action commenced: and actions of assault, menace, battery, mayhem, and imprisonment, must be brought within *four* years, and actions for words within *two* years, after the injury committed.[26] And by the statute 31 Eliz. c. 5, all suits, indictments, and informations, upon any penal statutes, where any forfeiture is to the crown alone, shall be sued within *two* years; and where the forfeiture is to a subject, or to the crown and a subject, within *one* year, after the offence committed,[27] unless where any other time is specially limited by the statute. Lastly, by statute 10 W. III. c. 14, no writ of error, *scire facias*, or other suit, shall be brought to reverse any judgment, fine, or recovery, for error, unless it be prosecuted within *twenty* years.[28] The use of these statutes of limitation is to preserve the peace of the kingdom, and to prevent those innumerable perjuries which might ensue if a man were allowed to bring an action for any injury committed at any distance of time. *Upon both these accounts the law therefore holds, that "*interest reipublicæ ut sit finis litium:*" and upon the same principle the Athenian laws in general prohibited all actions where the injury was committed *five* years before the complaint was made.(*e*) If therefore in any suit the injury or cause of action happened earlier than the period expressly limited by law, the defendant may plead the statutes of limitations in bar: as upon an *assumpsit*, or promise to pay money to the plaintiff, the defendant may plead *non assumpsit infra sex annos;* he made no such promise within six years; which is an effectual bar to the complaint.[29] [*308

An *estoppel* is likewise a special plea in bar; which happens where a man hath done some act or executed some deed which estops or precludes him from averring any thing to the contrary. As if tenant for years (who hath no freehold) levies a fine to another person. Though this is void as to strangers, yet it shall work as an estoppel to the cognizor; for if he afterwards brings an action to recover these lands, and his fine is pleaded against him, he shall thereby be estopped from saying that he had no freehold at the time and therefore was incapable of levying it.

The conditions and qualities of a plea (which, as well as the doctrine of estoppels, will also hold equally, *mutatis mutandis*, with regard to other parts of pleading) are—1. That it be single and containing only one matter; for duplicity begets confusion. But by statute 4 & 5 Anne, c. 16, a man with leave of the court may plead two or more distinct matters or single pleas; as,

(*e*) Pott. Ant. b. i. c. 21.

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[26] The statute makes an exception for all persons who shall be under age, *feme-coverts*, *non compos mentis*, in prison, or abroad, when the cause of action accrues; and the limitations of the statute shall only commence from the time when their respective impediments or disabilities are removed, (s. 7;) and the 4 Anne, c. 16, s. 19 extends this provision to defendants beyond seas at the time the cause of action accrues.—CHITTY.

By the statute 9 Geo. IV. c. 14, usually called Lord Tenterden's Act, in actions upon any simple contract, no acknowledgment or promise by *words* only shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of the statute 21 Jac. I. c. 16; but any such *acknowledgment* or promise must be *in writing*, signed by the party chargeable thereby. That statute also enacts that, when there are several joint contractors or executors or administrators of a contractor, one of them shall not lose the benefit of the statute by reason of a *written acknowledgment* or promise made by another; and the statute 19 & 20 Vict. c. 97 contains an enactment to the same effect with respect to a *payment* by any joint contractor or joint debtor, or the executor or administrator of any contractor.—KERR.

[27] Where the forfeiture is to the crown and a subject, a common informer must sue within one year, and the crown may prosecute for the whole penalty at any time within two years after that year ended.—CHITTY.

[28] But now, by the Common-Law Procedure Act, 1852, s. 146, error must be brought within *six* years.—STEWART.

[29] Besides these statutes of limitations pointed out by the learned commentator, there are various others, as the 4 Anne, c. 16, s. 17, relating to seamen's wages; and the 24 Geo. II. c. 44, s. 8, *ante*, 1 book, 354, n. (37), as to actions against justices, constables, &c.; and the 28 Geo. III. c. 37, s. 23, as to actions against persons in the customs and excise; and the 43 Geo. III. c. 99, s. 70, as to actions against tax-collectors, &c. &c.—CHITTY.

in an action of assault and battery, these three, not guilty, *son assault demesne*, and the statute of limitations. 2. That it be direct and positive, and not argumentative. 3. That it have convenient certainty of time, place, and persons. 4. That it answer the plaintiff's allegations in every material point. 5. That it be so pleaded as to be capable of trial.[30]

*309] *Special pleas are usually in the affirmative, sometimes in the negative; but they always advance some new fact not mentioned in the declaration; and then they must be averred to be true in the common form,—"and this he is ready to verify." This is not necessary in pleas of the general issue; those always containing a total denial of the facts before advanced by the other party, and therefore putting him upon the proof of them.

It is a rule in pleading that no man be allowed to plead specially such a plea as amounts only to the general issue, or a total denial of the charge; but in such case he shall be driven to plead the general issue in terms, whereby the whole question is referred to a jury. But if the defendant, in an assize or action of trespass, be desirous to refer the validity of his title to the court rather than the jury, he may state his title specially, and at the same time *give colour* to the plaintiff, or suppose him to have an appearance or colour of title, bad, indeed, in point of law, but of which the jury are not competent judges. As, if his own true title be, that he claims by feoffment, with livery from A., by force of which he entered on the lands in question, he cannot plead this by itself, as it amounts to no more than the general issue, *nul tort*, *nul disseisen*, in assize, or *not guilty* in an action of trespass. But he may allege this specially, provided he goes further, and says, that the plaintiff claiming by *colour* of a prior deed of feoffment without livery, entered; upon whom he entered; and may then refer himself to the judgment of the court which of these two titles is the best in point of law.(*f*)[31]

When the plea of the defendant is thus put in, if it does not amount to an issue or total contradiction of the declaration, but only evades it, the plaintiff may plead again, and *reply* to the defendant's plea; either traversing it; that is, totally denying it; as if in an action of debt upon bond the defendant

*310] pleads *solvit ad diem*, that he paid the money when *due; here the plaintiff in his *replication* may totally traverse this plea by denying that the defendant paid it; or he may allege new matter in contradiction to the defendant's plea; as when the defendant pleads *no award made*, the plaintiff may reply and set forth an actual award, and assign a breach;(*g*) or the replication may *confess and avoid* the plea, by some new matter or distinction consistent with the plaintiff's former declaration; as, in an action for trespassing upon land whereof the plaintiff is seised, if the defendant shows a title to the land by descent, and that therefore he had a right to enter, and gives colour to the plaintiff, the plaintiff may either traverse and totally deny the fact of the

(*f*) Dr. & Stud. 2, c. 53. (*g*) Append. No. III. § 6.

[30] In addition to these qualities, it should be observed that every plea in bar must be adapted to the nature of the action and conformable to the count, (Co. Litt. 303, a., 285, b. Bac. Abr. Pleas, I. *per tot.* 1 Roll. Rep. 216;) must answer the whole declaration or count, or rather all that it assumes in the introductory part to answer, and no more, (Co. Litt. 303, b. Com. Dig. Pleader, E. 1, 36. 1 Saund. 28. 2 B. & P. 427. 3 B. & P. 174;) must admit or confess the fact it justifies, (3 T. R. 298. 1 Salk. 394. Carth. 380. 1 Saund. 28;) must be certain, (Com. Dig. tit. Pleader, E. 5, &c.;) and must be true, and not too large. Hob. 295. Bac. Abr. tit. Pleas, G. 4. For more particular information as to these qualities, see 1 Chitt. on Pl. 451 to 463; as to their forms and particular parts, see id. 467 to 477.

The same rules which prevail in the *construction* and allowance of a declaration do so in the case of pleas in bar. See *ante*, 289, notes 1, 2, 3. If the plea be bad in part, it is so for the whole. Com. Dig. Pleader, E. 36. 3 T. R. 376. 3 B. & P. 174. 1 Saund. 337. The rules as to surplusage in a declaration here also prevail. *Ante*, 293, notes 1, 2, 3.—Chitty.

[31] But this form of pleading is now abolished, and other facilities for referring questions of title directly to the court are given by the Common-Law Procedure Act, 1852.—Stewart.

descent; or he may confess and avoid it by replying, that true it is that such descent happened, but that since the descent the defendant himself demised the lands to the plaintiff for a term of life.[32] To the replication the defendant may *rejoin*, or put in an answer, called a *rejoinder*. The plaintiff may answer the rejoinder by a *sur-rejoinder;* upon which the defendant may *rebut;* and the plaintiff answer him by a *sur-rebutter*. Which pleas, replications, rejoinders, sur-rejoinders, rebutters, and sur-rebutters answer to the *exceptio, replicatio, duplicatio, triplicatio*, and *quadruplicatio* of the Roman laws.(*h*)[33]

The whole of this process is denominated the *pleading;* in the several stages of which it must be carefully observed not to depart or vary from the title or defence which the party has once insisted on. For this (which is called a *departure* in pleading) might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder must support the plea, without departing out of it. As in the case of pleading no award made, in consequence of a bond of arbitration, to which the plaintiff replies, setting forth an actual award; now the defendant cannot rejoin that he hath performed this award, for such rejoinder would be an entire departure from his original plea, which alleged that no such award was made: therefore he has now no other *choice but to traverse the fact of the replication, or else to demur upon the law of it. [*311

Yet in many actions the plaintiff who has alleged in his declaration a general wrong may in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh, with all its specific circumstances, in such manner as clearly to ascertain and identify it, consistently with his general complaint; which is called a *new* or *novel assignment*. As, if the plaintiff in trespass declares on a breach of his close in D., and the defendant pleads that the place where the injury is said to have happened is a certain close of pasture in D., which descended to him from B. his father, and so is his own freehold; the plaintiff may reply and assign another close in D., specifying the abuttals and boundaries, as the real place of the injury.(*i*)

It hath previously been observed(*k*) that *duplicity* in pleading must be avoided. Every plea must be simple, entire, connected, and confined to one single point: it must never be entangled with a variety of distinct, independent answers to the same matter; which must require as many different replies, and introduce a multitude of issues upon one and the same dispute. For this would often embarrass a jury, and sometimes the court itself, and at all events would greatly enhance the expense of the parties. Yet it frequently is expedient to plead in such a manner as to avoid any implied admission of a fact which cannot with propriety or safety be positively affirmed or denied. And this may be done by what is called a *protestation;* whereby the party interposes an oblique allegation or denial of some fact, protesting (by the gerund

(*h*) Inst. 4, 14. Bract. *l.* 5, *tr.* 5, *c.* 1.
(*i*) Bro. Abr. tit. *trespass*, 205, 248.
(*k*) P. 308.

[32] As to the several replications in general, see 1 Chitt. on Pl. 4th ed. 500 to 518; and as to their forms and parts in particular, id. 518 to 555. The general *qualities* of a replication are that it must answer the plea, and answer so much of it as it professes to answer, or it will be a discontinuance, (Com. Dig. tit. Pleader, F. 4, W. 2. 1 Saund. 338;) and it must answer the plea directly, not argumentatively, (10 East, 205;) it must not depart from the declaration. 2 Saund. 84, a., n. 1. Co. Litt. 304, a. 2 Wils. 98. See 1 Chitt. on Pl. 556 to 560. It must be certain; and it is said that more certainty is requisite in a replication than a declaration, though certainty to a common intent is in general sufficient, (Com. Dig. Pleader, F. 17. 12 East, 263;) and, lastly, it must not be double, or, in other words, contain two answers to the same plea, (10 East, 73. 2 Camp. 176, 177. Com. Dig. Pleader, F. 16;) and the plaintiff cannot reply double, under the 4 Anne, c. 16, (Fortes. 335,) unless in replevin, (2 B. & P. 368, 376;) and more particularly as to these qualities, see 1 Chitt. on Pl. 556 to 562. An entire replication bad in part is bad for the whole. Com. Dig. Pleader, F. 25. 3 T. R. 376. 1 Saund. 28, n. 3.—CHITTY.

[33] Formerly but one replication and but one rejoinder were allowed: but the rule has been altered by the Common-Law Procedure Act, 1852. A party, however, can only have several replications, rejoinders, &c. by leave of the court or a judge.—STEWART.

protestando) that such a matter does or does not exist; and at the same time avoiding a direct affirmation or denial. Sir Edward Coke hath defined(*l*) a protestation (in the pithy dialect of that age) to be "an exclusion of a conclusion." *For the use of it is, to save the party from being concluded with respect to some fact or circumstance, which cannot be directly affirmed or denied without falling into duplicity of pleading; and which yet, if he did not thus enter his protest, he might be deemed to have tacitly waived or admitted. Thus, while tenure in villenage subsisted, if a villein had brought an action against his lord, and the lord was inclined to try the merits of the demand, and at the same time to prevent any conclusion against himself that he had waived his seignory; he could not in this case both plead affirmatively that the plaintiff was his villein, and also take issue upon the demand; for then his plea would have been *double*, as the former alone would have been a good bar to the action; but he might have alleged the villenage of the plaintiff, by way of protestation, and then have denied the demand. By this means the future vassalage of the plaintiff was saved to the defendant in case the issue was found in his (the defendant's) favor;(*m*) for the protestation prevented that conclusion, which would otherwise have resulted from the rest of his defence, that he had enfranchised the plaintiff,(*n*) since no villein could maintain a civil action against his lord. So also, if a defendant, by way of inducement to the point of his defence, alleges (among other matters) a particular mode of seisin or tenure, which the plaintiff is unwilling to admit, and yet desires to take issue on the principal point of the defence, he must deny the seisin or tenure by way of protestation, and then traverse the defensive matter. So, lastly, if an award be set forth by the plaintiff, and he can assign a breach in one part of it, (viz., the non-payment of a sum of money,) and yet is afraid to admit the performance of the rest of the award, or to aver in general a non-performance of any part of it, lest something should appear to have been performed; he may save to himself any advantage he might hereafter make of the general non-performance, by alleging *that* by protestation, and plead only the non-payment of the money.(*o*)[34]

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*In any stage of the pleadings, when either side advances or affirms any new matter, he usually (as we said) avers it to be true; "and this he is ready to verify." On the other hand, when either side traverses or denies the facts pleaded by his antagonist, he usually tenders an issue, as it is called; the language of which is different according to the party by whom the issue is tendered; for if the traverse or denial comes from the defendant, the issue is tendered in this manner, "and of this he puts himself upon the country," thereby submitting himself to the judgment of his peers;(*p*) but if the traverse lies upon the plaintiff he tenders the issue, or prays the judgment of the peers against the defendant in another form; thus: "and this he prays may be inquired of by the country."

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But if either side (as, for instance, the defendant) pleads a special negative plea; not traversing or denying any thing that was before alleged, but disclosing some new negative matter; as, where the suit is on a bond, conditioned to perform an award, and the defendant pleads, negatively, that no award was made, he tenders no issue upon this plea; because it does not appear whether the fact will be disputed, the plaintiff not having yet asserted the existence of any award; but when the plaintiff replies, and sets forth an actual specific award, if then the defendant traverses the replication, and denies the making of any such award, he then, and not before, tenders an issue to the plaintiff. For when in the course of pleading they come to a point which is affirmed on one side, and denied on the other, they are then said to be at issue; all their debates being at last contracted into a single point, which must now be determined either in favour of the plaintiff or of the defendant.

(*l*) 1 Inst. 124.
(*m*) Co. Litt. 126.
(*n*) See book ii. ch. 6, p, 94.
(*o*) Append. No. III. § 6.
(*p*) Ibid. No. II. § 4.

[34] No protestation is now required—or allowed, indeed—in any pleading; but either party is entitled to the same advantage as if protestation had been made.—Kerr.

CHAPTER XXI.

OF ISSUE AND DEMURRER.

*ISSUE, *exitus*, being the end of all the pleadings, is the fourth part or stage of an action, and is either upon matter of *law*, or matter of *fact*. [*314

An issue upon matter of law is called a *demurrer:* and it confesses the facts to be true, as stated by the opposite party; but denies that, by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse; according to the party which first demurs, *demoratur*, rests or abides upon the point in question. As, if the matter of the plaintiff's complaint or declaration be insufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to the declaration: if, on the other hand, the defendant's excuse or plea be invalid, as if he pleads that he committed the trespass by authority from a stranger, without making out the stranger's right; here the plaintiff may demur in law to the plea: and so on in every other part of the proceedings, where either side perceives any material objection in point of law, upon which he may rest his case.

The form of such demurrer is by averring the declaration or plea, the replication or rejoinder, to be insufficient in law to maintain the action or the defence; and therefore praying *judgment for want of sufficient [*315 matter alleged.(*a*) Sometimes demurrers are merely for want of sufficient *form* in the writ or declaration. But in cases of exceptions to the form or manner of pleading, the party demurring must, by statute 27 Eliz. c. 5, and 4 & 5 Anne, c. 16, set forth the causes of his demurrer, or wherein he apprehends the deficiency to consist.[1] And upon either a *general* or such a *special* demurrer, the opposite party must aver it to be sufficient, which is called a joinder in demurrer,(*b*) and then the parties are at issue in point of law. Which issue in law, or demurrer, the judges of the court before which the action is brought must determine.

An issue of fact is where the fact only, and not the law, is disputed. And when he that denies or traverses the fact pleaded by his antagonist has tendered the issue, thus, "and this he prays may be inquired of by the country;" or, "and of this he puts himself upon the country;" it may immediately be subjoined by the other party, "and the said A. B. doth the like." Which done, the issue is said to be joined, both parties having agreed to rest the fate of the cause upon the truth of the fact in question.(*c*) And this issue of fact must, generally speaking, be determined, not by the judges of the court, but by some other method; the principal of which methods is that by the country, *per pais*, (in Latin *per patriam*,) that is, by jury. Which establishment of different tribunals for determining these different issues is in some measure agreeable to the course of justice in the Roman republic, where the *judices ordinarii* determined only questions of fact, but questions of law were referred to the decisions of the *centumviri*.(*d*)[2]

(*a*) Append. No. III. § 6.
(*b*) Ibid.
(*c*) Ibid. No. II. § 4.
(*d*) Cic. *de Orator.* l. 1, c. 38.

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[1] Either party may demur when the preceding pleadings of his adversary are defective. A demurrer has been defined to be a declaration that the party demurring will go no further, because the other has not shown sufficient matter against him. 5 Mod. 132. Co. Litt. 71, b. When the pleading is defective in substance, a general demurrer will suffice; but where the objection is to the *form*, the demurrer must be special. Bac. Abr. Pleas, N. 5. A special demurrer must not merely show the kind of fault, but the specific fault complained of.—CHITTY.

[2] Formerly a party could not in any case demur and plead, by way of traverse or otherwise, to the same pleading at the same time. A defendant could not, for instance, answer a declaration, *first*, by a demurrer, for that it showed no cause of action; and, *secondly*, by pleading in confession and avoidance that the plaintiff had released the suit; for the objection in point of law could not be raised with an issue in fact, the demurrer

But here it will be proper to observe, that during the whole of these proceedings, from the time of the defendant's appearance in obedience to the king's writ, it is necessary *that both the parties be kept or *continued* in court from day to day, till the final determination of the suit. For the court can determine nothing unless in the presence of both the parties, in person or by their attorneys, or upon default of one of them, after his original appearance and a time prefixed for his appearance in court again. Therefore, in the course of pleading, if either party neglects to put in his declaration, plea, replication, rejoinder, and the like, within the times allotted by the standing rules of the court, the plaintiff, if the omission be his, is said to be *non-suit*, or not to follow and pursue his complaint, and shall lose the benefit of his writ: or, if the negligence be on the side of the defendant, judgment may be had against him for such his default. And, after issue or demurrer joined, as well as in some of the previous stages of proceeding, a day is continually given and entered upon the record, for the parties to appear on from time to time, as the exigence of the case may require. The giving of this day is called the *continuance*, because thereby the proceedings are continued without interruption from one adjournment to another. If these continuances are omitted, the cause is thereby discontinued, and the defendant is discharged *sine die*, without a day, for this turn: for by his appearance in court he has obeyed the command of the king's writ; and, unless he be adjourned over to a certain day, he is no longer bound to attend upon that summons; but he must be warned afresh, and the whole must begin *de novo*.[3]

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Now, it may sometimes happen, that after the defendant has pleaded, nay, even after issue or demurrer joined, there may have arisen some new matter, which it is proper for the defendant to plead; as that the plaintiff, being a feme-sole, is since married, or that she has given the defendant a release, and the like: here, if the defendant takes advantage of this new matter as early as he possibly can, viz., at the day given for his next appearance, he is permitted to plead it in what is called a plea of *puis darrein continuance*, or since the last adjournment.[4] *For it would be unjust to exclude him from the benefit of this new defence, which it was not in his power to make when he pleaded the former. But it is dangerous to rely on such a plea, without due consideration; for it confesses the matter which was before in dispute between the parties.(*e*) And it is not allowed to be put in, if any continuance has intervened between the arising of this fresh matter and the pleading of it: for then the defendant is guilty of neglect, or *laches*, and is supposed to rely on the merits of his former plea. Also it is not allowed after a demurrer is determined, or verdict given; because the relief may be had in another way, namely, by writ of *audita querela*, of which hereafter. And these pleas *puis darrein continuance*, when brought to a demurrer in law or issue of fact, shall be determined in like manner as other pleas.

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We have said that demurrers, or questions concerning the *sufficiency* of the matters alleged in the pleadings, are to be determined by the judges of the

(*e*) Cro. Eliz. 49.

being considered to admit the facts, although in reality this was only for the sake of argument. Now, however, a party may plead and demur to the same pleading at the same time, if he can satisfy a judge or the court that he ought to be allowed to do so. He may—as is but reasonable—be required to make an affidavit of the truth of the facts stated in the pleas, and of his belief that the objections raised by the demurrer are valid in law, before such leave will be granted. And the court or judge, in granting leave, may direct which shall be first determined, the issue in law or the issue in fact.—Kerr.

[3] But these continuances are now become mere matter of form, and may be entered at any time to make the record complete.—Coleridge.

[4] This plea, though treated in some respects as a dilatory plea, the court cannot refuse to receive, (2 Wils. 157. 3 T. R. 554. 1 Marsh. 280. 5 Taunt. 333. 1 Stark. 62;) but it must be verified on oath before it is filed. Freem. 252. 1 Stra. 493. 2 Smith's Rep. 396. It may be pleaded at nisi prius as well as in banc, but cannot be amended after the assizes are over. Yelv. 181. Freem. 252. Bull. N. P. 309. See further, 1 Chitty on Pl 4th ed. 569 to 573.—Chitty.

court, upon solemn argument by counsel on both sides, and to that end a demurrer-book is made up, containing all the proceedings at length, which are afterwards entered on *record;* and copies thereof, called *paper-books*, are delivered to the judges to peruse.[5] The *record*(*f*) is a history of the most material proceedings in the cause, entered on a parchment roll, and continued down to the present time; in which must be stated the original writ and summons, all the pleadings, the declaration, view, or *oyer* prayed, the imparlances, plea, replication, rejoinder, continuances, and whatever further proceedings have been had; all entered *verbatim* on the roll, and also the issue or demurrer, and joinder therein.

These were formerly all written, as indeed all public proceedings were, in Norman or law French,[6] and even the arguments of the counsel and decisions of the court were in the same barbarous dialect. An evident and shameful badge, it must be owned, of tyranny and foreign servitude; being *introduced under the auspices of William the Norman, and his sons: [*318 whereby the ironical observation of the Roman satirist came to be literally verified, that "*Gallia causidicos docuit facunda Britannos.*"(*g*) This continued till the reign of Edward III.; who, having employed his arms successfully in subduing the *crown* of France, thought it unbeseeming the dignity of the victors to use any longer the *language* of a vanquished country. By a statute, therefore, passed in the thirty-sixth year of his reign,(*h*) it was enacted, that for the future all pleas should be pleaded, shown, defended, answered, debated, and judged in the English tongue; but be entered and enrolled in Latin. In like manner as Don Alonso X., king of Castile, (the great-grandfather of our Edward III.,) obliged his subjects to use the Castilian tongue in all legal proceedings;(*i*) and as, in 1286, the German language was established in the courts of the empire.(*k*) And perhaps if our legislature had then directed that the writs themselves, which are mandates from the king to his subjects to perform certain acts or to appear at certain places, should have been framed in the English language, according to the rule of our antient law,(*l*) it had not been very improper. But the record or enrolment of those writs and the proceedings thereon, which was calculated for the benefit of posterity, was more serviceable (because more durable) in a dead and immutable language than in any flux or living one. The practisers, however, being used to the Norman language, and therefore imagining they could express their thoughts more aptly and more concisely in that than in any other, still continued to take their notes in law-French; and of course, when those notes came to be published, under the denomination of reports, they were printed in that barbarous dialect; which, joined to the additional terrors of Gothic black letter, has occasioned many a student to throw away his Plowden and Littleton, without venturing to attack a page of them. And yet, in reality, upon a nearer acquaintance, they would have found nothing very formidable in the language; which differs in its grammar *and [*319 orthography as much from the modern French, as the diction of Chaucer and Gower does from that of Addison and Pope. Besides, as the English and Norman languages were concurrently used by our ancestors for several centuries together, the two idioms have naturally assimilated, and mutually borrowed from each other: for which reason the grammatical construction of each is so very much the same, that I apprehend an Englishman (with a week's preparation) would understand the laws of Normandy, collected in their *grand coustumier*, as well, if not better, than a Frenchman bred within the walls of Paris.

The Latin, which succeeded the French for the entry and enrolment of pleas, and which continued in use for four centuries, answers so nearly to the English

(*f*) Append. No. II. § 4. No. III. § 6.
(*g*) *Juv.* xv. 111.
(*h*) C. 15.
(*i*) Mod. Un. Hist. xx. 211.
(*k*) Ibid. xxix. 235.
(*l*) Mirr. c. 4, § 3.

[5] The plaintiff, or his attorney, must deliver paper-books to the chief justice and senior judge, and the defendant, or his attorney, to the two other judges. R. M. 17 Car. I.—CHITTY.

[6] This is disputed, with great reason, by Mr. Serjeant Stephen, *Pleading*, Appendix, p. xxii., who thinks that the record was always in Latin.—STEWART.

(oftentimes word for word) that it is not at all surprising it should generally be imagined to be totally fabricated at home, with little more art or trouble than by adding Roman terminations to English words. Whereas in reality it is a very universal dialect, spread throughout all Europe at the irruption of the northern nations, and particularly accommodated and moulded to answer all the purposes of the lawyers with a peculiar exactness and precision. This is principally owing to the simplicity, or (if the reader pleases) the poverty and baldness, of its texture, calculated to express the ideas of mankind just as they arise in the human mind, without any rhetorical flourishes or perplexed ornaments of style; for it may be observed, that those laws and ordinances, of public as well as private communities, are generally the most easily understood, where strength and perspicuity, not harmony or elegance of expression, have been principally consulted in compiling them. These northern nations, or rather their legislators, though they resolved to make use of the Latin tongue in promulging their laws, as being more durable and more generally known to their conquered subjects than their own Teutonic dialects, yet (either through choice *320] or necessity) have frequently intermixed therein some words of a Gothic original, which is more or less the case in every country *of Europe, and therefore not to be imputed as any peculiar blemish in our English legal Latinity.(m) The truth is, what is generally denominated law-Latin is in reality a mere technical language, calculated for eternal duration, and easy to be apprehended both in present and future times; and on those accounts best suited to preserve those memorials which are intended for perpetual rules of action. The rude pyramids of Egypt have endured from the earliest ages, while the more modern and more elegant structures of Attica, Rome, and Palmyra have sunk beneath the stroke of time.

As to the objection of locking up the law in a strange and unknown tongue, that is of little weight with regard to records, which few have occasion to read but such as do, or ought to, understand the rudiments of Latin. And, besides, it may be observed of the law-Latin, as the very ingenious Sir John Davis(n) observes of the law-French, "that it is so very easy to be learned, that the meanest wit that ever came to the study of the law doth come to understand it almost perfectly in ten days without a reader."

It is true indeed that the many terms of art, with which the law abounds, are sufficiently harsh when Latinized, (yet not more so than those of other sciences,) and may, as Mr. Selden observes,(o) give offence "to some grammarians of squeamish stomachs, who would rather choose to live in ignorance of things the most useful and important, than to have their delicate ears wounded by the use of a word unknown to Cicero, Sallust, or the other writers of the Augustan age." Yet this is no more than must unavoidably happen when things of modern use, of which the Romans had no idea and consequently no *321] phrases to express them, come to be delivered in the Latin tongue. It would puzzle *the most classical scholar to find an appellation, in his pure Latinity, for a constable, a record, or a deed of feoffment; it is therefore to be imputed as much to necessity, as ignorance, that they were styled in our forensic dialect *constabularius*, *recordum*, and *feoffamentum*. Thus, again, another uncouth word of our *antient* laws, (for I defend not the ridiculous barbarisms sometimes introduced by the ignorance of *modern* practisers,) the substantive *murdrum*, of the verb *murdrare*, however harsh and unclassical it may seem, was necessarily framed to express a particular offence; since no other word in being, *occidere*, *interficere*, *necare*, or the like, was sufficient to express the *intention* of the criminal, or *quo animo* the act was perpetrated; and therefore by no means came up to the notion of murder at present entertained by our law; viz., a killing *with malice aforethought*.

A similar necessity to this produced a similar effect at Byzantium, when the Roman laws were turned into Greek for the use of the Oriental empire: for,

(m) The following sentence, "*Si quis ad battalia curte sua exierit*, if any one goes out of his own court to fight.' &c., may raise a smile in the student as a flaming modern Anglicism; but he may meet with it, among others of the same stamp, in the laws of the Burgundians on the continent, before the end of the fifth century. Addi. l, c. 5, § 2.

(n) Pref. Rep.

(o) Pref. *ad Eadmer*.

without any regard to Attic elegance, the lawyers of the imperial courts made no scruple to translate *fidei commissarios*, φιδεϊκομμισσαριους;(*p*) *cubiculum*, κουβουκλειον;(*q*) *filium-familias*, παιδα-φαμιλιας;(*r*) *repudium*, ρεπουδιον:(*s*) *compromissum* κομπρομισσον;(*t*) *reverentia et obsequium*, ρευερεντια και οβσεκουιον;(*u*) and the like. They studied more the exact and precise import of the words than the neatness and delicacy of their cadence. And many academical readers will excuse me for suggesting that the terms of the law are not more numerous, more uncouth, or more difficult to be explained by a teacher, than those of logic, physics, and the whole circle of Aristotle's philosophy, nay, even of the politer arts of architecture and its kindred studies, or the science of rhetoric itself. Sir Thomas More's famous legal question(*w*) contains in it nothing more difficult than the *definition which in his time the philosophers currently gave of their *materia prima*, the groundwork of all natural knowledge; that it is "*neque quid, neque quantum, neque quale, neque aliquid eorum quibus ens determinatur;*" or its subsequent explanation by Adrian Heereboord, who assures us(*x*) that "*materia prima non est corpus, neque per formam corporeitatis, neque per simplicem essentiam: est tamen ens, et quidem substantia, licet incompleta; habetque actum ex se entitativum, et simul est potentia subjectiva.*" The law therefore, with regard to its technical phrases, stands upon the same footing with other studies, and requests only the same indulgence. [*322

This technical Latin continued in use from the time of its first introduction till the subversion of our antient constitution under Cromwell; when, among many other innovations in the law, some for the better and some for the worse, the language of our records was altered and turned into English. But, at the restoration of king Charles, this novelty was no longer countenanced; the practisers finding it very difficult to express themselves so concisely or significantly in any other language but the Latin. And thus it continued without any sensible inconvenience till about the year 1730, when it was again thought proper that the proceedings at law should be done into English; and it was accordingly so ordered by statute 4 Geo. II. c. 26. This provision was made, according to the preamble of the statute, that the common people might have knowledge and understanding of what was alleged or done for and against them in the process and pleadings, the judgment and entries, in a cause. Which purpose has, I fear, not been answered; being apt to suspect that the people are now, after many years' experience, altogether as ignorant in matters of law as before. On the other hand, these inconveniences have already arisen from the alteration; that now many clerks and attorneys are hardly able to read, much less to understand, a record even of so modern a date as the reign of George the First. And it has much enhanced the expense of all legal proceedings: for since the practisers are confined (for *the sake of the stamp-duties, which are thereby considerably increased) to write only a stated number of words in a sheet; and as the English language, through the multitude of its particles, is much more verbose than the Latin, it follows that the number of sheets must be very much augmented by the change.(*y*) The translation also of technical phrases, and the names of writs and other process, were found to be so very ridiculous (a writ of *nisi prius, quare impedit, fieri facias, habeas corpus*, and the rest, not being capable of an English dress with any degree of seriousness) that in two years' time it was found necessary to make a new act, 6 Geo. II. c. 14; which allows all technical words to continue in the usual language, and has thereby almost defeated every beneficial purpose of the former statute. [*323

What is said of the alteration of language by the statute 4 Geo. II. c. 26 will hold equally strong with respect to the prohibition of using the antient immutable *court-hand* in writing the records or other legal proceedings; whereby the reading of any record that is fifty years old is now become the object of science, and calls for the help of an antiquarian. But that branch of it, which

(*p*) Nov. 1, c. 1.
(*q*) Nov. 8, *edict. Constantinop.*
(*r*) Nov. 117, c. 1.
(*s*) Ibid. c. 8.
(*t*) Ibid. 82, c. 11.
(*u*) Ibid. 117, c. 2.

(*w*) See page 149.
(*x*) *Philosoph. Natural*, c. 1, § 28, &c.
(*y*) For instance, these three words, "*secundum formam statuti*," are now converted into seven, "according to the form of the statute."

forbids the use of abbreviations, seems to be of more solid advantage, in delivering such proceedings from obscurity: according to the precept of Justinian;(z) "*ne per scripturam aliqua fiat in posterum dubitatio, jubemus non per siglorum captiones et compendiosa enigmata ejusdem codicis textum conscribi, sed per literarum consequentiam explanari concedimus.*" But to return to our demurrer.

When the substance of the record is completed, and copies are delivered to the judges, the matter of law upon which the demurrer is grounded is upon solemn argument determined by the court, and not by any trial by jury; and judgment is thereupon accordingly given. As, in an action of trespass, if the *324] defendant in his plea confesses the fact, but *justifies it *causa venationis*, for that he was hunting; and to this the plaintiff demurs, that is, he admits the truth of the plea, but denies the justification to be legal: now, on arguing this demurrer, if the court be of opinion that a man may not justify trespass in hunting, they will give judgment for the plaintiff; if they think that he may, then judgment is given for the defendant. Thus is an issue in law, or demurrer, disposed of.

An issue of fact takes up more form and preparation to settle it; for here the truth of the matters alleged must be solemnly examined and established by proper evidence in the channel prescribed by law. To which examination of facts, the name of trial is usually confined, which will be treated of at large in the two succeeding chapters.

CHAPTER XXII.

OF THE SEVERAL SPECIES OF TRIAL.

*325] *The uncertainty of legal proceedings is a notion so generally adopted, and has so long been the standing theme of wit and good humour, that he who should attempt to refute it would be looked upon as a man who was either incapable of discernment himself, or else meant to impose upon others. Yet it may not be amiss, before we enter upon the several modes whereby certainty is meant to be obtained in our courts of justice, to inquire a little wherein this uncertainty, so frequently complained of, consists; and to what causes it owes its original.

It hath sometimes been said to owe its original to the number of our municipal constitutions, and the multitude of our judicial decisions;(a) which occasion, it is alleged, abundance of rules that militate and thwart with each other, as the sentiments or caprice of successive legislatures and judges have happened to vary. The fact of multiplicity is allowed; and that thereby the researches of the student are rendered more difficult and laborious; but that, with proper industry, the result of those inquiries will be doubt and indecision, is a consequence that cannot be admitted. People are apt to be angry at the want of simplicity in our laws: they mistake variety for confusion, and complicated *326] cases for contradictory. *They bring us the example of arbitrary governments, of Denmark, Muscovy, and Prussia; of wild and uncultivated nations, the savages of Africa and America; or of narrow domestic republics, in antient Greece and modern Switzerland; and unreasonably require the same paucity of laws, the same conciseness of practice, in a nation of freemen, a polite and commercial people, and a populous extent of territory.

In an arbitrary despotic government, where the lands are at the disposal of the prince, the rules of succession, or the mode of enjoyment, must depend upon his will and pleasure. Hence there can be but few legal determinations relating to the property, the descent, or the conveyance of real estates; and the same holds in a stronger degree with regard to goods and chattels, and the contracts relating thereto. Under a tyrannical sway, trade must be continually

(z) *De concept. digest.* § 13.

(a) See the preface to Sir John Davies's Reports, wherein many of the following topics are discussed more at large.

in jeopardy, and of consequence can never be extensive: this therefore puts an end to the necessity of an infinite number of rules, which the English merchant daily recurs to for adjusting commercial differences. Marriages are there usually contracted with slaves; or at least women are treated as such: no laws can be therefore expected to regulate the rights of dower, jointures, and marriage settlements. Few also are the persons who can claim the privileges of any laws; the bulk of those nations, viz., the commonalty, boors, or peasants, being merely villeins and bondmen. Those are therefore left to the private coercion of their lords, are esteemed (in the contemplation of these boasted legislators) incapable of either right or injury, and of consequence are entitled to no redress. We may see, in these arbitrary states, how large a field of legal contests is already rooted up and destroyed.

Again: were we a poor and naked people, as the savages of America are, strangers to science, to commerce, and the arts as well of convenience as of luxury, we might perhaps be content, as some of them are said to be, to refer all disputes to the next man we meet upon the road, and so put a short [*327 end *to every controversy. For in a state of nature there is no room for municipal laws; and the nearer any nation approaches to that state, the fewer they will have occasion for. When the people of Rome were little better than sturdy shepherds or herdsmen, all their laws were contained in ten or twelve tables; but as luxury, politeness, and dominion increased, the civil law increased in the same proportion, and swelled to that amazing bulk which it now occupies, though successively pruned and retrenched by the emperors Theodosius and Justinian.

In like manner we may lastly observe, that, in petty states and narrow territories, much fewer laws will suffice than in large ones, because there are fewer objects upon which the laws can operate. The regulations of a private family are short and well known; those of a prince's household are necessarily more various and diffuse.

The causes therefore of the multiplicity of the English laws are, the extent of the country which they govern, the commerce and refinement of its inhabitants; but, above all, the liberty and property of the subject. These will naturally produce an infinite fund of disputes which must be terminated in a judicial way; and it is essential to a free people, that these determinations be published and adhered to; that their property may be as certain and fixed as the very constitution of their state. For though in many other countries every thing is left in the breast of the judge to determine, yet with us he is only to *declare* and *pronounce*, not to *make* or *new-model*, the law. Hence a multitude of decisions, or cases adjudged, will arise; for seldom will it happen that any one rule will exactly suit with many cases. And in proportion as the decisions of courts of judicature are multiplied, the law will be loaded with decrees, that may sometimes (though rarely) interfere with each other: either because succeeding judges may not be apprized of the prior adjudication; or because they may think differently from their predecessors; or because the same arguments did not occur formerly as at *present; or, in fine, because of the natural [*328 imbecility and imperfection that attends all human proceedings. But wherever this happens to be the case in any material point, the legislature is ready, and from time to time both may, and frequently does, intervene to remove the doubt; and, upon due deliberation had, determines by a declaratory statute how the law shall be held for the future.

Whatever instances therefore of contradiction or uncertainty may have been gleaned from our records, or reports, must be imputed to the defects of human laws in general, and are not owing to any particular ill construction of the English system. Indeed, the reverse is most strictly true. The English law is less embarrassed with inconsistent resolutions and doubtful questions, than any other known system of the same extent and the same duration. I may instance in the civil law: the text whereof, as collected by Justinian and his agents, is extremely voluminous and diffuse; but the idle comments, obscure glosses, and jarring interpretations grafted thereupon by the learned jurists are literally

without number. And these glosses, which are mere private opinions of scholastic doctors, (and not, like our books of reports, judicial determinations of the court,) are all of authority sufficient to be vouched and relied on: which must needs breed great distraction and confusion in their tribunals. The same may be said of the canon law; though the text thereof is not of half the antiquity with the common law of England; and though the more antient any system of law is, the more it is liable to be perplexed with the multitude of judicial decrees. When therefore a body of laws, of so high antiquity as the English, is in general so clear and perspicuous, it argues deep wisdom and foresight in such as laid the foundations, and great care and circumspection in such as have built the superstructure.

But is not (it will be asked) the multitude of law-suits, which we daily see and experience, an argument against the clearness and certainty of the law itself? By no means: for *among the various disputes and controversies which are daily to be met with in the course of legal proceedings, it is obvious to observe how very few arise from obscurity in the rules or maxims of law. An action shall seldom be heard of, to determine a question of inheritance, unless the fact of the descent be controverted. But the dubious points which are usually agitated in our courts arise chiefly from the difficulty there is of ascertaining the intentions of individuals, in their solemn dispositions of property; in their contracts, conveyances, and testaments. It is an object indeed of the utmost importance, in this free and commercial country, to lay as few restraints as possible upon the transfer of possessions from hand to hand, or their various designations marked out by the prudence, convenience, necessities, or even by the caprice, of their owners: yet to investigate the *intention* of the owner is frequently matter of difficulty, among heaps of entangled conveyances or wills of a various obscurity. The law rarely hesitates in declaring its own meaning; but the judges are frequently puzzled to find out the meaning of others. Thus the powers, the interest, the privileges and properties of a tenant for life, and a tenant in tail, are clearly distinguished and precisely settled by law: but, what words in a will shall constitute this or that estate, has occasionally been disputed for more than two centuries past, and will continue to be disputed as long as the carelessness, the ignorance or singularity of testators shall continue to clothe their intentions in dark or new-fangled expressions.

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But, notwithstanding so vast an accession of legal controversies, arising from so fertile a fund as the ignorance and wilfulness of individuals, these will bear no comparison in point of number to those which are founded upon the dishonesty and disingenuity of the parties: by either their suggesting complaints that are false in fact, and thereupon bringing groundless actions; or by their denying such facts as are true, in setting up unwarrantable defences. *Ex facto oritur jus:* if therefore the fact be perverted or misrepresented, the law which arises from thence will unavoidably be unjust or partial. *And, in order to prevent this, it is necessary to set right the fact, and establish the truth contended for, by appealing to some mode of *probation* or *trial*, which the law of the country has ordained for a criterion of truth and falsehood.

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These modes of probation or trial form in every civilized country the great object of judicial decisions. And experience will abundantly show, that above a hundred of our law-suits arise from disputed facts, for one where the law is doubted of. About twenty days in the year are sufficient in Westminster hall, to settle (upon solemn argument) every demurrer, or other special point of law, that arises throughout the nation: but two months are annually spent in deciding the truth of facts, before six distinct tribunals, in the several circuits of England: exclusive of Middlesex and London, which afford a supply of causes much more than equivalent to any two of the largest circuits.

Trial, then, is the examination of the matter of fact in issue: of which there are many different species, according to the difference of the subject, or thing to be tried: of all which we will take a cursory view in this and the subsequent chapter. For the law of England so industriously endeavours to investigate truth at any rate, that it will not confine itself to one, or to a few, manners of

trial; but varies its examination of facts according to the nature of the facts themselves: this being the one invariable principle pursued, that as well the best method of trial, as the best evidence upon that trial which the nature of the case affords, and no other, shall be admitted in the English courts of justice.

The species of trials in civil cases are seven. By *record;* by *inspection*, or *examination;* by *certificate;* by *witnesses;* by *wager of battle;* by *wager of law;* and by *jury.*

I. First, then, of the trial by *record.* This is only used in one particular instance: and that is where a matter of record *is pleaded in any action, as a fine, a judgment, or the like; and the opposite party pleads, "*nul tiel record*," that there is no such matter of record existing: upon this, issue is tendered and joined in the following form, "and this he prays may be inquired of by *the record*, and the other doth the like;" and hereupon the party pleading the record has a day given him to bring it in, and proclamation is made in court for him to "bring forth the record by him in pleading alleged, or else he shall be condemned;" and, on his failure, his antagonist shall have judgment to recover. The trial therefore of this issue is merely by the record; for, as Sir Edward Coke(*b*) observes, a record or enrolment is a monument of so high a nature, and importeth in itself such absolute verity, that if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself. Thus titles of nobility, as whether earl or no earl, baron or no baron, shall be tried by the king's writ or patent only, which is matter of record.(*c*) Also in case of an alien, whether alien friend or enemy, shall be tried by the league or treaty between his sovereign and ours; for every league or treaty is of record.(*d*) And also, whether a manor be to be held in antient demesne or not, shall be tried by the record of *domesday* in the king's exchequer. [*331

II. Trial by *inspection*, or *examination*, is when, for the greater expedition of a cause, in some point or issue being either the principal question or arising collaterally out of it, but being evidently the object of senses, the judges of the court, upon the testimony of their own sense, shall decide the point in dispute For, where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it; who are properly called in to inform the conscience of the court in respect of *dubious* facts: and therefore when the fact, from its nature, must be evident to the court either from ocular demonstration or other irrefragable proof, there the law departs *from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone. As in case of a suit to reverse a fine for non-age of the cognizor, or to set aside a statute or recognizance entered into by an infant; here, and in other cases of the like sort, a writ shall issue to the sheriff;(*e*) commanding him that he constrain the said party to appear, that it may be ascertained, by the view of his body by the king's justices, whether he be of full age or not; "*ut per aspectum corporis sui constare poterit justiciariis nostris, si prædictus A. sit plenæ ætatis necne.*"(*f*) If however the court has, upon inspection, any doubt of the age of the party, (as may frequently be the case,) it may proceed to take proofs of the fact; and, particularly, may examine the infant himself upon an oath of *voire dire, veritatem dicere*, that is, to make true answer to such questions as the court shall demand of him: or the court may examine his mother, his godfather, or the like.(*g*) [*332

In like manner, if a defendant pleads in abatement of the suit that the plaintiff is *dead*, and one appears and calls himself the plaintiff, which the defendant denies: in this case the judges shall determine by inspection and examination whether he be the plaintiff or not.(*h*) Also, if a man be found by a jury an idiot *a nativitate*, he may come in person into the chancery before the

(*b*) 1 Inst. 117 260.
(*c*) 6 Rep. 53.
(*d*) 9 Rep. 31.
(*e*) Ibid.
(*f*) This question of non-age was formerly, according to Glanvil. (l. 13, c. 15.) tried by a jury of eight men, though now it is tried by inspection.
(*g*) 2 Roll. Abr. 573.
(*h*) 9 Rep. 30.

chancellor, or be brought there by his friends, to be inspected and examined, whether idiot or not: and if upon such view and inquiry it appears that he is not so, the verdict of the jury and all the proceedings thereon are utterly void and instantly of no effect.(*i*)

Another instance in which the trial by inspection may be used is when, upon an appeal of mayhem, the issue joined is whether it be mayhem or no mayhem; this shall be decided by the court upon inspection, for which purpose *333] they may *call in the assistance of surgeons.(*j*)[1] And, by analogy to this, in an action of trespass for mayhem, the court (upon view of such mayhem as the plaintiff has laid in his declaration, or which is certified by the judges who tried the cause to be the same as was given in evidence to the jury) may increase the damages at their own discretion.(*k*) as may also be the case upon view of an atrocious battery.(*l*) But then the battery must likewise be alleged so certainly in the declaration that it may appear to be the same with the battery inspected.

Also, to ascertain any circumstances relative to a particular day past, it hath been tried by an inspection of the almanac by the court. Thus, upon a writ of error from an inferior court, that of Lynn, the error assigned was that the judgment was given on a Sunday, it appearing to be on 26 February, 26 Eliz., and upon inspection of the almanacs of that year it was found that the 26th of February in that year actually fell upon a Sunday: this was held to be a sufficient trial, and that a trial by a jury was not necessary, although it was an error in fact; and so the judgment was reversed.(*m*) But in all these cases the judges, if they conceive a doubt, may order it to be tried by jury.

III. The trial by *certificate* is allowed in such cases where the evidence of the person certifying is the only proper criterion of the point in dispute. For, when the fact in question lies out of the cognizance of the court, the judges must rely on the solemn averment or information of persons in such a station as affords them the most clear and competent knowledge of the truth. As therefore such evidence (if given to a jury) must have been conclusive, the law, to save trouble and circuity, permits the fact to be determined upon such certificate merely. Thus, 1. If the issue be, whether A. was absent with the king in his army out of the realm in time of war; this shall be tried(*n*) by the *334] certificate of the mareschal of *the king's host in writing under his seal, which shall be sent to the justices. 2. If, in order to avoid an outlawry or the like, it was alleged that the defendant was in prison, *ultra mare*, at Bourdeaux, or in the service of the mayor of Bourdeaux, this should have been tried by the certificate of the mayor; and the like of the captain of Calais.(*o*) But when this was law(*p*) those towns were under the dominion of the crown of England. And therefore, by parity of reason, it should now hold that in similar cases arising at Jamaica or Minorca, the trial should be by certificate from the governor of those islands. We also find(*q*) that the certificate of the queen's messenger, sent to summon home a peeress of the realm, was formerly held a sufficient trial of the contempt in refusing to obey such summons. 3. For matters within the realm, the customs of the city of London shall be tried by the certificate of the mayor and aldermen, certified by the mouth of their recorder;(*r*) upon a surmise from the party alleging it, that the custom ought to be thus tried: else it must be tried by the country.(*s*) As, the custom of distributing the effects of freemen deceased, of enrolling apprentices, or that he who is free of one trade may use another; if any of these or other similar points come in issue. But this rule admits of an exception where the corporation of London is party or interested in the suit; as in an action brought for a penalty inflicted by the custom; for there the reason of

(*i*) Ibid. 31.
(*j*) 2 Roll. Abr. 578.
(*k*) 1 Sid. 108.
(*l*) Hardr. 408.
(*m*) Cro. Eliz. 227.
(*n*) Litt. § 102.
(*o*) 9 Rep. 31.
(*p*) 2 Roll. Abr. 583.
(*q*) Dyer, 176, 177.
(*r*) Co. Litt. 74. 4 Burr. 248.
(*s*) Bro. Abr. tit. *trial*, pl. 96.

[1] All appeals of mayhem are now abolished, 59 Geo. III. c. 46.—Stewart.

the law will not endure so partial a trial; but this custom shall be determined by a jury, and not by the mayor and aldermen certifying by the mouth of their recorder.(*t*) 4. In some cases the sheriff of London's certificate shall be the final trial; as, if the issue be whether the defendant be a citizen of London or a foreigner,(*u*) in case of privilege pleaded to be sued only in the city courts. Of a nature somewhat similar to which is the trial of the privilege of the university, when the chancellor claims cognizance of the cause because one of the parties is a *privileged person. In this case, the charters confirmed by act of parliament direct the trial of the question, whether a [*335 privileged person or no, to be determined by the certificate and notification of the chancellor under seal, to which it hath also been usual to add an *affidavit* of the fact; but if the parties be at issue between themselves, whether A. is a member of the university or no, on a plea of privilege, the trial shall be then by jury and not by the chancellor's certificate;(*v*) because the charters direct only that the privilege be allowed on the chancellor's certificate when the claim of cognizance is made by him, and not where the defendant himself pleads his privilege; so that this must be left to the ordinary course of determination. 5. In matters of ecclesiastical jurisdiction, as *marriage*, and of course *general bastardy;* and also *excommunications* and *orders*, these and other like matters shall be tried by the bishop's certificate.(*w*) As, if it be pleaded in abatement that the plaintiff is excommunicated, and issue is joined thereon; or, if a man claims an estate by descent, and the tenant alleges the demandant to be a bastard; or, if on a writ of dower the heir pleads no marriage; or, if the issue in a *quare impedit* be whether or no the church be full by institution; all these, being matters of mere ecclesiastical cognizance, shall be tried by certificate from the ordinary. But, in an action on the case for calling a man bastard, the defendant having pleaded in justification that the plaintiff was really so, this was directed to be tried by a jury:(*x*) because, whether the plaintiff be found either a general or special bastard, the justification will be good; and no question of special bastardy shall be tried by the bishop's certificate, but by a jury.(*y*) For a special bastard is one born before marriage of parents who afterwards intermarry; which is bastardy by our law, though not by the ecclesiastical. It would therefore be improper to refer the trial of that question to the bishop, who, whether the child be born before or after marriage, will be *sure to return or certify him legitimate.(*z*) *Ability* of a clerk presented,(*a*) *admission*, *institution*, and *deprivation* of a clerk, shall also be [*336 tried by certificate from the ordinary or metropolitan, because of these he is the most competent judge:(*b*) but *induction* shall be tried by a jury, because it is a matter of public notoriety,(*c*) and is likewise the corporal investiture of the temporal profits. *Resignation* of a benefice may be tried in either way;(*d*) but it seems most properly to fall within the bishop's cognizance. 6. The trial of all customs and practice of the courts shall be by certificate from the proper officers of those courts respectively; and what return was made on a writ by the sheriff or under-sheriff shall be only tried by his own certificate.(*e*) And thus much for those several issues or matters of fact which are proper to be tried by certificate.

IV. A fourth species of trial is that by *witnesses*, *per testes*, without the intervention of a jury. This is the only method of trial known to the civil law in which the judge is left to form in his own breast his sentence upon the credit of the witnesses examined; but it is very rarely used in our law, which prefers the trial by jury before it in almost every instance.[2] Save only that when a

(*t*) Hob. 85.
(*u*) Co. Litt. 74.
(*v*) 2 Roll. Abr. 588.
(*w*) Co. Litt. 74. 2 Lev. 250.
(*x*) Hob. 179.
(*y*) Dyer, 79.
(*z*) See Introd. to the Great Charter, *edit. Oxon. sub anno* 1233.
(*a*) See book i. ch. 11.
(*b*) 2 Inst. 632. Show. Parl. c. 83. 2 Roll. Abr. 583, &c.
(*c*) Dyer, 228.
(*d*) 2 Roll. Abr. 583.
(*e*) 9 Rep. 31.

[2] By numerous local acts for the recovery of small debts, the claim of a creditor may be sustained by his own oath without the intervention of a jury.—CHITTY.

widow brings a writ of dower, and the tenant pleads that the husband is not dead; this, being looked upon as a dilatory plea, is in favour of the widow, and for greater expedition allowed to be tried by witnesses examined before the judges; and so, saith Finch,(*f*) shall no other case in *our* law. But Sir Edward Coke(*g*) mentions some others; as to try whether the tenant in a real action was duly summoned, or the validity of a challenge to a juror: so that Finch's observation must be confined to the trial of direct and not collateral issues. And in every case Sir Edward Coke lays it down that the affirmative must be proved by two witnesses at the least.[3]

*337] *V. The next species of trial is of great antiquity, but much disused; though still in force if the parties choose to abide by it: I mean the trial by *wager of battle*.[4] This seems to have owed its original to the military spirit of our ancestors, joined to a superstitious frame of mind; it being in the nature of an appeal to Providence under an apprehension and hope (however presumptuous and unwarrantable) that Heaven would give the victory to him who had the right. The decision of suits by this appeal to the God of battles is by some said to have been invented by the Burgundi, one of the northern or German clans that planted themselves in Gaul. And it is true that the first written injunction of judiciary combats that we meet with is in the laws of Gundebald, A.D. 501, which are preserved in the Burgundian code. Yet it does not seem to have been merely a local custom of this or that particular tribe, but to have been the common usage of all those warlike people from the earliest times.(*h*) And it may also seem, from a passage in Velleius Paterculus,(*i*) that the Germans, when first they became known to the Romans, were wont to decide all contests of right by the sword; for when Quintilius Varus endeavored to introduce among them the Roman laws and method of trial, it was looked upon (says the historian) as a "*novitas incognitæ disciplinæ, ut solita armis decerni jure terminarentur.*" And among the antient Goths in Sweden we find the practice of judiciary duels established upon much the same footing as they formerly were in our own country.(*j*)

This trial was introduced into England, among other Norman customs, by William the Conqueror; but was only used in three cases, one military, one criminal, and the third civil. The first in the court martial, or court of chivalry and honour;(*k*) the second in appeals of felony,(*l*) of which we shall speak in the next book; and the third upon issue joined in a *writ of right, *338] the last and most solemn decision of real property. For in writs of right the *jus proprietatis*, which is frequently a matter of difficulty, is in question; but other real actions being merely questions of the *jus possessionis*, which are usually more plain and obvious, our ancestors did not in them appeal to the decision of Providence. Another pretext for allowing it upon these final writs of right was also for the sake of such claimants as might have the true right, but yet, by the death of witnesses, or other defect of evidence, be unable to prove it to a jury. But the most curious reason of all is given in the Mirror,(*m*) that it is allowable upon warrant of the combat between David for the people of Israel of the one party, and Goliath for the Philistines of the other party; a reason which pope Nicholas I. very seriously decides to be inconclusive.(*n*) Of battle, therefore, on a writ of right,(*o*) we are now to speak; and although the writ of right itself, and of course this trial thereof, be at present much disused, yet, as it is law at this day, it may be matter of curiosity, at

(*f*) L. 423.
(*g*) Inst. 6.
(*h*) Seld. of Duels, c. 5.
(*i*) *L.* 2, c. 118.
(*j*) Stiernh. *de jure Sueon. l.* 1, c. 7.
(*k*) Co. Litt. 261.
(*l*) 2 Hawk. P. C. 45.
(*m*) C. 3, § 23.
(*n*) *Decret. part.* 2, *caus.* 2, *qu.* 5, c. 22.
(*o*) Append. No. I. § 5.

[3] In courts of law in general, it suffices to prove a fact by one witness. In courts of equity it is sometimes otherwise, and two witnesses are required. *Vide post*, ch. 27 and note.—Chitty.

[4] Now abolished, by 59 Geo. III. c. 46, passed in consequence of a defendant having waged his battle in Ashford *vs.* Thornton, 1 B. & Ald. 405.—Stewart.

least to inquire into the forms of this proceeding as we may gather them from antient authors.(*p*)

The last trial by battle that was waged in the court of common pleas at Westminster (though there was afterwards(*q*) one in the court of chivalry in 1631, and another in the county palatine of *Durham*(*r*) in 1638) was in the thirteenth year of queen Elizabeth, A.D. 1571, as reported by Sir James Dyer,(*s*) and was held in Tothill fields, Westminster, "*non sine magna juris consultorum perturbatione*," saith Sir Henry Spelman,(*t*) who was himself a witness of the ceremony. The form, as appears from the authors before cited, is as follows:

When the tenant in a writ of right pleads the general issue, viz., that he hath more right to hold than the *demandant hath to recover, and offers to prove it by the body of his champion, which tender is accepted by the demandant; the tenant in the first place must produce his champion, who by throwing down his glove as a gage or pledge thus *wages* or stipulates battle with the champion of the demandant; who, by taking up the gage or glove, stipulates on his part to accept the challenge. The reason why it is waged by champions and not by the parties themselves in civil actions is, because if any party to the suit dies, the suit must abate and be at an end for the present, and therefore no judgment could be given for the lands in question if either of the parties were slain in battle:(*u*) and also that no person might claim an exemption from this trial, as was allowed in criminal cases where the battle was waged in person. [*339

A piece of ground is then in due time set out of sixty feet square, enclosed with lists, and on one side a court erected for the judges of the court of common pleas, who attend there in their scarlet robes; and also a bar is prepared for the learned sergeants-at-law. When the court sits, which ought to be by sunrising, proclamation is made for the parties and their champions, who are introduced by two knights and are dressed in a coat of armour, with red sandals, bare-legged from the knee downwards, bare-headed, and with bare arms to the elbows. The weapons allowed them are only batons or staves of an ell long, and a four-cornered leathern target; so that death very seldom ensued this civil combat. In the court military, indeed, they fought with sword and lance, according to Spelman and Rushworth; as likewise in France only villeins fought with the buckler and baton, gentlemen armed at all points. And upon this and other circumstances, the president Montesquieu(*v*) hath with great ingenuity not only deduced the impious custom of private duels upon imaginary points of honour, but hath also traced the heroic madness of knight-errantry from the same original of judicial combats. But to proceed.

*When the champions thus armed with batons arrive within the lists or place of combat, the champion of the tenant then takes his adversary by the hand and makes oath that the tenements in dispute are not the right of the demandant; and the champion of the demandant then, taking the other by the hand, swears in the same manner that they are; so that each champion is, or ought to be, thoroughly persuaded of the truth of the cause he fights for. Next, an oath against sorcery and enchantment is to be taken by both the champions, in this or similar form:—"Hear this, ye justices, that I have this day neither eat, drank, nor have upon me, neither bone, stone, ne grass, nor any enchantment, sorcery, or witchcraft, whereby the law of God may be abased or the law of the devil exalted. So help me God and his saints." [*340

The battle is thus begun, and the combatants are bound to fight till the stars appear in the evening; and if the champion of the tenant can defend himself till the stars appear, the tenant shall prevail in his cause; for it is sufficient for him to maintain his ground and make it a drawn battle, he being already in possession; but if victory declares itself for either party, for him is judgment finally

(*p*) Glanvil. *l.* 2, c. 3. *Vet. Nat. Brev.* fol. 2. *Nov. Nor.* tit. *Droit, patent*, fol. 221, (edit. 1534,) Year-book. 29 Edw. III. c. 12. Finch, L. 421. Dyer, 301. 2 Inst. 247.
(*q*) Rushw. Coll. vol. 2, part 2, fol. 112. 19 Rym. 322.
(*r*) Cro. Car. 512.
(*s*) Dyer, 801.
(*t*) Gloss. 102.
(*u*) Co. Litt. 294. *Dyversyté des courtes*, 304.
(*v*) Sp. L. b. 28, c. 20, 22.

given. This victory may arise from the death of either of the champions; which, indeed, hath rarely happened; the whole ceremony, to say the truth, bearing a near resemblance to certain rude athletic diversions, which are probably derived from this original. Or, victory is obtained if either champion proves *recreant*, that is, yields, and pronounces the horrible word of *craven;* a word of disgrace and obloquy rather than of any determinate meaning.[5] But a horrible word it indeed is to the vanquished champion; since, as a punishment to him for forfeiting the land of his principal by pronouncing that shameful word, he is condemned as a recreant *amittere liberam legem*, that is, to become infamous, and not to be accounted *liber et legalis homo;* being supposed by the event to be proved forsworn, and therefore never to be put upon a jury or admitted as a witness in any cause.

*341] *This is the form of a trial by battle; a trial which the tenant or defendant in a writ of right has it in his election at this day to demand, and which was the only decision of such writ of right after the Conquest, till Henry the Second by consent of parliament introduced the *grand assize*,(*w*) a peculiar species of trial by jury in concurrence therewith, giving the tenant his choice of either the one or the other. Which example of discountenancing these judicial combats was imitated about a century afterwards in France, by an edict of Louis the Pious, A.D. 1260, and soon after by the rest of Europe. The establishment of this alternative, Glanvil, chief justice to Henry the Second, and probably his adviser herein, considers as a most noble improvement, as in fact it was, of the law.(*x*)

VI. A sixth species of trial is by *wager of law*,[6] *vadiatio legis*, as the foregoing is called *wager of battle*, *vadiatio duelli;* because, as in the former case, the defendant gave a pledge, gage, or *vadium*, to try the cause by battle; so here he was to put in sureties or *vadios* that at such a day he will make his law, that is, take the benefit which the law has allowed him.(*y*) For our ancestors considered that there were many cases where an innocent man of good credit might be overborne by a multitude of false witnesses, and therefore established this species of trial, by the oath of the defendant himself; for if he will absolutely swear himself not chargeable, and appears to be a person of reputation, he shall go free and forever acquitted of the debt or other cause of action.

*342] *This method of trial is not only to be found in the codes of almost all the northern nations that broke in upon the Roman empire and established petty kingdoms upon its ruins;(*z*) but its original may also be traced as far back as the Mosaical law. "If a man deliver unto his neighbour an ass,

(*w*) Append. No. I. § 6.

(*x*) *Est autem magna assisa regale quoddam beneficium, clementia principis, de concilio procerum, populis indultum: quo vitæ hominum, et status integritati tam salubriter consulitur, ut, retinendo quod quis possidet in libero tenemento soli, duelli casum declinare possint homines ambiguum. Ac per hoc contingit, insperatæ et præmaturæ mortis ultimum evadere supplicium, vel saltem perennis infamiæ opprobrium illius infasti et inverecundi verbi, quod in ore victi turpiter sonat, consecutirum. Ex æquitate item maxima prodita est legalis ista institutio. Jus enim, quod post multas et longas dilationes vix evincitur per duellum, per beneficium istius constitutionis commodius et acceleratius expeditur.* L. 2, c. 7.

(*y*) Co. Litt. 295.

(*z*) Sp. L. b. 28, c. 13. Stiernh. *de jure Sueon. l.* 1, c. 9. Feud. *l.* 1, *t.* 4, 10, 28.

[5] The word "*craven*" has an obvious and intelligible meaning from the occasion on which it is employed. It is of Anglo-Saxon derivation, (crafian,) and means to *crave*, to beg, or to implore,—which to do of an adversary in combat was held to be cowardly and dishonourable, however hopeless the conflict, in the age of chivalry. See Kendall's Argument on Trial by Battle, 143, n.—Chitty.

[6] The right to wage law in an action of debt on simple contract still exists. See Barry *vs.* Robinson, 1 Bos. & Pul. New Rep. 297. In the case of King *vs.* Williams, (2 B. & C. 538,) the defendant having waged his law, and the master assigned a day for him to come in and perfect it, he applied, by his counsel, to the court to assign the number of compurgators with whom he should come to perfect it, on the ground that, the number being uncertain, it was the duty of the court to say how many were necessary; but the court, being disinclined to assist the revival of this obsolete mode of trial, refused the application, and left the defendant to bring such number as he should be advised were sufficient; and observed, that if the plaintiff were not satisfied with the number brought, the objection would be open to him, and then the court would hear both sides. The defendant afterwards prepared to bring eleven compurgators; but the plaintiff abandoned the action. 2 B. & C. 538. 4 Dowl. & Ryl. 3.—Chitty.

Abolished by 3 & 4 W. IV. c. 42, s. 13.—Stewart.

or an ox, or a sheep, or any beast, to keep; and it die, or be hurt, or driven away, no man seeing it; then shall an oath of the Lord be between them both, that he hath not put his hand unto his neighbour's goods; and the owner of it shall accept thereof, and he shall not make it good."(a) We shall likewise be able to discern a manifest resemblance between this species of trial, and the canonical purgation of the popish clergy when accused of any capital crime. The defendant or person accused was in both cases to make oath of his own innocence, and to produce a certain number of compurgators, who swore they believed his oath. Somewhat similar also to this is the *sacramentum decisionis*, or the voluntary and decisive oath of the civil law;(b) where one of the parties to the suit, not being able to prove his charge, offers to refer the decision of the cause to the oath of his adversary; which the adversary was bound to accept, or tender the same proposal back again; otherwise the whole was taken as confessed by him. But, though a custom somewhat similar to this prevailed formerly in the city of London,(c) yet in general the English law does not thus, like the civil, reduce the defendant, in case he is in the wrong, to the dilemma of either confession or perjury: but is indeed so tender of permitting the oath to be taken, even upon the defendant's own request, that it allows it only in a very few cases, and in those it has also devised other collateral remedies for the party injured, in which the defendant is excluded from his wager of law.

*The manner of waging and making law is this. He that has waged, or given security, to make his law, brings with him into court eleven of his neighbours: a custom which we find particularly described so early as in the league between Alfred and Guthrun the Dane;(d) for by the old Saxon constitution every man's credit in courts of law depended upon the opinion which his neighbours had of his veracity. The defendant, then standing at the end of the bar, is admonished by the judges of the nature and danger of a false oath.(e) And if he still persists, he is to repeat this or the like oath:—"Hear this, ye justices, that I do not owe unto Richard Jones the sum of ten pounds, nor any penny thereof, in manner and form as the said Richard hath declared against me. So help me God." And thereupon his eleven neighbours, or compurgators, shall avow upon their oaths that they believe in their consciences that he saith truth; so that himself must be sworn *de fidelitate*, and the eleven *de credulitate*.(f) It is held indeed by later authorities,(g) that fewer than eleven compurgators will do: but Sir Edward Coke is positive that there must be this number; and his opinion not only seems founded upon better authority, but also upon better reason: for, as wager of law is equivalent to a verdict in the defendant's favour, it ought to be established by the same or equal testimony, namely, by the oath of *twelve* men. And so indeed Glanvil expresses it,(h) "*jurabit duodecima manu:*" and in 9 Henry III., when a defendant in an action of debt waged his law, it was adjudged by the court "*quod defendat se duodecima manu.*"(i) Thus, too, in an author of the age of Edward the First,(k) we read, "*adjudicabitur reus ad legem suam duodecima manu.*" And the antient treatise, entitled, *Diversite des courts*, expressly confirms Sir Edward Coke's opinion.(l) [*343

*It must be however observed, that so long as the custom continued of producing the *secta*, the *suit*, or witnesses to give probability to the plaintiff's demand, (of which we spoke in a former chapter,) the defendant was not put to wage his law unless the *secta* was first produced and their testimony was found consistent. To this purpose speaks *magna carta*, c. 28. "*Nullus ballivus de cætero ponat aliquem ad legem manifestam,*" (that is, wager of battle,) "*nec ad juramentum,*" (that is, wager of law,) "*simplici loquela sua,*" (that is, merely by his count or declaration,) "*sine testibus fidelibus ad hoc inductis.*" Which Fleta thus explains:(m) "*si petens sectam produxerit, et concordes inveniantur, tunc reus poterit vadiare legem suam contra petentem et contra sectam suam prolatam; sed si* [*344

(a) Exod. xxii. 10.
(b) Cod. 4, 1, 12.
(c) Bro. Abr. tit. *ley gager*. 77.
(d) Cap. 3. Wilk. *L. L. Angl. Sax.*
(e) Salk. 682.
(f) Co. Litt. 295.
(g) 2 Ventr. 171.
(h) *L.* 1, c. 9.
(i) Fitz. Abr. tit. *ley*, 78.
(k) *Hengham magna*, c. 5.
(l) *Il covint aver' oue luy xi maynz de jurer que luy, sc. que ilz entendre en lour conseiens que il disoyt voier.* Fol. 305, edit. 1534.
(m) *L.* 2, c. 63.

secta variabilis inveniatur, extunc non tenebitur legem vadiare contra sectam illam." It is true, indeed, that Fleta expressly limits the number of compurgators to be only double to that of the *secta* produced; "*ut si* duos *vel* tres *testes produxerit ad probandum, oportet quod defensio fiat per* quatuor *vel per* sex; *ita quod pro quolibet teste duos producat juratores, usque ad* duodecim:" so that according to this doctrine the eleven compurgators were only to be *produced*, but not all of them *sworn*, unless the *secta* consisted of *six*. But though this might possibly be the rule till the production of the *secta* was generally disused, since that time the *duodecima manus* seems to have been generally required.(*n*)

In the old Swedish or Gothic constitution, wager of law was not only permitted, as it still is in *criminal* cases, unless the fact be extremely clear against the prisoner,(*o*) but was also absolutely required, in many *civil* cases: which an author of their own(*p*) very justly charges as being the source of frequent perjury. This, he tells us, was owing to the popish ecclesiastics, who introduced this method of purgation from their canon law, and, having sown a plentiful crop of oaths *in all judicial proceedings, reaped afterwards an ample harvest of perjuries: for perjuries were punished in part by pecuniary fines, payable to the coffers of the church. But with us in England wager of law is never *required;* and is then only *admitted* where an action is brought upon such matters as may be supposed to be privately transacted between the parties, and wherein the defendant may be presumed to have made satisfaction without being able to prove it. Therefore it is only in actions of debt upon simple contract, or for amercement,[7] in actions of detinue, and of account, where the debt may have been paid, the goods restored, or the account balanced, without any evidence of either; it is only in these actions, I say, that the defendant is admitted to wage his law:(*q*) so that wager of law lieth not, when there is any specialty (as a bond or deed) to charge the defendant, for that would be cancelled, if satisfied; but when the debt groweth by word only: nor doth it lie in an action of debt, for arrears of an account settled by auditors in a former action.(*r*) And by such wager of law (when admitted) the plaintiff is perpetually barred; for the law, in the simplicity of the antient times, presumed that no one would forswear himself for any worldly thing.(*s*) Wager of law however, lieth in a real action, where the tenant alleges he was not legally summoned to appear, as well as in mere personal contracts.(*t*)

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A man outlawed, attainted for false verdict, or for conspiracy or perjury, or otherwise become infamous, as by pronouncing the horrible word in a trial by battle, shall not be permitted to wage his law. Neither shall an infant under the age of twenty-one, for he cannot be admitted to his oath; and therefore, on the other hand, the course of justice shall flow equally, and the defendant, where an infant is plaintiff, shall not wage his law. But a feme-covert, when joined with her husband, may be admitted to wage her law, and an alien shall do it in his own language.(*u*)

*It is moreover a rule, that where a man is compellable by law to do any thing whereby he becomes creditor to another, the defendant in that case shall not be permitted to wage his law; for then it would be in the power of any bad man to run in debt first against the inclinations of his creditor, and afterwards to swear it away. But where the plaintiff hath given voluntary credit to the defendant, there he may wage his law; for by giving him such credit the plaintiff has himself borne testimony that he is one whose character may be trusted. Upon this principle it is that in an action of debt against a prisoner by a gaoler for his victuals, the defendant shall not wage his law; for the gaoler cannot refuse the prisoner, and ought not to suffer him to perish for want of sustenance. But otherwise it is for the board or diet of a man at liberty. In an action of debt brought by an attorney for his fees, the defendant cannot

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(*n*) Bro. Abr. tit. *ley gager*, 9.
(*o*) Mod. Un. Hist. xxxiii. 22.
(*p*) Stiernhook, *de jure Sueon. l.* 1, c. 9.
(*q*) Co. Litt. 295.
(*r*) 10 Rep. 103.
(*s*) Co. Litt. 295.
(*t*) Finch, L. 423.
(*u*) Co. Litt. 295.

[7] In a court not of record; for if the amercement were imposed by a court of record, the defendant could not wage his law. Co. Litt. 295, a.—Coleridge.

wage his law, because the plaintiff is compellable to be his attorney. And so, if a servant be retained according to the statute of labourers, 5 Eliz. c. 4, which obliges all single persons of a certain age, and not having other visible means of livelihood, to go out to service; in an action of debt for the wages of such a servant the master shall not wage his law, because the plaintiff was compellable to serve. But it had been otherwise had the hiring been by special contract, and not according to the statute.(*w*)

In no case where a contempt, trespass, deceit, or any injury *with force* is alleged against the defendant, is he permitted to wage his law:(*x*) for it is impossible to presume he has satisfied the plaintiff his demand in such cases where damages are uncertain and left to be assessed by a jury. Nor will the law trust the defendant with an oath to discharge himself where the private injury is coupled as it were with a public crime, that of force and violence; which would be equivalent to the purgation-oath of the civil law, which ours has so justly rejected.

*Executors and administrators, when charged for the debt of the deceased, shall not be admitted to wage their law:(*y*) for no man can with [*347 a safe conscience wage law of another man's contract; that is, swear that he never entered into it, or at least that he privately discharged it. The king also has his prerogative; for as all wager of law imports a reflection on the plaintiff for dishonesty, therefore there shall be no such wager on actions brought by him.(*z*) And this prerogative extends and is communicated to his debtor and accomptant, for on a writ of *quo minus* in the exchequer for a debt on simple contract, the defendant is not allowed to wager his law.(*a*)

Thus the wager of law was never permitted but where the defendant bore a fair and unreproachable character: and it also was confined to such cases where a debt might be supposed to be discharged, or satisfaction made in private, without any witnesses to attest it: and many other prudential restrictions accompanied this indulgence. But at length it was considered that (even under all its restrictions) it threw too great a temptation in the way of indigent or profligate men; and therefore, by degrees, new remedies were devised, and new forms of action were introduced, wherein no defendant is at liberty to wage his law. So that now no plaintiff need at all apprehend any danger from the hardiness of his debtor's conscience, unless he voluntarily chooses to rely on his adversary's veracity by bringing an obsolete instead of a modern action. Therefore, one shall hardly hear at present of an action of *debt* brought upon a simple contract; that being supplied by an action of *trespass on the case* for the breach of a promise, or *assumpsit;* wherein, though the specific debt cannot be recovered, yet damages may, equivalent to the specific debt. And, this being an action of trespass, no law can be waged therein. So, instead of an action of *detinue* to recover the very thing detained, an action of trespass on the case in *trover* and *conversion* is usually brought; *wherein, though the horse [*348 or other specific chattel cannot be had, yet the defendant shall pay damages for the conversion equal to the value of the chattel; and for this trespass also no wager of law is allowed. In the room of actions of *account*, a bill in equity is usually filed, wherein, though the defendant answers upon his oath, yet such oath is not conclusive to the plaintiff, but he may prove every article by other evidence, in contradiction to what the defendant has sworn. So that wager of law is quite out of use, being avoided by the mode of bringing the action; but still it is not out of force. And therefore, when a new statute inflicts a penalty, and gives an action of debt for recovering it, it is usual to add, in which no wager of law shall be allowed: otherwise a hardy delinquent might escape any penalty of the law, by swearing he had never incurred, or else had discharged it.

These six species of trials that we have considered in the present chapter are only had in certain special and eccentrical cases; where the trial by the

(*w*) Co. Litt. 295.
(*x*) Ibid. Raym. 286.
(*y*) Finch, L. 424.
(*z*) Finch. L. 523.
(*a*) Co. Litt. 295

country, *per pais*, or by jury would not be so proper or effectual. In the next chapter we shall consider at large the nature of that principal criterion of truth in the law of England.

CHAPTER XXIII.

OF THE TRIAL BY JURY.

*349] *The subject of our next inquiries will be the nature and method of the trial *by jury;* called also the trial *per pais*, or *by the country:* a trial that hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof. Some authors have endeavoured to trace the original of juries up as high as the Britons themselves, the first inhabitants of our island; but certain it is that they were in use among the earliest Saxon colonies, their institution being ascribed by bishop Nicholson(*a*) to Woden himself, their great legislator and captain. Hence it is, that we may find traces of juries in the laws of all those nations which adopted the feodal system, as in Germany, France, and Italy; who had all of them a tribunal composed of twelve good men and true, "*boni homines*," usually the vassals or tenants of the lord, being the equals or peers of the parties litigant; and, as the lord's vassals judged each other in the lord's courts, so the king's vassals, or the lords themselves, judged each other in the king's court.(*b*) In England we find actual mention of them so early as the laws of king Ethelred, and that not as a new invention.(*c*) Stiernhook(*d*) ascribes the invention of the jury, which in the Teutonic language is denominated *nembda*, to Regner, king of Sweden and Denmark, who was cotemporary with our king Egbert. Just as we are apt to impute the invention of this, and some *other pieces of juridical polity, to the superior genius of Alfred the Great; to whom, on account of his having done much, it is usual to attribute every thing; and as the tradition of antient Greece placed to the account of their own Hercules whatever achievement was performed superior to the ordinary prowess of mankind. Whereas the truth seems to be, that this tribunal was universally established among all the northern nations, and so interwoven in their very constitution, that the earliest accounts of the one give us also some traces of the other.[1] Its establishment however and use, in this island, of what date soever it be, though for a time greatly impaired and shaken by the introduction of the Norman trial by battle, was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it. In *magna carta* it is more than once insisted on as the principal bulwark of our liberties; but especially by chap. 29, that no freeman shall be hurt in either his person or property; "*nisi per legale judicium parium suorum vel per legem terræ.*" A privilege which is couched in almost the same words with that of the emperor Conrad, two hundred years before:(*e*) "*nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum et per judicium parium suorum.*" And it was ever esteemed, in all countries, a privilege of the highest and most beneficial nature.

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But I will not misspend the reader's time in fruitless encomiums on this method of trial; but shall proceed to the dissection and examination of it in all its parts, from whence indeed its highest encomium will arise; since, the more it is searched into and understood, the more it is sure to be valued. And this is a species of knowledge most absolutely necessary for every gentleman in the

(*a*) *De jure Saxonum*, p. 12.
(*b*) Sp. L. b. 30, c. 18. *Capitul. Lud. pii.* A.D. 819, c. 2.
(*c*) Wilk. *LL. Angl. Sax.* 117.
(*d*) *De jure Sueonum*, *l.* 1, c. 4.
(*e*) *LL. Longob. l.* 3, *t.* 8, *l.* 4.

[1] The Athenians, according to Sir Wm. Jones, had trials by jury. Sir Wm. Jones on Bailment, 74.—Chitty.

kingdom: as well because he may be frequently called upon to determine in this capacity the rights of others, his fellow-subjects, as because his own property, his liberty, and his life, depend upon maintaining, in its legal force, the constitutional trial by jury.

*Trials by jury in civil causes are of two kinds; *extraordinary* and *ordinary*. The extraordinary I shall only briefly hint at, and confine the main of my observations to that which is more usual and ordinary. [*351

The first species of extraordinary trial by jury is that of the *grand assize*, which was instituted by king Henry the Second in parliament, as was mentioned in the preceding chapter, by way of alternative offered to the choice of the tenant or defendant in a writ of right, instead of the barbarous and unchristian custom of duelling. For this purpose a writ *de magna assisa eligenda* is directed to the sheriff,(*f*) to return four knights, who are to elect and choose twelve others to be joined with them, in the manner mentioned by Glanvil;(*g*) who, having probably advised the measure itself, is more than usually copious in describing it; and these, all together, form the grand assize, or great jury, which is to try the matter of right, and must now consist of sixteen jurors.(*h*)[2]

Another species of extraordinary juries is the jury to try an *attaint;* which is a process commenced against a former jury, for bringing in a false verdict; of which we shall speak more largely in a subsequent chapter. At present I shall only observe, that this jury is to consist of twenty-four of the best men in the county, who are called the *grand* jury in the attaint, to distinguish them from the first or *petit* jury; and these are to hear and try the goodness of the former verdict.[3]

With regard to the *ordinary* trial by jury in civil cases, I shall pursue the same method in considering it, that I set out with in explaining the nature of prosecuting actions in general, viz., by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

*When therefore an issue is joined, by these words, "and this the said A. prays may be inquired of by the country," or, "and of this he puts himself upon the country,—and the said B. does the like," the court awards a writ of *venire facias* upon the roll or record, commanding the sheriff "that he cause to come *here*, on such a day, twelve free and lawful men, *liberos et legales homines*, of the body of his county, by whom the truth of the matter may be better known, and who are neither of kin to the aforesaid A. nor the aforesaid B., to recognise the truth of the issue between the said parties."(*i*) And such writ was accordingly issued to the sheriff. [*352

Thus the cause stands ready for a trial *at the bar* of the court itself; for all trials were there antiently had, in actions which were there first commenced; which then never happened but in matters of weight and consequence, all trifling suits being ended in the court-baron, hundred, or county courts: and indeed all causes of great importance or difficulty are still usually retained upon motion, to be tried at the bar in the superior courts. But when the usage began to bring actions of any trifling value in the courts of Westminster hall, it was found to be an intolerable burden to compel the parties, witnesses, and jurors to come from Westmoreland perhaps or Cornwall, to try an action of assault at Westminster. A practice therefore very early obtained, of *continuing* the cause from term to term, in the court above, provided the justices in eyre did

(*f*) F. N. B. 4.
(*g*) L. 2, c. 11, 12.
(*h*) Finch, L. 412. 1 Leon. 303.
(*i*) Append. No. III. § 4.

[2] It seems not to be ascertained that any specific number above twelve is absolutely necessary to constitute the grand assize; but it is the usual course to swear upon it the four knights and twelve others. Viner, Trial, Xe.

See the proceedings upon a writ of right before the sixteen recognitors of the grand assize, in 3 Wils. 541.—CHITTY.

As the writ of right has been abolished, this mode of trial can no longer be resorted to.—STEWART.

[3] But, by stat. 6 Geo. IV. c. 50, s. 60, this kind of trial by jury is abolished, and a juror for such an offence may be proceeded against by way of indictment or information.—STEWART.

not previously come into the county where the cause of action arose;(*j*) and if it happened that they arrived there within that interval, then the cause was removed from the jurisdiction of the justices at Westminster to that of the justices in eyre. Afterwards, when the justices in eyre were superseded by the modern justices of assize, (who came twice or thrice in the year into the several *353] counties, *ad capiendas assisas*, to take or try writs of assize, of *mort d'ancestor*, *novel disseisin*, *nuisance*, *and the like,) a power was superadded by statute Westm. 2, 13 Edw. I. c. 30, to these justices of assize to try common issues in trespass, and other less important suits, with direction to return them (when tried) into the court above, where alone the judgment should be given. And as only the trial, and not the determination, of the cause, was now intended to be had in the court below, therefore the clause, of *nisi prius* was left out of the conditional *continuances* before mentioned, and was directed by the statute to be inserted in the writs of *venire facias;* that is, "that the sheriff should cause the jurors to come to Westminster (or wherever the king's court should be held) on such a day in Easter and Michaelmas Terms; *nisi prius*, unless before that day the justices assigned to take assizes shall come into his said county." By virtue of which the sheriff returned his jurors to the court of the justices of assize, which was sure to be held in the vacation before Easter and Michaelmas Terms; and there the trial was had.

An inconvenience attended this provision . principally because, as the sheriff made no return of the jury to the court at Westminster, the parties were ignorant who they were till they came upon the trial, and therefore were not ready with their challenges or exceptions. For this reason, by the statute 42 Edw. III. c. 11, the method of trials by *nisi prius* was altered; and it was enacted that no inquests (except of assize and gaol-delivery) should be taken by writ of *nisi prius*, till after the sheriff had returned the names of the jurors to the court above. So that now in almost every civil cause the clause of *nisi prius* is left out of the writ of *venire facias*, which is the sheriff's warrant to warn the jury; and is inserted in another part of the proceedings, as we shall see presently.

For now the course is, to make the sheriff's *venire* returnable on the last return of the same term wherein issue is joined, viz., Hilary or Trinity Terms; which, from the making up of the issues therein, are usually called *issuable* terms. And he returns the names of the jurors in a *panel* (a little pane, or oblong piece of *354] parchment) annexed to the writ. This jury *is not summoned, and therefore, not appearing at the day, must unavoidably make default. For which reason a compulsive process is now awarded against the jurors, called in the common pleas a writ of *habeas corpora juratorum*, and in the king's bench a *distringas*, commanding the sheriff to have their bodies or to distrain them by their lands and goods, that they may appear upon the day appointed. The entry therefore on the roll or record is,(*k*) "that the jury is respited, through defect of the jurors, till the first day of the next term, then to appear at Westminster; unless before that time, viz., on Wednesday the fourth of March, the justices of our lord the king, appointed to take assizes in that county, shall have come to Oxford, that is, to the place assigned for holding the assizes." And thereupon the writ commands the sheriff to have their bodies at Westminster on the said first day of next term, or before the said justices of assize, if before that time they come to Oxford; viz., on the fourth of March aforesaid. And, as the judges are sure to come and open the circuit commissions on the day mentioned in the writ, the sheriff returns and summons the jury to appear at the assizes, and there the trial is had before the justices of *assize* and *nisi prius:* among whom (as hath been said)(*l*) are usually two of the judges of the courts of Westminster, the whole kingdom being divided into six[4] circuits for this purpose.[5] And

(*j*) *Semper dabitur dies partibus ab justiciariis de banco, sub tali conditione, "nisi justiciarii itinerantes prius venerint ad partes illas."* Bract. *l.* 3, *tr.* 1, c. 11, § 8.

(*k*) Append. No. II. § 4.

(*l*) See page 59.

[4] Now seven.—Stewart.

[5] These several writs, generally called the "Jury Process," are now, however, abolished, and the jurors are summoned by the sheriff for the commission-day, in virtue of a pro-

thus we may observe that the trial of common issues, at *nisi prius*, which was in its original only a collateral incident to the original business of the justices of assize, is now, by the various revolutions of practice, become their principal civil employment: hardly any thing remaining in use of the real *assizes* but the name.

If the sheriff be not an indifferent person; as if he be a party in the suit, or be related by either blood or affinity to either of the parties, he is not then trusted to return the jury, but the *venire* shall be directed to the coroners, who in this, as in many other instances, are the substitutes of the sheriff, to execute process when he is deemed an improper person. If any exception lies to the coroners, the *venire* shall be directed to two clerks of the court, or two persons of the county *named by the court, and sworn.(*m*) And these [*355 two, who are called *elisors*, or electors, shall indifferently name the jury, and their return is final; no challenge being allowed to their array.

Let us now pause a while, and observe (with Sir Matthew Hale)(*n*) in these first preparatory stages of the trial, how admirably this constitution is adapted and framed for the investigation of truth beyond any other method of trial in the world For, first, the *person returning* the jurors is a man of some fortune and consequence; that so he may be not only the less tempted to commit wilful errors, but likewise be responsible for the faults of either himself or his officers: and he is also bound by the obligation of an oath faithfully to execute his duty. Next, as to the *time of their return:* the panel is returned to the court upon the original *venire*, and the jurors are to be summoned and brought in many weeks afterwards to the trial, whereby the parties may have notice of the jurors, and of their sufficiency or insufficiency, characters, connections, and relations, that so they may be challenged upon just cause; while at the same time by means of the compulsory process (of *distringas*, or *habeas corpora*) the cause is not like to be retarded through defect of jurors. Thirdly, as to the *place* of their appearance: which in causes of weight and consequence is at the bar of the court, but in ordinary cases at the assizes, held in the county where the cause of action arises, and the witnesses and jurors live: a provision most excellently calculated for the saving of expense to the parties. For though the preparation of the causes in point of pleading is transacted at Westminster, whereby the order and uniformity of proceeding is preserved throughout the kingdom, and multiplicity of forms is prevented; yet this is no great charge or trouble, one attorney being able to transact the business of forty clients. But the troublesome and most expensive attendance is that of jurors and witnesses at the trial; which therefore is brought home to them, in the country, where most of them inhabit. Fourthly, the *persons before *whom* they are to appear, and be- [*356 fore whom the trial is to be held, are the judges of the superior court, if it be a trial at bar; or the judges of assize, delegated from the courts at Westminster by the king, if the trial be held in the country: persons whose learning and dignity secure their jurisdiction from contempt, and the novelty and very parade of whose appearance have no small influence upon the multitude. The very point of their being strangers in the county is of infinite service, in preventing those factions and parties, which would intrude in every cause of moment, were it tried only before persons resident on the spot, as justices of the peace, and the like. And, the better to remove all suspicion of partiality, it was wisely provided by the statutes 4 Edw. III. c. 2, 8 Ric. II. c. 2, and 32 Hen. VIII. c. 24, that no judge of assize should hold pleas in any county wherein he was born or inhabits. And, as this constitution prevents party and faction from intermingling in the trial of right, so it keeps both the rule and the administration of the laws uniform. These justices, though thus varied and shifted at every assizes, are all sworn to the same laws, have had the same

(m) Fortesc. *de Laud. LL.* c. 25. Co. Litt. 158. (n) Hist. C. L. c. 12.

cept issued to him for that purpose by the judges of assize, a panel of the jurors so summoned being made and kept in the sheriff's office for inspection seven days before the commission-day, and a copy of it annexed to the record. Com. Law Proc. Act, 1852, B 105–109.—STEWART.

education, have pursued the same studies, converse and consult together, communicate their decisions and resolutions, and preside in those courts which are mutually connected and their judgments blended together, as they are interchangeably courts of appeal or advice to each other. And hence their administration of justice and conduct of trials are consonant and uniform; whereby that confusion and contrariety are avoided, which would naturally arise from a variety of uncommunicating judges, or from any provincial establishment.[6] But let us now return to the assizes.

When the general day of trials is fixed, the plaintiff or his attorney must bring down the record to the assizes and enter it with the proper officer in order to its being called on in course. If it be not so entered, it cannot be tried; therefore it is in the plaintiff's breast to delay any trial by not carrying down the record: unless the defendant, being fearful of such neglect in the plaintiff, and willing to discharge himself from the action, will himself undertake to bring on *the trial, giving proper notice to the plaintiff. Which *357] proceeding is called the trial by *proviso;* by reason of the clause then inserted in the sheriff's *venire*, viz., "*proviso*, provided that if two writs come to your hands, (that is, one from the plaintiff and another from the defendant,) you shall execute only one of them." But this practice hath begun to be disused since the statute of 14 Geo. II. c. 17, which enacts that if, after issue joined, the cause is not carried down to be tried according to the course of the court, the plaintiff shall be esteemed to be non-suited, and judgment shall be given for the defendant as in case of a non-suit. In case the plaintiff intends to try the cause, he is bound to give the defendant (if he lives within forty miles of London) eight days' notice of trial, and if he lives at a greater distance, then fourteen days' notice, in order to prevent surprise;[7] and if the plaintiff then changes his mind and does not countermand the notice six days before the trial, he shall be liable to pay costs to the defendant for not proceeding to trial, by the same last-mentioned statute.[8] The defendant, however, or plaintiff, may, upon good cause shown to the court above, as upon absence or sickness of a material witness, obtain leave upon motion to defer the trial of the cause to the next assizes.[9]

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[6] On the 22d of June, 1825, the 6 Geo. IV. c. 50 was passed for consolidating and amending the laws relative to jurors and juries, and came into complete operation the 1st of January, 1826.—Chitty.

Besides the trial at bar and that at nisi prius, there is another mode of trial by jury, which is given by stat. 3 & 4 W. IV. c. 42, s. 17, and is applicable only to causes where the debt or demand does not exceed 20*l*. In such cases, if the court or one of the judges be satisfied that the trial will involve no difficult question of law or fact, they will make a rule or order that the issue be tried by the sheriff of the county where the action is brought, or any judge of a court of record for the recovery of debts in such county. In pursuance of the rule or order, a writ of trial is directed to such judge or sheriff, commanding him to try the issue and return the proceedings to the court, that judgment may be given accordingly.—Stewart.

[7] This practice is confined to causes tried in London and Middlesex. Tidd, 8th ed. 814. In all causes tried at an assizes, ten days' notice suffice. Tidd, 8th ed. 815.—Chitty.

[8] At the sittings in London or Westminster, when defendant resides within forty miles from London, two days' notice of countermand before it is to be tried is sufficient. Tidd, 8th ed. 81, n.—Christian.

[9] Where there have been no proceedings within four terms, a full term's notice of trial must be given previous to the assizes or sittings, unless the cause has been delayed by the defendant himself, by an injunction or other means. 2 Bla. Rep. 784. 3 T. R. 530. If the defendant proceeds to trial by *proviso*, he must give the same notice as would have been required from the plaintiff. 1 Cromp. Prac. 219. Sometimes the courts impose it as a condition upon the defendant that he shall accept *short notice* of trial, which in country causes shall be given at the least four days before the commission-day,—one day being exclusive, and the other inclusive. 3 T. R. 600. But in town causes, two days' notice seems to be sufficient in such a case. Tidd, 250.—Christian.

This statute, so far as it relates to judgment, as in case of a non-suit, is repealed by the Common-Law Procedure Act, 1852, which, however, enables a defendant, after the plaintiff has neglected to bring on the cause for trial within a certain period after issue has been joined, to give the plaintiff twenty days' notice to bring the cause on for trial

But we will now suppose all previous steps to be regularly settled, and the cause to be called on in court. The record is then handed to the judge, to peruse and observe the pleadings, and what issues the parties are to maintain and prove, while the jury is called and sworn. To this end the sheriff returns his compulsive process, the writ of *habeas corpora*, or *distringas*, with the panel of jurors annexed, to the judge's officer in court. The jurors contained in the panel are either *special* or *common* jurors. *Special* juries were originally introduced in trials at bar when the causes were of too great nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him. He is in such cases, upon motion in court and a rule granted thereupon, to attend the prothonotary or other proper officer with his freeholders' book: and the officer is to take *indifferently forty-eight of the principal freeholders in the presence of the attorneys on both sides; who are each of them to [*358 strike off twelve, and the remaining twenty-four are returned upon the panel. By the statute 3 Geo. II. c. 25, either party is entitled, upon motion, to have a special jury struck upon the trial of any issue, as well at the assizes as at bar; he paying the extraordinary expense, unless the judge will certify (in pursuance of the statute 24 Geo. II. c. 18) that the cause required such special jury.

A common jury is one returned by the sheriff according to the direction of the statute 3 Geo. II. c. 25, which appoints that the sheriff or officer shall not return a separate panel for every separate cause, as formerly; but one and the same panel for every cause to be tried at the same assizes, containing not less than forty-eight nor more than seventy-two jurors: and that their names, being written on tickets, shall be put into a box or glass; and when each cause is called, twelve of these persons, whose names shall be first drawn out of the box, shall be sworn upon the jury, unless absent, challenged, or excused; or unless a previous view of the messuages, lands, or place in question shall have been thought necessary by the court: (o) in which case six or more of the jurors returned, to be agreed on by the parties, or named by a judge or other proper officer of the court, shall be appointed by special writ of *habeas corpora* or *distringas* to have the matters in question shown to them by two persons named in the writ; and then such of the jury as have had the view, or so many of them as appear, shall be sworn on the inquest previous to any other jurors. These acts are well calculated to restrain any suspicion of partiality in the sheriff, or any tampering with the jurors when returned.[10]

As the jurors appear, when called, they shall be sworn, unless *challenged* by either party. Challenges are of two sorts: challenges to the *array*, and challenges to the *polls*.

*Challenges to the array are at once an exception to the whole panel, [*359 in which the jury are arrayed or set in order by the sheriff in his return; and they may be made upon account of partiality or some default in the sheriff or his under-officer who arrayed the panel. And, generally speaking, the same reasons that before the awarding the *venire* were sufficient to have directed it to the coroners or elisors will be also sufficient to quash the array when made by a person or officer of whose partiality there is any tolerable ground of suspicion. Also, though there be no personal objection against the sheriff, yet if he arrays

(o) Stat. 4 Anne, c. 16.

at the next sittings or assizes. If the plaintiff again neglects to try the cause, the defendant may obtain judgment for his costs of suit. In case the plaintiff intends to try the cause, he is bound to give the defendant ten days' notice of trial, in order to prevent surprise: and if the plaintiff then changes his mind and does not countermand the notice four days before the trial, he shall be liable to pay costs to the defendant for not proceeding to trial, by the same last-mentioned statute. The defendant, however, or plaintiff, may, upon good cause shown to the court above, as upon absence or sickness of a material witness, obtain leave, upon motion, to defer the trial of the cause till the next assizes.—STEWART.

[10] The qualification of both common and special jurymen is now regulated by stat. 6 Geo. IV. c. 50, by which all other acts are repealed.—STEWART.

the panel at the nomination or under the direction of either party, this is good cause of challenge to the array. Formerly, if a lord of parliament had a cause to be tried, and no knight was returned upon the jury, it was a cause of challenge to the array:(p) but, an unexpected use having been made of this dormant privilege by a spiritual lord,(q) it was abolished by statute 24 Geo. II. c. 18. But still, in an attaint, a knight must be returned on the jury.(r) Also, by the policy of the antient law, the jury was to come *de vicineto*, from the neighbourhood of the vill or place where the cause of action was laid in the declaration; and therefore some of the jury were obliged to be returned from the hundred in which such vill lay; and, if none were returned, the array might be challenged for defect of hundredors. Thus the Gothic jury, or *nembda*, was also collected out of every quarter of the country: "*binos, trinos, vel etiam senos, ex singulis territorii quadrantibus.*"(s) For, living in the neighbourhood, they were properly the very country, or *pais*, to which both parties had appealed, and were supposed to know beforehand the characters of the parties and witnesses, and therefore they better knew what credit to give to the facts alleged in evidence. But this convenience was overbalanced by another very natural and almost unavoidable inconvenience: that jurors coming out of the immediate neighbourhood would be apt *to intermix their prejudices and partialities in the trial of right. And this our law was so sensible of that it for a long time has been gradually relinquishing this practice; the number of necessary hundredors in the whole panel, which in the reign of Edward III. were constantly *six*,(t) being in the time of Fortescue(u) reduced to *four*. Afterwards, indeed, the statute 35 Hen. VIII. c. 6 restored the antient number of *six;* but that clause was soon virtually repealed by statute 27 Eliz. c. 6, which required only *two*. And Sir Edward Coke(v) also gives us such a variety of circumstances whereby the courts permitted this necessary number to be evaded, that it appears they were heartily tired of it. At length, by statute 4 & 5 Anne, c. 6, it was entirely abolished upon all civil actions, except upon penal statutes; and upon those also by the 24 Geo. II. c. 18, the jury being now only to come *de corpore comitatus*, from the body of the county at large, and not *de vicineto*, or from the particular neighbourhood.[11] The array, by the antient law, may also be challenged if an alien be party to the suit, and, upon a rule obtained by his motion to the court for a jury *de medietate linguæ*, such a one be not returned by the sheriff, pursuant to the statute 28 Edw. III. c. 13, enforced by 8 Hen. VI. c. 29, which enact, that where either party is an alien born, the jury shall be one half denizens and the other aliens, (if so many be forthcoming in the place,) for the more impartial trial; a privilege indulged to strangers in no other country in the world, but which is as antient with us as the time of king Ethelred, in whose statute *de monticolis Walliæ*, (then aliens to the crown of England,) *cap.* 3, it is ordained that "*duodeni legales homines, quorum sex Walli et sex Angli erunt, Anglis et Wallis jus dicunto.*" But where both parties are aliens, no partiality is to be presumed to one more than another; and therefore it was resolved soon after the statute 8 Hen. VI.(w) that where the issue is joined between two aliens (unless the plea be had before the mayor of the staple, and thereby subject to the restrictions of statute 27 Edw. III. st. 2, c. 8) the jury shall all be denizens. And it now might be a question how far the *statute 3 Geo. II. c. 25 (before referred to) hath in civil causes undesignedly abridged this privilege of foreigners by the positive directions therein given concerning the manner of impanelling jurors, and the persons to be returned in such panel. So that (unless this statute is to be construed by the same equity which the statute 8 Hen. VI. c. 29 declared to be the rule of interpreting the statute 2 Hen. V. st. 2, c. 3 concerning the landed qualifications of jurors in suits to which aliens were parties) a court

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(p) Co. Litt. 156. Seld. on Baronage, ii. 11.
(q) K. *vs.* Bishop of Worcester, M. 28 Geo. II. B. R.
(r) Co. Litt. 156.
(s) Stiernhook *de jure Goth. l.* 1, c. 4.
(t) Gilb. Hist. C. P. c. 8.
(u) *De Laud. LL.* c. 25.
(v) 1 Inst. 157.
(w) Year-book, 21 Hen. VI. 4.

[11] See an excellent note, Co. Litt. 125, a. b., n (2.)—Chitty.

might perhaps hesitate whether it has now a power to direct a panel to be returned *de medietate linguæ*, and thereby alter the method prescribed for striking a special jury or balloting for common jurors.[12]

Challenges to the polls, *in capita*, are exceptions to particular jurors, and seem to answer the *recusatio judicis* in the civil and canon laws; by the constitutions of which a judge might be refused upon any suspicion of partiality.(*x*) By the laws of England also, in the times of Bracton(*y*) and Fleta,(*z*) a judge might be refused for good cause; but now the law is otherwise, and it is held that judges and justices cannot be challenged.(*a*) For the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. And should the fact at any time prove flagrantly such, as the delicacy of the law will not presume beforehand, there is no doubt but that such misbehaviour would draw down a heavy censure from those to whom the judge is accountable for his conduct.

But challenges to the polls of the jury (who are judges of fact) are reduced to four heads by Sir Edward Coke:(*b*) *propter honoris respectum; propter defectum; propter affectum;* and *propter delictum.*

1. *Propter honoris respectum;* as, if a lord of parliament be impanelled on a jury, he may be challenged by either party, or he may challenge himself.

*2. *Propter defectum;* as if a juryman be an alien born, this is defect of birth; if he be a slave or bondman, this is defect of liberty, and he [*362 cannot be *liber et legalis homo.* Under the word *homo* also, though a name common to both sexes, the female is however excluded, *propter defectum sexus;* except when a widow feigns herself with child, in order to exclude the next heir, and a supposititious birth is suspected to be intended; then upon the writ *de ventre inspiciendo*, a jury of women is to be impanelled to try the question whether with child or not.(*c*) But the principal deficiency is defect of estate sufficient to qualify him to be a juror. This depends upon a variety of statutes. And, first, by the statute of Westm. 2, 13 Edw. I. c. 38, none shall pass on juries in assizes within the county, but such as may dispend 20*s.* by the year at the least; which is increased to 40*s.* by the statutes 21 Edw. I. st. 1, and 2 Hen. V. st. 2, c. 3. This was doubled by the statute 27 Eliz. c. 6, which requires in every such case the jurors to have estate of freehold to the yearly value of 4*l.* at the least. But, the value of money at that time decreasing very considerably, this qualification was raised by the statute 16 & 17 Car. II. c. 3 to 20*l. per annum*, which being only a temporary act, for three years, was suffered to expire without renewal, to the great debasement of juries. However, by the statute 4 & 5 W. & M. c. 24, it was again raised to 10*l. per annum* in England and 6*l.* in Wales, of freehold lands *or copyhold;* which is the first time that copyholders (as such) were admitted to serve upon juries in any of the king's courts, though they had before been admitted to serve in some of the sheriff's courts, by statutes 1 Ric. III. c. 4, and 9 Hen. VII. c. 13. And, lastly, by statute 3 Geo. II. c. 25, any leaseholder for the term of five hundred years absolute, or for any term determinable upon life or lives, of the clear yearly value of 20*l. per annum* over and above the rent reserved, is qualified to serve upon juries.[13] When the jury is *de medietate linguæ*, that is, one moiety of the English tongue or nation, and the

(*x*) Cod. 3, 1. 16. *Decretal. l.* 2, *t.* 28, c. 36.
(*y*) *L.* 5, c. 15.
(*z*) *L.* 6, c. 37.
(*a*) Co. Litt. 294.
(*b*) 1 Inst. 156.
(*c*) Cro. Eliz. 566.

[12] From the enactments of the statute 6 Geo. IV. c. 50, and especially section 47 thereof, it would seem that a jury *de medietate linguæ* is now allowed only upon trials for felony or misdemeanour.—KERR.

[13] A juror must be twenty-one years; and, if above sixty, he is exempted, though not disqualified, from serving. He must also possess freehold or copyhold property of the clear yearly value of ten pounds, or have leasehold property, held by lease for twenty-one years or longer, of the annual value of twenty pounds, or occupy a house containing not less than fifteen windows. In London, the occupation of a house, shop, or place of business within the city, or the possession of real or personal property of the value of 100*l.*, constitutes a qualification. 6 & 7 Geo. IV. c. 50.—KERR.

*363] other of any foreign one, no want of lands shall be *cause of challenge to the alien; for, as he is incapable to hold any, this would totally defeat the privilege.(d)

3. Jurors may be challenged *propter affectum*, for suspicion of bias or partiality This may be either a *principal* challenge, or *to the favour*. A *principal* challenge is such where the cause assigned carries with it *prima facie* evident marks of suspicion either of malice or favour: as, that a juror is of kin to either party within the ninth degree;(e) that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him; all these are principal causes of challenge, which, if true, cannot be overruled, for jurors must be *omni exceptione majores*. Challenges *to the favour* are where the party hath no principal challenge, but objects only some probable circumstances of suspicion, as acquaintance and the like;(f) the validity of which must be left to the determination of *triors*, whose office it is to decide whether the juror be favourable or unfavourable. The triors, in case the first man called be challenged, are two indifferent persons named by the court; and if they try one man and find him indifferent, he shall be sworn; and then he and the two triors shall try the next; and when another is found indifferent and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest.(g)[14]

4. Challenges *propter delictum* are for some crime or misdemeanour that affects the juror's credit and renders him infamous. As for a conviction of treason, felony, perjury, or conspiracy; or if for some infamous offence he hath received *364] judgment of the pillory, tumbrel, or the like; or to be branded, *whipt, or stigmatized; or if he be outlawed or excommunicated, or hath been attainted of false verdict, *præmunire*, or forgery; or lastly, if he hath proved recreant when champion in the trial by battle, and thereby hath lost his *liberam legem*. A juror may himself be examined on oath of *voir dire, veritatem dicere*, with regard to such causes of challenge as are not to his dishonour or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage.(h)

Besides these challenges, which are exceptions against the fitness of jurors, and whereby they may be *excluded* from serving, there are also other causes to be made use of by the jurors themselves, which are matter of exemption; whereby their service is *excused*, and not *excluded*. As by statute Westm. 2, 13 Edw. I. c. 38, sick and decrepit persons, persons not commorant in the county, and men above seventy years old; and by the statute 7 & 8 W. III. c. 32, infants under twenty-one. This exemption is also extended, by divers statutes,

(d) See stat. 2 Hen. V. st. 2, c. 3. 8 Hen. VI. c. 29.

(e) Finch, L. 401.

(f) In the *nembda*, or jury of the ancient Goths, three challenges only were allowed to the favour, but the principal challenges were indefinite. "*Licebat palam excipere, et semper ex probabili causa tres repudiari: etiam plures ex causa prægnanti et manifesta.*" Stiernhook, *l.* 1, c. 4.

(g) Co. Litt. 153.

(h) Ibid. 158, b.

[14] The question of challenge to the array, and incidentally to the polls and triers, underwent much discussion in The King *vs.* Edmonds, 4 B. & A. 476; and in that case it was determined that no challenge, either to the array or to the polls, can be taken until a full jury shall have appeared; that the disallowing a challenge is not a ground for a new trial, but for a *venire de novo*; that every challenge, either to the array or to the polls, ought to be propounded in such a way that it may be put at the time upon the *nisi prius* record, so that when a challenge is made the adverse party may either demur or counterplead, or he may deny what is alleged for matter of challenge; and it is then only that triers can be appointed. It was also thereby determined that the whole special jury-panel cannot be challenged for the supposed unindifferency of the Master of the Crown Office, he being the officer of the court appointed to nominate the jury. And a material point was also ruled in the same case,—namely, that it is not competent to ask jurymen, whether special or talesmen, whether they have not, previously to the trial, expressed opinions hostile to the defendants and their cause, in order to found a challenge to the polls on that ground; but such expressions must be proved by extrinsic evidence. But see now stat. 6 Geo. IV. c. 50, ss. 27, 89.—Chitty.

customs, and charters, to physicians and other medical persons, counsel, attorneys, officers of the courts, and the like; all of whom, if impanelled, must show their special exemption. Clergymen are also usually excused, out of favour and respect to their function: but, if they are seised of lands and tenements, they are in strictness liable to be impanelled in respect of their lay-fees, unless they be in the service of the king or of some bishop: "*in obsequio domini regis, vel alicujus episcopi.*"(*i*)[15]

If by means of challenges, or other cause, a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a *tales*. A *tales* is a supply of *such* men as are summoned upon the first panel, in order to make up the deficiency. For this purpose, a writ of *decem tales, octo tales*, and the like, was used to be issued to the sheriff at common law, and must be still so done at a trial at bar, if the jurors make default. But at the assizes or *nisi prius*, by virtue of the statute 35 Hen. VIII. c. 6, and other subsequent *statutes, the judge is empowered at the prayer of either party to award [*365 a *tales de circumstantibus*,(*j*) of persons present in court, to be joined to the other jurors to try the cause; who are liable, however, to the same challenges as the principal jurors. This is usually done, till the legal number of twelve be completed; in which patriarchal and apostolical number Sir Edward Coke(*k*) hath discovered abundance of mystery.(*l*)

When a sufficient number of persons impanelled, or *tales*-men, appear, they are then separately sworn, well and truly to try the issue between the parties, and a true verdict to give according to the evidence; and hence they are denominated the jury, *jurata*, and jurors, *sc. juratores*.

We may here again observe, and observing we cannot but admire, how scrupulously delicate, and how impartially just, the law of England approves itself, in the constitution and frame of a tribunal, thus excellently contrived for the test and investigation of truth; which appears most remarkably, 1. In the avoiding of frauds and secret management, by electing the twelve jurors out of the whole panel by lot. 2. In its caution against all partiality and bias, by quashing the whole panel or array, if the officer returning is suspected to be other than indifferent; and repelling particular jurors, if probable cause be shown of malice or favour to either party. The prodigious multitude of exceptions or challenges allowed to jurors, who are the judges of fact, amounts nearly to the same thing as was practised in the Roman republic, before she lost her liberty: that the select judges should be appointed by the prætor with the mutual consent of the parties. *Or, as Tully(*m*) expresses it: "*neminem voluerunt majores nostri, non modo de existimatione cujusquam, sed ne* [*366 *pecuniaria quidem de re minima, esse judicem: nisi qui inter adversarios convenisset.*"

Indeed, these *selecti judices* bore in many respects a remarkable resemblance to our juries: for they were first returned by the prætor; *de decuria senatoria conscribuntur:* then their names were drawn by lot, till a certain number was completed; *in urnam sortito mittuntur, ut de pluribus necessarius numerus conjici posset:* then the parties were allowed their challenges; *post urnam permittitur accusatori, ac reo, ut ex illo numero rejiciant quos putaverint sibi, aut inimicos, aut ex aliqua re incommodos fore:* next they struck what we call a *tales; rejectione celebrata, in eorum locum qui rejecti fuerunt subsortiebatur prætor alios, quibus ille judicum legitimus numerus compleretur;* lastly, the judges, like our jury, were sworn; *his perfectis, jurabant in leges judices, ut obstricti religione judicarent.*(*n*)

The jury are now ready to hear the merits; and, to fix their attention the closer to the facts which they are impanelled and sworn to try, the pleadings

(*i*) F. N. B. 166. *Reg. Brev.* 179.
(*j*) Append. No. II. § 4.
(*k*) 1 Inst. 155.
(*l*) Pausanias relates that at the trial of Mars, for murder, in the court denominated *Areopagus* from that incident, he was acquitted by a jury composed of *twelve* pagan deities. And Dr. Hickes, who attributes the introduction of this *number* to the Normans, tells us that among the inhabitants of Norway, from whom the Normans as well as the Danes were descended, a great veneration was paid to the number *twelve*: "*nihil sanctius, nihil antiquius fuit; perinde ac si in ipso hoc numero secreta quædam esset religio.*" *Dissert. Epistolar.* 49. Spelm. Gloss. 329.
(*m*) *Pro Cluentio*, 43.
(*n*) Ascon. in *Cic. Ver.* 1, 6. A learned writer of our own, Dr. Pettingal, hath shown in an elaborate work (published A.D. 1796) so many resemblances between the δικασται of the Greeks, the *judices selecti* of the Romans, and the juries of the English, that he is tempted to conclude that the latter are derived from the former.

[15] They are now excused, by 6 Geo. IV. c. 50.—CHITTY.

are opened to them by counsel on that side which holds the affirmative of the question in issue. For the issue is said to lie, and proof is always first required, upon that side which affirms the matter in question: in which our law agrees with the civil;(o) "*ei incumbit probatio, qui dicit, non qui negat; cum per rerum naturam factum-negantis probatio nulla sit.*" The opening counsel briefly informs them what has been transacted in the court above; the parties, the nature of the action, the declaration, the plea, replication, and other proceedings, and, lastly, upon what point the issue is joined, which is there set down to be determined. Instead of which,(p) formerly the whole record and process of the *367] pleadings was read to *them in English by the court, and the matter in issue clearly explained to their capacities. The nature of the case, and the evidence intended to be produced, are next laid before them by counsel also on the same side: and when their evidence is gone through, the advocate on the other side opens the adverse case, and supports it by evidence; and then the party which began is heard by way of reply.

The nature of my present design will not permit me to enter into the numberless niceties and distinctions of what is, or is not, legal *evidence* to a jury.(q) I shall only therefore select a few of the general heads and leading maxims relative to this point, together with some observations on the manner of giving evidence.

And, first, evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other; and no evidence ought to be admitted to any other point. Therefore upon an action of debt, when the defendant denies his bond by the plea of *non est factum*, and the issue is, whether it be the defendant's deed or no; he cannot give a release of this bond in evidence: for that does not destroy the bond, and therefore does not prove the issue which he has chosen to rely upon, viz., that the bond has no existence.

Again: evidence in the trial by jury is of two kinds, either that which is given in proof, or that which the jury may receive by their own private knowledge. The former, or *proofs*, (to which in common speech the name of evidence is usually confined,) are either written, or *parol*, that is, by word of mouth. Written proofs or evidence are,—1. Records, and 2. Antient deeds of thirty years' standing, which prove themselves;[16] but, 3. Modern deeds, and 4. Other *368] *writings, must be attested and verified by parol evidence of witnesses. And the one general rule that runs through all the doctrine of trials is this,—that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but, if not possible, then the best evidence that can be had shall be allowed.[17] For if it be found that there is any better

(o) *Ff.* 22, 3, 2. Cod. 4, 19, 23.
(p) Fortesc. c. 20.
(q) This is admirably well performed in lord chief-baron Gilbert's excellent treatise of evidence,—a work which it is impossible to abstract or abridge without losing some beauty and destroying the chain of the whole, and which hath lately been engrafted into a very useful work, The Introduction of the Law of Nisi Prius, 4to. 1767.

[16] The same rule applies to wills thirty years old. 4 T. R. 709, note. This rule is laid down in books of evidence without sufficient explanation of its principle, or of the extent of its application. There seems to be danger in permitting a deed to be read merely because it bears date above thirty years before its production, and in requiring no evidence, where a forgery may be committed with the least probability of detection. Chief-Baron Gilbert lays down, that where possession has gone agreeably to the limitations of a deed bearing date thirty years ago, it may be read without any evidence of its execution, though the subscribing witnesses be still living. Law of Ev. 94. For such possession affords so strong a presumption in favour of the authenticity of the deed as to supersede the necessity of any other proof of the validity of its origin, or of its due execution. The court of King's Bench have determined that the mere production of a parish certificate dated above thirty years ago was sufficient to make it evidence, without giving any account of the custody from which it was extracted. 5 T. R. 259.—Christian.

[17] No rule of law is more frequently cited and more generally misconceived than this. It is certainly true when rightly understood; but it is very limited in its extent and application. It signifies nothing more than that, if the best *legal* evidence cannot possibly be produced, the next best *legal* evidence shall be admitted. Evidence may be divided into primary and secondary; and the secondary evidence is as accurately defined

evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed. Thus, in order to prove a lease for years, nothing else shall be admitted but the very deed of lease itself, if in being; but if that be positively proved to be burned or destroyed, (not relying on any loose negative, as that it cannot be found, or the like,) then an attested copy may be produced; or *parol* evidence be given of its contents. So, no evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any general customs, or matters of common tradition or repute) the courts admit of *hearsay* evidence, or an account of what persons deceased have declared in their lifetime; but such evidence will not be received of any particular facts.[18] So, too, books of account or shop-books are not allowed of

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by the law as the primary. But in general the want of better evidence can never justify the admission of hearsay, interested witnesses, or the copies of copies, &c. Where there are exceptions to general rules, these exceptions are as much recognised by the law as the general rule; and, where boundaries and limits are established by the law for every case that can possibly occur, it is immaterial what we call the rule and what the exception.—CHRISTIAN.

Some of the numerous cases which are found even in modern books may be cited for illustration and in confirmation of the text and note.

If the subscribing witness be living and within the jurisdiction of the court, he must be called to prove the execution; or if he cannot be found, and that fact be satisfactorily explained, proof of his handwriting will be sufficient evidence of the execution. Barnes *vs.* Trompowsky, 7 T. R. 266. And the witness of the execution is necessary; acknowledgment of the party who executed the deed cannot be received. Johnson *vs.* Mason, 1 Esp. 89. At least only as secondary evidence. Call, Bart *vs.* Dunning, 4 East, 53. And acknowledgment to a subscribing witness by an obligor of a bond that he has executed it is sufficient. Powell *vs.* Blackett, 9 Esp. 87; and see Grellier *vs.* Neale, Peake, 146. But a mere bystander may not be received to supply the absence of the subscribing witness. (McCraw *vs.* Gentry, 3 Camp. 232.) or only as secondary evidence. See the next case. If the apparent attesting witness deny that he saw the execution, secondary evidence is admissible; that is to say, the handwriting of the obligor, &c. may be proved. Ley *vs.* Ballard, 3 Esp. 173, n. And, as a general rule, it seems that wherever a subscribing witness appears to an instrument, note, &c., he must be called, or his absence explained. See Higgs *vs.* Dixon, 2 Stark. 180. Breton *vs.* Cope, Peake, 31.—CHITTY.

[18] It is a general rule that the mere recital of a fact—that is, the mere oral assertion or written entry by an individual that a particular fact is true—cannot be received in evidence. But the objection does not apply to any public documents made under lawful authority, such as gazettes, proclamations, public surveys, records, and other memorials of a similar description, and whenever the declaration or entry is in itself a fact and is part of the *res gestæ*. Stark. on Evid. p. 1, 46, 47. But it is to be carefully observed that neither the declarations nor any other acts of those who are mere strangers, or, as it is usually termed, any *res inter alios acta*, is admissible in evidence against any one, as affording a presumption against him in the way of admission, or otherwise. Ib. 51.—CHITTY.

In cases of customs and prescriptive rights, hearsay or traditional evidence is not admitted until some instances of the custom or exercise of the right claimed are first proved. The declarations of parents respecting their marriage, and the legitimacy of their children, are admitted after their decease as evidence. And hearsay is also received respecting pedigrees and the death of relations abroad. Bull. N. P. 294. 2 Esp. 784. What has been said in conversation in the hearing of any party, if not contradicted by him, may be given in evidence; for, not being denied, it amounts to a species of confession. But it can only be received where it must be presumed to have been heard by the party; and therefore in one case the court stopped the witness from repeating a conversation which had passed in a room where the prisoner was, but at the time while she had fainted away. It has been the practice of the quarter-sessions to admit the declarations of paupers respecting their settlements, to be received as evidence after their death, or, if living, where they could not be produced. See 3 T. R. 707, where the judges of the King's Bench were divided upon the legality of this practice, and where the subject of hearsay evidence is much discussed. For many years, whilst lord Mansfield presided in the court of King's Bench, the court were unanimously of opinion that the declarations of a pauper respecting his settlement might after his death be proved and given in evidence. When lord Kenyon and another judge were introduced, the court were divided, and the former practice prevailed; but when the court were entirely changed, they determined that this hearsay evidence was not founded on any principles of law, and that the evidence at the quarter-sessions in the cases of settlement ought to be the same

themselves to be given in evidence for the owner; but a servant who made the entry may have recourse to them to refresh his memory; and if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence;(r) for as tradesmen are often under a necessity of giving credit without any note or writing, this is therefore, when accompanied with such other collateral proofs of fairness and regularity,(s) the best evidence that can then be produced. However, this dangerous species of evidence is not carried so far in England as abroad;(t) where a man's own books of accounts, by a distortion of the civil law, (which seems to have meant the same thing as is practised with us,)(u) with the suppletory oath of *the merchant, amount at all times to full proof.[19] But as this kind of evidence, even thus regulated, would be much too hard upon the buyer at any long distance of time, the statute 7 Jac. I. c. 12 (the penners of which seem to have imagined that the books themselves were evidence at common law) confines this species of proof to such transactions as have happened within one year before the action brought; unless between merchant

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(r) Law of Nisi Prius, 266.
(s) Salk. 285.
(t) Gail. *observat.* 2, 20, 23.
(u) *Instrumenta domestica, seu adnotatio, si non aliis quoque adminiculis adjuvantur, ad probationem sola non sufficiunt.* Cod. 4, 19, 5. *Nam exemplo perniciosum est, ut ei scripturæ credatur, qua unusquisque sibi adnotatione propria debitorem constituit.* Ibid. l. 7.

as that in all other courts, in the trials which could respectively be brought before them. 2 East, 54, 63. The court of King's Bench has decided that a father's declaration of the place of the birth of his son is not evidence after the father's death. 8 East, 539. But it would not, probably, be difficult to prove that this is of the nature of pedigree, and ought to be admitted, as the father's declaration of the time of his son's birth, which has always been legal evidence. In criminal cases, the declarations of a person who relates *in extremis*, or under an apprehension of dying, the cause of his death, or any other material circumstance, may be admitted in evidence; for the mind in that awful state is presumed to be under as great a religious obligation to disclose the truth as is created by the administration of an oath. But declarations of a deceased person ought not to be received unless the court is satisfied from the circumstances of the case that they were made under the impression of approaching dissolution. Leach's Cases, 400. But the declarations of a felon at the place of execution cannot be received, as he is incompetent to give evidence upon oath, and the situation of a dying man is only thought equivalent to that of a competent witness when he is sworn. Ibid. 276. By the 1 & 2 Ph. & Mar. c. 13, depositions taken before a justice of peace in cases of felony may be read in evidence at the trial, if the witness dies before the trial. But as the statute confines this to felony, and as it is an innovation upon the common law, it cannot be extended to any misdemeanour. 1 Salk. 281.—Christian.

[19] Although in England the shop-book of a tradesman is not evidence without the oath of the clerk who made the entry, yet in the United States, in the early periods of settlement, as business was generally carried on by the principal, and few shop-keepers kept clerks, the book of original entries, proved by the oath of the plaintiff, has, from the necessity of the case, generally, if not universally, been admitted. It has been confined, however, to the case of goods sold and delivered and work and labour done. It is necessary, however, that the book should appear to be the book in which the first entry was made cotemporaneously with the original transaction which it professes to record. It is not necessary, indeed, that it should be in the form of a journal or day-book. Entries in ledger-form have been admitted, or in a pocket memorandum-book. Still, the entry must have been made within a reasonable time after the transaction,—not further than twenty-four, or at most forty-eight, hours. It should not be made until the contract is complete, the work done, the goods delivered, or, at least, so far set aside and distinguished as that the property has passed. Where, however, entries are first made on a slate or a blotter, which is afterwards destroyed and the transfer made in due time to the regular book, it is sufficient. The credibility of such a book may be attacked by any circumstances which would go to show that it is not a regular and reliable record of daily transactions. Poultney *et al. vs.* Ross, 1 Dall. 239. Curren *vs.* Crawford, 4 Serg. & Rawle, 5. Ingraham *vs.* Bockius, 9 Serg. & R. 285. Hartley *vs.* Brookes, 6 Whart. 189. Patton *vs.* Ryan, 4 Rawle, 408. Rhoads *vs.* Gaul, 4 Rawle, 404. Parker *vs.* Donaldson, 2 Watts & Serg. 20. Coggswell *vs.* Dolliver, 2 Mass. 217. Case *vs.* Potter, 8 Johns. 211. Linnell *vs.* Sutherland, 11 Wend. 568. It would encumber this note to go further in the citation of cases from every State in the Union in support of this species of evidence. Since the parties themselves are now competent witnesses in England, the original entry may evidently be effectually used as a memorandum to refresh the memory.—Sharswood.

and merchant in the usual intercourse of trade. For accounts of so recent a date, if erroneous, may more easily be unravelled and adjusted.[20]

With regard to *parol* evidence, or *witnesses;* it must first be remembered, that there is a process to bring them in by writ of *subpœna ad testificandum:* which commands them, laying aside all pretences and excuses, to appear at the trial on pain of 100*l.* to be forfeited to the king; to which the statute 5 Eliz. c 9 has added a penalty of 20*l.* to the party aggrieved, and damages equivalent to the loss sustained by want of his evidence. But no witness, unless his reasonable expenses be tendered him, is bound to appear at all; nor, if he appears, is he bound to give evidence till such charges are actually paid him; except he resides within the bills of mortality, and is summoned to give evidence within the same This compulsory process, to bring in unwilling witnesses, and the additional terrors of an attachment in case of disobedience, are of excellent use in the thorough investigation of truth:[21] and, upon the same principle, in the Athenian courts, the witnesses who were summoned to attend the trial had the choice of three things: either to swear to the truth of the fact in question, to deny or abjure it, or else to pay a fine of a thousand drachmas.(*v*)

All witnesses, of whatever religion or country, that have the use of their reason,[22] are to be received and examined, except such as are *infamous*, or such as are *interested* in the event of the cause. All others are *competent* witnesses; though

(*v*) Pott. Antiq. b. i. c. 21.

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[20] The entries in the book of a person deceased, not connected with the parties, are of no more avail than hearsay. But the books of an incumbent respecting the tithes of the parish are evidence for his successor. 5 T. R. 123. 2 Ves. 43.—CHRISTIAN.

[21] A copy of the writ, or the substance thereof, (5 Mod. 355. Cro. Car. 540,) should be served personally on each witness and the original shown to him. The usual mode of proceeding against witnesses for disobedience of the writ of subpœna is by the summary process of an attachment for a contempt, (2 Stra. 1054. Cowp. 386. Doug. 561;) but the court will not grant an attachment against a witness unless all the necessary expenses of the journey to and from and the witness's stay at the place of trial be tendered at the time of serving the subpœna. 1 H. Bl. 49. 1 Meriv. 191. 13 East, 15. Still, the court will not enter into nice calculations of expense, but consider whether the non-attendance originated in obstinacy or not. 2 Stra. 1150. The same rule prevails in the case of witnesses *bona fide* brought from abroad. 1 Marsh. 563. 4 Taunt. 699. 6 ib. 88. A witness is not in general entitled to remuneration for loss of time, (1 B. & B. 515. 5 M. & S. 156.) though in some instances it is allowed to attorneys and medical practitioners. Ib. 159. The expenses of making scientific experiments with a view to evidence are not allowable. 3 B. & B. 72.—CHITTY.

[22] A Mohammedan may be sworn upon the Alcoran, and a Gentoo according to the custom of India; and their evidence may be received even in a criminal case. Leach's Cases, 52. 1 Atk. 21. But an atheist, or a person who has no belief or notion of a God or a future state of rewards and punishments, ought not in any instance to be admitted as a witness. 1 Atk. 45. B. N. P. 202. See Peake, Rep. 11, where Buller, J., held that the proper question to be asked of a witness is, whether he believes in God, the obligation of an oath, and in a future state of rewards and punishments.—CHITTY.

I have known a witness rejected and hissed out of court who declared that he doubted of the existence of a God and a future state. But I have since heard a learned judge declare at nisi prius that the judges had resolved not to permit adult witnesses to be interrogated respecting their belief of a Deity and a future state. It is probably more conducive to the course of justice that this should be presumed till the contrary is proved; and the most religious witness may be scandalized by the imputation which the very question conveys.

Quakers, who refuse to take an oath under any form, by the 7 & 8 W. III. c. 34 are permitted in judicial proceedings to make a solemn affirmation: and if such affirmation, like an oath, is proved to be false, they are subject to the penalties of perjury. But this does not extend to criminal cases. 8 Geo. I. c. 6. 22 Geo. II. c. 30 and c. 46.

Their affirmations are received in penal actions, as for bribery. See Atcheson *vs.* Everitt, Cowp. 382, where this subject is largely discussed.

Lord Mansfield lays down generally that an affirmation is not refused where the action, though in form of a criminal action, in substance is a mere action between party and party. Lord Mansfield there laments that such an exception had been made by the legislature.—CHRISTIAN.

*370] the jury from other circumstances will judge of their *credibility*.[23] *Infamous persons are such as may be challenged as jurors *propter delictum*; and therefore never shall be admitted to give evidence to inform that jury with whom they were too scandalous to associate. Interested witnesses may be examined upon a *voir dire*, if suspected to be secretly concerned in the event; or their interest may be proved in court. Which last is the only method of supporting an objection to the former class: for no man is to be examined to prove his own infamy.[24] And no counsel, attorney, or other person, intrusted with the

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[23] "The old cases upon the competency of witnesses have gone upon very subtle grounds; but of late years the courts have endeavoured as far as possible, consistent with authorities, to let the objection go to the credit rather than to the competency of a witness." Lord Mansfield, 1 T. R. 300.

It is now established that if a witness does not immediately gain or lose by the event of the cause, and if the verdict in the cause cannot be evidence either for or against him in any other suit, he shall be admitted as a competent witness, though the circumstances of the case may in some degree lessen his credibility. 3 T. R. 27. The interest must be a present, certain, vested interest, and not uncertain or contingent, (Doug. 134. 1 T. R. 163. 1 P. Wms. 287:) therefore the heir-apparent is competent in support of the claim of the ancestor, though the remainderman, having a *vested* interest, is incompetent. Salk. 283. Ld. Raym. 724. A clerk of the company of wire-drawers is competent in an action against a person for acting as an assistant, although the verdict might cause the defendant to be sworn, upon which the clerk would obtain a fee. See Stark. on Evid. p. 4, 745.

A servant of a tradesman from necessity is permitted in an action by his master to prove the delivery of goods, though he himself may have purloined them; but in an action brought against the master for the negligence of his servant, the servant cannot be a witness for his master without a release; for his master may afterwards have his action against the servant, and the verdict recovered against him may be given in evidence in that action to prove the damage which the master has sustained. 4 T. R. 589.

By the 46 Geo. III. c. 37, it is enacted that a witness cannot refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to a penalty or forfeiture, by reason only that the answer to such question may establish, or tend to establish, that he owes a debt or is subject to a civil suit.

This statute was passed because upon a point which arose at lord Melville's impeachment the high living authorities of the law were nearly divided, whether a witness was compellable to answer such a question. But surely it was agreeably to the law of England that a man should be compelled to be honest, and where, if he avoided the question, injustice would be done both between the parties before the court and afterwards between the witness and some other party.—Christian.

[24] A witness may be examined with regard to his own infamy, if the confession of it does not subject him to any future punishment; as a witness may be asked if he has not stood in the pillory for perjury, (4 T. R. 440:) but he cannot be entirely rejected as a witness without the production of the record of conviction, by which he is rendered incompetent. 8 East, 77.—Christian.

Though it has been held in some other cases that a witness is not *bound to answer* such questions. 4 St. Tri. 748. 1 Salk. 153. 4 Esp. 225, 242. It is quite clear that a man is not bound to answer any questions, either in a court of law or equity, which may tend to criminate himself, or which may render him liable to a penalty. Stra. 444. 3 Taunt. 424. 4 St. Tri. 6. 6 ib. 649. 16 Ves. 242. 2 Ld. Raym. 1088. Mitford's Ch. Pl. 157. As to questions which *merely* disgrace the witness, there is some difficulty. See Stark. on Evid. pt. 2, 139. Still, a witness is in no case legally *incompetent* to allege his own turpitude, or to give evidence which involves his own infamy (2 Stark. Rep 116. 8 East, 78. 11 East, 309) or impeaches his own solemn acts, (5 M. & S. 244. 7 T. R. 604,) unless he be rendered incompetent by a legal interest in the event of the cause, or in the record. It seems to be a universal rule that a *particeps criminis* may be examined as a witness in both civil and criminal cases, provided he has not been incapacitated by a conviction of crime. As a clerk who had laid out money which he had embezzled in illegal insurances was held to be a competent witness for the master against the insurer. Cowp. 197. So a man who has pretended to convey lands to another may prove that he had no title. Ld. Raym. 1008. A co-assignee of a ship may prove that he had no interest in the vessel. Cited in 1 T. R. 301. The parents may give evidence to bastardize their issue, (6 T. R. 330, 331,) or to prove the legitimacy, (ib.;) though it is said the sole evidence of the mother,

secrets of the cause by the party himself, shall be compelled, or perhaps allowed, to give evidence of such conversation or matters of privacy, as came to his knowledge by virtue of such trust and confidence:(w)[25] but he may be examined as to mere matters of fact, as the execution of a deed or the like, which might have come to his knowledge without being intrusted in the cause.

One witness (if credible) is *sufficient* evidence to a jury of any single facts, though undoubtedly the concurrence of two or more corroborates the proof. Yet our law considers that there are many transactions to which only one person is privy; and therefore does not *always* demand the testimony of two, as the civil law universally requires. "*Unius responsio testis omnino non audiatur.*"(x) To extricate itself out of which absurdity, the modern practice of the civil-law courts has plunged itself into another. For, as they do not allow a less number than two witnesses to be *plena probatio*, they call the testimony of one, though never so clear and positive, *semi-plena probatio* only, on which no sentence can be founded. To make up therefore the necessary complement of witnesses, when

(w) Law of Nisi Prius, 267. (x) Cod. 4, 20, 9.

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a married woman, shall not be sufficient to bastardize her child. B. R. H. 79. 1 Wils. 340.—CHITTY.

The first inroad on the systematic exclusion of evidence, which was the result of the former state of the law, was made by the statute 3 & 4 W. IV. c. 42, s. 96, which enacted that "in order to render the rejection of witnesses on the ground of interest less frequent, if any witness should be objected to as incompetent, on the ground that the verdict or judgment in the action would be admissible in evidence for or against him, he should nevertheless be examined: but in that case the verdict or judgment should not be admissible for or against him or any one claiming under him." A much greater improvement was, however, effected by the statute 6 & 7 Vict. c. 85, which removed incompetency by reason of incapacity from crime or on the ground of *interest* in all persons, *except the parties to the suit*, or the persons whose rights were involved therein, such as the real plaintiff in the fictitious action of ejectment, or any person in whose immediate and individual behalf any action was brought or defended, or the husband or wife of such persons. The advantages found to flow from this alteration in the law led to the statute 14 & 15 Vict. c. 99, by the first section of which the proviso in the statute 6 & 7 Vict. c. 85 (which excluded all persons directly interested in the suit) was repealed. By the second section, the parties and the persons in whose behalf any action, suit, or other proceeding is brought or defended are made (except as therein excepted) *competent* and *compellable* to give evidence on behalf of either or any of the parties to the suit in any court of justice. The third section of the statute provides that it shall not render any person charged with an offence competent or compellable to give evidence against himself, nor shall it render any person compellable to answer any question tending to criminate himself, nor shall it in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. The fourth section of the statute further provides that it shall not apply to any proceeding instituted in consequence of adultery, or to any action for breach of promise of marriage. It was decided soon after it had become law that the *second* section of the statute did not render a wife admissible as a witness for or against her husband; and accordingly the statute 16 & 17 Vict. c. 83 was passed, enacting that the husbands and wives of the parties to any suit, or of the persons on whose behalf any such proceeding is brought or defended, shall thereafter be competent and compellable to give evidence on behalf of either party or any of the parties. Neither husband nor wife is compellable, however, to disclose any communication made or received during marriage; and neither party is a competent witness in a criminal proceeding, or in any proceeding instituted in consequence of adultery.—KERR.

[25] But the principles and policy of this rule restrain it to that confidence only which is placed in a counsel or solicitor, and which must necessarily be inviolable where the use of advocates and legal assistants is admitted. But the purposes of public justice supersede the delicacy of every other species of confidential communication. In the trial of the duchess of Kingston, it was determined that a friend might be bound to disclose, if necessary in a court of justice, secrets of the most sacred nature which one sex could repose in the other; and that a surgeon was bound to communicate any information whatever which he was possessed of in consequence of his professional attendance. 11 St. Tr. 243, 246. And those secrets only communicated to a counsel or attorney are inviolable in a court of justice which have been intrusted to them whilst acting in their respective characters to the party as their client. 4 T. R. 431, 753.—CHRISTIAN.

they have one only to a single fact, they admit the party himself (plaintiff or defendant) to be examined in his own behalf, and administer to him what is called the *suppletory* oath; and, if his evidence happens to be in his own favour, this immediately converts the half proof into a whole one. By this ingenious device satisfying at once the forms of the Roman law, and acknowledging the superior reasonableness of the law of England: which permits one witness to be sufficient where no more are to be had: and, to avoid all temptations of perjury, lays it down as an invariable rule, that *nemo testis esse debet in propria causa.*[26]

*371] *Positive proof is always required, where from the nature of the case it appears it might possibly have been had. But next to *positive* proof, *circumstantial* evidence or the doctrine of *presumptions* must take place; for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances which either *necessarily*, or *usually*, attend such facts; and these are called presumptions, which are only to be relied upon till the contrary be actually proved. *Stabitur præsumptioni donec probetur in contrarium.*(y) *Violent* presumption is many times equal to full proof:(z) for there those circumstances appear, which *necessarily* attend the fact. As if a landlord sues for rent due at Michaelmas, 1754, and the tenant cannot prove the payment, but produces an acquittance for rent due at a subsequent time, in full of all demands, this is a violent presumption of his having paid the former rent, and is equivalent to full proof; for though the actual payment is not proved, yet the acquittance in full of all demands is proved, which could not be without such payment; and it therefore induces so forcible a presumption, that no proof shall be admitted to the contrary.(a)[27] *Probable* presumption, arising from such

(y) Co. Litt. 373. (z) Ibid. 6. (a) Gilb. Evid. 161.

[26] In equity no decree can be made on the oath of one witness against the defendant's answer on oath, (Ventr. 161. 3 Ch. C. 123, 69;) and one witness is not sufficient against the husband, although it be supported by the answer of the wife, for she cannot be a witness against her husband. 2 ib. 30. 3 P. Wms. 238. But a decree may be made on the evidence of a single witness, where the evidence of the other party is falsified or discredited by strong circumstances. 2 Vern. 554. 2 Atk. 19. 3 ib. 419. 1 Bro. Ch. C. 52. In high treason, when it works corruption of blood, two witnesses are necessary, by 7 W. III. c. 3. So two are necessary in perjury. 10 Mod. 195; *post*, 4 book, 150. In all other cases the effect of admissible evidence, whether given by one or more witnesses, is solely for the consideration of the jury. See Stark. on Evid. pp. 3, 398, 399.—Chitty.

[27] The author does not, perhaps, literally mean here that no evidence would be *received*, if in fact it could be produced, to rebut even the most violent presumption, for the maxim which he has cited above implies the contrary; but I suppose him to mean that such a presumption is so weighty that no evidence will countervail it. Even in this light it is too strongly expressed; for the acquittance might undoubtedly be shown to have been given by mistake, or extorted by menace, or drawn from the party by fraud. So in lord Coke's instance:—"If one be runne throw the bodie with a sword in a house, whereof he instantly dieth, and a man is seene to come out of that house with a bloody sword, and no other man was at that time in the house." The party here might have run himself through the body, in spite of the endeavours of the other to the contrary; and if a witness had seen that from an opposite window, undoubtedly he would be received to destroy the violent presumption arising from the apparent circumstances. Indeed, if witnesses are receivable, as they daily are, to contradict or explain away *positive* proof, of course they must, *a fortiori*, be so to rebut presumptive proof.

But there are presumptions in law which are not controvertible: that is, where the law has declared that such a consequence *always* follows such a fact, and therefore withdraws that consequence from the decision of the jury. These, therefore, are not the proper subject of evidence as we understand the word here: and therefore when the causing fact is proved, as no evidence *aliunde* is required, so none will be admitted to rebut the consequence. Thus, if a conspiracy to imprison the king's person be proved, the law presumes an intention to kill him. Fost. 196. See Fearne *vs.* Hutchinson, 9 Ad. & Ell. 641.—Coleridge.

Presumptions are of three kinds: 1st, Legal presumptions, made by the law itself; 2d, Legal presumptions, to be made by a jury, of law and fact; 3d, Natural presumptions, or presumptions of *mere* fact.

1st. Legal presumptions are in some cases absolute, as that a bond or other specialty was executed upon a good consideration, (4 Burr. 2225,) so long as the deed or bond

circumstances as *usually* attend the fact, hath also its due weight: as if, in a suit for rent due in 1754, the tenant proves the payment of the rent due in 1755; this will prevail to exonerate the tenant,(*b*) unless it be clearly shown that the rent of 1754 was retained for some special reason, or that there was some fraud or mistake; for otherwise it will be presumed to have been paid before that in 1755, as it is most usual to receive first the rents of longest standing. *Light*, or rash, presumptions have no weight or validity at all.[28]

*The oath administered to the witness is not only that what he deposes shall be true, but that he shall also depose the *whole* truth; so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all bystanders, and before the judge and jury; each party having liberty to except to its competency, which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country; which must curb any secret bias or partiality that might arise in his own breast. And if, either in his directions or decisions, he mistakes the law by ignorance, inadvertence, or design, the counsel on either side may require him publicly to seal a *bill of exceptions*, stating the point in which he is supposed to err; and this he is obliged to seal, by statute Westm. 2, 13 Edw. I. c. 31, or, if he refuse so to do, the party may have a compulsory writ against him,(*c*) commanding him to seal it, if the fact alleged be truly stated: and if he returns that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. This bill of exceptions is in the nature of an appeal, examinable, not in the court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court, upon a writ of error, after judgment given in the court below. But a *demurrer* to evidence shall be determined by the court out of which the record is sent. This happens where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law; in which case the adverse [*372

(*b*) Co. Litt. 373. (*c*) Reg. Br. 182. 2 Inst. 487.

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remains unimpeached: but it may be impeached on the ground of fraud, and then the consideration becomes the subject of inquiry. But in the case of bills of exchange, the presumption that it was accepted for a good consideration may be rebutted by evidence. So where a fine has been levied, it will be implied that it has been levied with proclamations, (3 Co. 86, b.,) unless rebutted, (Bull. N. P. 229,) and some other like instances; but the presumption in favour of innocence is, it has been held, too strong to be overcome by any artificial intendment of law. 2 B. & A. 386. 2d. Presumptions of law and fact, as that adverse enjoyment, unquestioned for twenty years, of an incorporeal hereditament, presumes a grant; that a bond has been satisfied upon which no interest has been paid, nor other acknowledgment made of its existence, for a like period, (2 Stra. 826. 2 Ld. Raym. 1370;) that there has been a conversion in the case of trover where the defendant refuses to deliver them up. 3d. Natural presumptions. It is the peculiar province of the jury to deal with presumptions of this class; yet, where the particular facts are inseparably connected according to the usual course of nature, the courts themselves will draw the inference; as when a child has been born within a few weeks after access of the husband, its bastardy will be inferred without the aid of a jury. 8 East, 193. All cases of circumstantial evidence may be more or less within this class. And it is obvious that the case put in the text belongs to this division, upon which Mr. Christian has made the following remark:—

"This can scarcely be correct. I should conceive that proof may be admitted to repel all presumptions whatever: and even if a receipt should be produced expressly for the rent of the year 1754, still, the landlord might show that it had been obtained by mistake or fraud, and that no rent had been received at the time." In a case of a similar nature tried before Abbott, C. J., at Guildhall, A.D. 1824, the landlord adduced evidence to show the mistake, and recovered.—CHITTY.

[28] It is difficult to say what is a light and rash presumption, if it is any presumption at all. Any circumstance may be proved from which a fair inference can be drawn, though alone it would be too slight to support the verdict of the jury; yet it may corroborate other testimony, and a number of such presumptions may become of importance. *Possunt diversa genera ita conjungi, ut quæ singula non nocerent, ea universa tanquam grando rem opprimant.* Matthæus de Crim.—CHRISTIAN.

party may if he pleases demur to the whole evidence; which admits the truth of every fact that has been alleged, but denies the sufficiency of them all in point of law to maintain or overthrow the issue;(*d*) which draws the question of law from the cognizance of the jury to be decided (as it ought) by the court. But neither these demurrers to evidence, nor the bills of exceptions, *373] are at present so much *in use as formerly; since the more frequent extension of the discretionary powers of the court in granting a new trial, which is now very commonly had for the misdirection of the judge at *nisi prius*.[29]

This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth(*e*) than the private and secret examination taken down in writing before an officer or his clerk in the ecclesiastical courts and all others that have borrowed their practice from the civil law, where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides, the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled; and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. Nor is the presence of the judge during the examination a matter of small importance; for, besides the respect and awe with which his presence will

(*d*) Co. Litt. 72. 5 Rep. 104. (*e*) Hale's Hist. C. L. 254, 255, 256.

[29] The matter which the jury has to try is the issue joined upon the pleadings which are copied on the nisi prius record, and at which alone the judge is permitted to look for the question to be tried. Although, therefore, the plaintiff may be able to prove a good cause of action, or the defendant a good defence, that is not sufficient to entitle either to a verdict, unless the proof of it establishes that side of the issue which it is his duty to maintain. When there was no power to amend the pleadings at nisi prius, it accordingly often happened that a party failed on the trial, by reason of some minute discrepancy between the statement of his cause of action or defence and the evidence produced to support it; for though as a rule it is sufficient that the issue shall be *substantially* proved, it is necessary that it be *completely* proved. This strictness consequently produced great injustice; for parties perfectly aware of the true nature of the dispute came to trial relying upon some slight misstatement in his adversary's pleadings not material to the merits of the case, and which, had it been discovered in time, would have been corrected. To obviate hardships of this kind, the statute 9 Geo. IV. c. 15 enacted that it should be lawful for any court or any judge sitting at nisi prius, when any variance appeared between any matter in writing or in print produced in evidence and the recital thereof on the record, to cause the record to be forthwith amended in such particular on payment of such costs, if any, to the other party, as such judge or court thought reasonable; the trial thenceforth to proceed as if no such variance had appeared. The statute 3 & 4 W. IV. c. 42, ss. 23, 24 extended this power of amendment to all cases where any variance appeared between the proof and the recital or setting forth thereof on the record, the trial to proceed as if no variance had happened.

The powers of amendment given by these statutes have been still further extended, if not superseded, by the provisions of the Common-Law Procedure Act, 1852. Thus, a *non-joinder* or *misjoinder* may be amended at the trial; so the evidence of the plaintiff may show a contract or cause of action varying somewhat from that alleged in his declaration; or the defendant's witnesses may make out a defence which has not been pleaded with technical exactness. In either case the declaration or plea may be amended; and this must be done by the presiding judge, so that the real question in controversy between the parties to the cause may be determined in the existing suit. Amendments are generally granted in payment of the costs previously incurred, and which by the amendment have been rendered unnecessary or without result. The defendant may be allowed, if necessary, to plead *de novo;* in which latter case the further trial of the action is at once stopped and the jury discharged from giving any verdict. If either party is dissatisfied with the decision of the judge, he may apply for a new trial; and if the court think that the amendment was improper, a new trial will be granted.—Kerr.

naturally inspire the witness, he is able by use and experience to keep the evidence from wandering from the point in issue. In short, by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all persons must appear alike when their depositions are reduced to writing and read to the judge in the absence of those who made them; and yet as much may be frequently collected from the manner in which the evidence is delivered as from the matter of *it. These are a few of the advantages attending this the English way of giving testimony *ore tenus*. Which was also, indeed, familiar among the *antient* Romans, as may be collected from Quintilian,(*f*) who lays down very good instructions for examining and cross-examining witnesses *viva voce*. And this, or somewhat like it, was continued as low as the time of Hadrian;(*g*) but the civil law, as it is now modelled, rejects all public examination of witnesses. [*374

As to such evidence as the jury may have in their own consciences by their private knowledge of facts, it was an antient doctrine that this had as much right to sway their judgment as the written or parol evidence which is delivered in court. And therefore, it hath been often held(*h*) that though no proofs be produced on either side, yet the jury might bring in a verdict. For the oath of the jurors to find according to their evidence was construed(*i*) to be, to do it according to the best of their own knowledge. This seems to have arisen from the antient practice of taking recognitions of assize at the first introduction of that remedy; the sheriff being bound to return such recognitors as knew the truth of the fact, and the recognitors when sworn being to retire immediately from the bar, and bring in their verdict according to their own personal knowledge, without hearing extrinsic evidence or receiving any direction from the judge.(*j*) And the same doctrine (when attaints came to be extended to trials by jury as well as to recognitions of assize) was also applied to the case of common jurors, that they might escape the heavy penalties of the *attaint* in case they could show by any additional proof that their verdict was agreeable to the truth, though not according to the evidence produced; with which additional proof the law presumed they were privately acquainted, though it did not appear in *court. But this doctine was again gradually exploded, when *attaints* began to be disused and *new trials* introduced in their stead. For it is quite incompatible with the grounds upon which such new trials are every day awarded, viz., that the verdict was given *without*, or *contrary to*, evidence. And therefore, together with new trials, the practice seems to have been first introduced(*k*) which now universally obtains, that if a juror knows any thing of the matter in issue he may be sworn as a witness and give his evidence publicly in court. [*375

When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence.

The jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of their verdict; and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. A method of accelerating unanimity not wholly unknown in other constitutions of Europe, and in matters of greater concern. For by the golden bull of the empire,(*l*) if, after the congress is opened, the electors delay the election of a king of the Romans for thirty days, they shall be fed only with bread and water, till

(*f*) *Institut. Orat. l.* 5, c. 7.

(*g*) See his epistle to Varus, the legate or judge of Cilicia: "*Tu magis scire potes, quanta fides sit habenda testibus; qui, et cujus dignitatis, et cujus æstimationis sint; et, qui simpliciter visi sint dicere; utrum unum eundemque meditatum sermonem attulerint, an ad ea quæ interrogaveras extempore verisimilia responderint.*" *Ff.* 22, 5, 3.

(*h*) Year-book, 14 Hen. VII. 29. Plowd. 12. Hob. 227. 1 Lev. 87.

(*i*) Vaugh. 148, 149.

(*j*) Bract. *l.* 4, *tr.* 1. c. 19, § 3. Flet. *l.* 4, c. 9, § 2.

(*k*) Styl. 233. 1 Sid. 133.

(*l*) C. 2.

the same is accomplished. But if our juries eat or drink at all, or have any eatables about them, without consent of the court, and before verdict, it is finable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict. Also if they speak with either of the parties or their *376] agents, after they are gone *from the bar; or if they receive any fresh evidence in private; or if to prevent disputes they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict. And it has been held, that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned,(*m*) the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart.(*n*)[30] This necessity of a total unanimity seems to be peculiar to our own constitution;(*o*) or, at least, in the *nembda* or jury of the antient Goths, there was required (even in criminal cases) only the consent of the major part; and, in case of an equality, the defendant was held to be acquitted.(*p*)[31]

When they are all unanimously agreed, the jury return back to the bar; and, before they deliver their verdict, the plaintiff is bound to appear in court, by himself, attorney, or counsel, in order to answer the amercement to which by the old law he is liable, as has been formerly mentioned,(*q*) in case he fails in his suit, as a punishment for his false claim. To be *amerced*, or *à mercie*, is to be at the king's mercy with regard to the fine to be imposed; *in misericordia domini regis pro falso clamore suo.* The amercement is disused, but the form still continues; and if the plaintiff does not appear, no verdict can be given, but the plaintiff is said to be *non-suit, non sequitur clamorem suum.* Therefore it is usual for a plaintiff, when he or his counsel perceives that he has not given evidence

(*m*) Mirr. c. 4, § 24.
(*n*) *Lib. Ass.* fol. 40, pl. 11.
(*o*) See Barrington on the Statutes, 19, 20, 21.
(*p*) Stiern. *l.* 1, c. 4.
(*q*) Page 275. See also book iv. 379.

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[30] Pending a trial of long duration the jury may be adjourned, and in civil cases may separate; but after the judge has summed up, they cannot separate. 2 Bar. & Ald. 462. —Chitty.

[31] The learned judge has displayed much erudition in the beginning of this chapter to prove the antiquity of the trial by jury; but the trials referred to by the authors there cited, and even the *judicium parium*, mentioned in the celebrated chapter of *magna charta*, are trials which were something similar to that by a jury, rather than instances of a trial by jury according to its present established form. The *judicium parium* seems strictly the judgment of a subject's equals in the feudal courts of the king and barons. And so little appears to be ascertained by antiquarians respecting the introduction of the trial in criminal cases by two juries, that although it is one of the most important, it is certainly one of the most obscure and inexplicable, parts of the law of England.

The unanimity of twelve men, so repugnant to all experience of human conduct, passions, and understandings, could hardly in any age have been introduced into practice by a deliberate act of the legislature.

But that the life, and perhaps the liberty and property, of a subject should not be affected by the concurring judgment of a less number than twelve, where more were present, was a law founded in reason and caution, and seems to be transmitted to us by the common law, or from immemorial antiquity. The grand assize might have consisted of more than twelve, yet the verdict must have been given by twelve or more; and if twelve did not agree, the assize was afforced,—that is, others were added till twelve did concur. See 1 Reeve's Hist of Eng. Law, 241, 480. This was a majority, and not unanimity. A grand jury may consist of any number from twelve to twenty-three inclusive, but a presentment ought not to be made by less than twelve. 2 Hale, P. C. 161. The same is true also of an inquisition before the coroner. In the high court of parliament and the court of the lord high steward a peer may be convicted by the greater number; yet there can be no conviction unless the greater number consists at least of twelve. 3 Inst. 30. Kelyng. 56. Moore, 622. Under a commission of lunacy the jury was seventeen, but twelve joined in the verdict. 7 Ves. Jr. 450. A jury upon a writ of inquiry may be more than twelve. In all these cases, if twelve only appeared, it followed as a necessary consequence that to act with effect they must have been unanimous.

Hence this may be suggested as a conjecture respecting the origin of the unanimity of juries, that, as less than twelve—if twelve or more were present—could pronounce no effective verdict, when twelve only were sworn, their unanimity became indispensable. —Christian.

sufficient to maintain his issue, to be voluntarily non suited, or withdraw himself: whereupon the crier is ordered to *call the plaintiff:* and if neither he, nor anybody for him, appears, he is non-suited, the jurors are discharged, the action is at an end, and the defendant shall recover his costs. The reason of this practice is, that a non-suit is more eligible for the plaintiff than a verdict against him: for after a non-suit, which is only a default, he may commence the same suit *again for the same cause of action; but after a verdict had, and judgment consequent thereupon, he is forever barred from attacking the defendant upon the same ground of complaint. But, in case the plaintiff appears, the jury by their foreman deliver in their verdict.[32] [*377

A verdict, *vere dictum*, is either *privy*, or *public*. A *privy* verdict is when the judge hath left or adjourned the court: and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court:(r) which privy verdict is of no force unless afterwards affirmed by a public verdict given openly in court; wherein the jury may, if they please, vary from the privy verdict. So that the privy verdict is indeed a mere nullity; and yet it is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged.[33] But the only effectual and legal verdict is the *public* verdict: in which they openly declare to have found the issue for the plaintiff, or for the defendant; and if for the plaintiff, they assess the damages also sustained by the plaintiff in consequence of the injury upon which the action is brought.

Sometimes, if there arises in the case any difficult matter of law, the jury, for the sake of better information, and to avoid the danger of having their verdict attainted, will find a *special* verdict; which is grounded on the statute of Westm. 2, 13 Edw. I. c. 30, § 2. And herein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court should be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant. This is entered at length on the record and afterwards argued and determined in the court at Westminster, from whence the issue came to be tried.

*Another method of finding a species of special verdict is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judge or the court above, on a *special case* stated by the counsel on both sides with regard to a matter of law; which has this advantage over a special verdict, that it is attended with much less expense, and obtains a much speedier decision; the *postea* (of which in the next chapter) being stayed in the hands of the officer of *nisi prius*, till the question is determined, and the verdict is then entered for the plaintiff or defendant, as the case may happen. But, as nothing appears upon the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the judgment of the court, or judge, upon the point of law. Which makes it a thing to be wished, that a method could be devised of either lessening the expense of special verdicts, or else of entering the cause at length upon the *postea*. But in both these instances the jury may, if they think proper, take upon themselves to determine, at their own hazard, the complicated question of fact and law, [*378

(r) If the judge hath adjourned the court to his own lodgings, and there receives the verdict, it is a *public* and not a *privy* verdict.

[32] When a verdict will carry all the costs, and it is doubtful from the evidence for which party it will be given, it is a common practice for the judge to recommend, and the parties to consent, that a juror should be withdrawn; and thus no verdict is given, and each party pays his own costs.

Where there is a doubt at the trial whether the evidence produced by the plaintiff is sufficient to support the verdict given in his favour by the jury, the judge will give leave to apply to the court above to set aside the verdict and to enter a non-suit; but if such liberty is not reserved at the trial, the court above can only grant the defendant a new trial, if they think the plaintiff's evidence insufficient to support his case. 6 T. R. 67.—CHRISTIAN.

[33] A privy verdict cannot be given in treason and felony. 2 H. P. C. 300.—CHITTY.

and, without either special verdict or special case, may find a verdict absolutely either for the plaintiff or defendant.(s)

When the jury have delivered in their verdict, and it is recorded in court, they are then discharged. And so ends the trial by jury: a trial which, besides the other vast advantages which we have occasionally observed in its progress, is also as expeditious and cheap, as it is convenient, equitable, and certain; for a commission out of chancery, or the civil-law courts, for examining witnesses in one cause will frequently last as long, and of course be full as expensive, as the trial of a hundred issues at *nisi prius:* and yet the fact cannot be determined by such commissioners at all; no, not till the depositions are published, and read at the hearing of the cause in court.

*379] *Upon these accounts the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases! But this we must refer to the ensuing book of these commentaries: only observing for the present, that it is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals. A constitution that I may venture to affirm has, under Providence, secured the just liberties of this nation for a long succession of ages. And therefore a celebrated French writer,(t) who concludes that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury.

Great as this eulogium may seem, it is no more than this admirable constitution, when traced to its principles, will be found in sober reason to deserve. The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince, or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity; it is not to be expected from human nature, that *the few* should be always attentive to the interests and good of *the many.* On the other hand, if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts. It is wisely therefore ordered, that the principles and axioms of law, which are general propositions, flowing from abstracted reason, and not *accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope: the law is well known, and is the same for all ranks and degrees; it follows as a regular conclusion from the premises of fact pre-established. But in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here therefore a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth and the surest guardians of public justice. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. Every new tribunal, erected for the decision of facts, without the intervention

*380]

(s) Litt. § 386.

(t) Montesq. Sp. L. xi. 6.

of a jury, (whether composed of justices of the peace, commissioners of the revenue, judges of a court of conscience, or any other standing magistrates,) is a step towards establishing aristocracy, the most oppressive of absolute governments. The feodal system, which, for the sake of military subordination, pursued an aristocratical plan in all its arrangements of property, had been intolerable in times of peace, had it not been wisely counterpoised by that privilege, so universally diffused through every part of it, the trial by the feodal peers. And in every country on the continent, as the trial by the peers has been gradually disused, so the nobles have increased in power, till the state has been torn to pieces by rival factions, and oligarchy in effect has been established, though under the shadow of regal government; *unless where the miserable commons have taken shelter under absolute monarchy, as the lighter evil of the two. And, particularly, it is a circumstance well worthy an Englishman's observation, that in Sweden the trial by jury, that bulwark of northern liberty, which continued in its full vigour so lately as the middle of the last century,(u) is now fallen into disuse:(w) and that there, though the regal power is in no country so closely limited, yet the liberties of the commons are extinguished, and the government is degenerated into a mere aristocracy.(x) It is therefore, upon the whole, a duty which every man owes to his country, his friends, his posterity, and himself, to maintain to the utmost of his power this valuable constitution in all its rights; to restore it to its antient dignity, if at all impaired by the different value of property, or otherwise deviated from its first institution; to amend it, wherever it is defective; and, above all, to guard with the most jealous circumspection against the introduction of new and arbitrary methods of trial, which, under a variety of plausible pretences, may in time imperceptibly undermine this best preservative of English liberty. [*381

Yet, after all, it must be owned, that the best and most effectual method to preserve and extend the trial by jury in practice, would be by endeavouring to remove all the defects, as well as to improve the advantages, incident to this mode of inquiry. If justice is not done to the entire satisfaction of the people in this method of deciding facts, in spite of all encomiums and panegyrics on trials at the common law, they will resort in search of that justice to another tribunal; though more dilatory, though more expensive, though more arbitrary in its frame and constitution. If justice is not done to the crown by the verdict of a jury, the necessities of the public revenue will call for the erection of summary tribunals. The principal defects seem to be,—

1. The want of a complete discovery by the oath of the parties. This each of them is now entitled to have, by *going through the expense and circuity of a court of equity; and therefore it is sometimes had by consent, even in the courts of law. How far such a mode of compulsive examination is agreeable to the rights of mankind, and ought to be introduced in any country, may be matter of curious discussion, but is foreign to our present inquiries. It has long been introduced and established in our courts of equity, not to mention the civil-law courts; and it seems the height of judicial absurdity, that in the same cause, between the same parties, in the examination of the same facts, a discovery by the oath of the parties should be permitted on one side of Westminster hall, and denied on the other; or that the judges of one and the same court should be bound by law to reject such a species of evidence, if attempted on a trial at bar, but, when sitting the next day as a court of equity, should be obliged to hear such examination read, and to found their decrees upon it. In short, within the same country, governed by the same laws, such a mode of inquiry should be universally admitted, or else universally rejected.[34] [*382

(u) 2 Whitelocke of Parl. 427. (w) Mod. Un. Hist. xxxiii. 22. (x) Ibid. 17.

[34] The Common-Law Procedure Act, 1854, now, however, enables either party, by leave of the court or a judge, to *interrogate* his opponent upon any matter as to which discovery may be sought, and to require such party to answer the questions within ten days, by affidavit sworn and filed in court in the ordinary way. Any person omitting, without

2. A second defect is of a nature somewhat similar to the first: the want of a compulsive power for the production of books and papers belonging to the parties. In the hands of third persons they can generally be obtained by rule of court, or by adding a clause of requisition to the writ of *subpœna*, which is then called a *subpœna duces tecum*. But, in mercantile transactions especially, the sight of the party's own books is frequently decisive; as the day-book of a trader, where the transaction was recently entered, as really understood at the time; though subsequent events may tempt him to give it a different colour. And, as this evidence may be finally obtained, and produced on a trial at law, by the circuitous course of filing a bill in equity, the want of an original power for the same purposes in the courts of law is liable to the same observations as were made on the preceding article.[35]

*383] 3. *Another want is that of powers to examine witnesses abroad, and to receive their depositions in writing, where the witnesses reside, and especially when the cause of action arises, in a foreign country.[36] To which may be added the power of examining witnesses that are aged, or going abroad, upon interrogatories *de bene esse;* to be read in evidence if the trial should be deferred till after their death or departure, but otherwise to be totally suppressed. Both these are now very frequently effected by mutual consent, if the parties are open and candid; and they may also be done indirectly at any time, through the channel of a court of equity; but such a practice has never yet been directly adopted(*y*) as the rule of a court of law.[37] Yet where the cause of action arises in India, and a suit is brought thereupon in any of the king's courts at Westminster, the court may issue a commission to examine witnesses upon the spot and transmit the depositions to England.(*z*)

4. The administration of justice should not only be chaste, but should not even be suspected. A jury coming from the neighbourhood has in some respects a great advantage, but is often liable to strong objections; especially in small jurisdictions, as in cities which are counties of themselves, and where such assizes are but seldom holden; or where the question in dispute has an extensive

(*y*) See page 73. (*z*) Stat. 13 Geo. III. c. 63.

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just cause, to answer all questions as to which a discovery is sought is guilty of a contempt, and liable to be proceeded against accordingly.—KERR.

[35] Where one party is in possession of papers or any species of written evidence material to the other, if notice is given him to produce them at the trial, upon his refusal copies of them will be admitted; or, if no copy has been made, parol evidence of their contents will be received. The court and jury presume in favour of such evidence, because, if it were not agreeable to the strict truth, it would be corrected by the production of the originals. There is no difference with respect to this species of evidence between criminal and civil cases. 2 T. R. 201.—CHRISTIAN.

The statute 14 & 15 Vict. c. 99, s. 6, enacts that, on any action or other legal proceeding in the superior courts of common law, the court or any judge thereof may, on application by either of the litigants, compel the opposite party to allow the party applying to *inspect* all documents in his custody or under his control relating to such action or other legal proceeding, in all cases in which a discovery may be obtained by filing a bill or other proceeding in a court of equity.—KERR.

[36] But now, by stat. 1 W. IV. c. 22, the courts of law at Westminster are empowered, in any action depending in such courts, upon the application of any of the parties to such action, to order the examination, upon oath, upon interrogatories, or otherwise, of any witnesses, and, if any of such witnesses are out of the jurisdiction of the court when the action is pending, to order a commission to issue for their examination, and to give all such directions touching the time, place, and manner of the examination as may appear reasonable and just; but no examination or deposition taken by virtue of the act can be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge that the examinant is then beyond the jurisdiction of the court, or dead, or unable, from permanent sickness, to attend the trial. And now, by stat. 6 & 7 Vict. c. 82, s. 5, power is given to compel the attendance of persons to be examined under any commission.—STEWART.

[37] A court can compel the plaintiff to consent to have a witness going abroad examined upon interrogatories, or to have an absent witness examined under a commission, by the power the judges have of putting off the trial; but they have no control in these instances over the defendant.—CHRISTIAN.

local tendency; where a cry has been raised, and the passions of the multitude been inflamed; or where one of the parties is popular, and the other a stranger or obnoxious. It is true that, if a whole county is interested in the question to be tried, the trial by the rule of law(*a*) must be in some adjoining county; but, as there may be a strict interest so minute as not to occasion any bias, so there may be the strongest bias without any pecuniary interest. In all these cases, to summon a jury, labouring under local prejudices, is laying a snare for their consciences; and, though they should have virtue and vigour of mind sufficient to keep them upright, the parties will grow suspicious, and resort under various pretences to another mode of trial. The courts of law will therefore, in *transitory* actions, very often change the *venue*, or county wherein the cause is to be *tried:(*b*) but in *local* actions, though they sometimes do it indirectly and by mutual consent, yet to effect it directly and absolutely, the parties [*384 are driven to a court of equity; where, upon making out a proper case, it is done upon the ground of being necessary to a fair, impartial, and satisfactory trial.(*c*)[38]

The locality of trial required by the common law seems a consequence of the antient locality of jurisdiction. All over the world, actions transitory follow the person of the defendant, territorial suits must be discussed in the territorial tribunal. I may sue a Frenchman here for a debt contracted abroad; but lands lying in France must be sued for there, and English lands must be sued for in the kingdom of England. Formerly they were usually demanded only in the court-baron of the manor, where the steward could summon no jurors but such as were the tenants of the lord. When the cause was removed to the hundred court, (as seems to have been the course in the Saxon times,)(*d*) the lord of the hundred had a further power, to convoke the inhabitants of different vills to form a jury; observing probably always to intermix among them a stated number of tenants of that manor wherein the dispute arose. When afterwards it came to the county-court, the great tribunal of Saxon justice, the sheriff had wider authority, and could impanel a jury from the men of his county at large: but was obliged (as a mark of the original locality of the cause) to return a competent number of hundredors; omitting the inferior distinction, if indeed it ever existed. And when at length, after the conquest, the king's justiciars drew the cognizance of the cause from the county-court, though they could have summoned a jury from any part of the kingdom, yet they chose to take the cause as they found it, with all its local appendages; triable by a stated number of hundredors, mixed with other freeholders of the county. The restriction as to hundredors hath gradually worn away, and at length entirely vanished;(*e*) that of *counties still remains, for many beneficial pur- [*385 poses: but, as the king's courts have a jurisdiction coextensive with the kingdom, there surely can be no impropriety in sometimes departing from the general rule, when the great ends of justice warrant and require an exception.

I have ventured to mark these defects, that the just panegyric, which I have given on the trial by jury, might appear to be the result of sober reflection, and not of enthusiasm or prejudice. But should they, after all, continue unremedied and unsupplied, still (with all its imperfections) I trust that this mode of decision will be found the best criterion, for investigating the truth of facts, that was ever established in any country.

(*a*) Stra. 177.
(*b*) See page 294.
(*c*) This, among a number of other instances, was the case of the issues directed by the house of lords in the cause between the duke of Devonshire and the minors of the county of Derby, A.D. 1762.
(*d*) *LL. Edw. Conf.* c 32. Wilk. 203.
(*e*) See page 360.

[38] This may now be done in a court of law. Tidd, 8th ed. 655.—CHITTY.

CHAPTER XXIV.

OF JUDGMENT AND ITS INCIDENTS.

*386] *In the present chapter we are to consider the transactions in a cause, next immediately subsequent to arguing the demurrer, or trial of the issue.

If the issue be an issue of fact, and, upon trial by any of the methods mentioned in the two preceding chapters, it be found for either the plaintiff or defendant, or specially; or if the plaintiff makes default, or is non-suit; or whatever, in short, is done subsequent to the joining of issue and awarding the trial, it is entered on record, and is called a *postea*.(a) The substance of which is, that *postea*, *afterwards*, the said plaintiff and defendant appeared by their attorneys at the place of trial; and a jury, being sworn, found such a verdict; or, that the plaintiff, after the jury sworn, made default, and did not prosecute his suit; or, as the case may happen. This is added to the roll, which is now returned to the court from which it was sent; and the history of the cause, from the time it was carried out, is thus continued by the *postea*.[1]

Next follows, *sixthly*, the judgment of the court upon what has previously passed; both the matter of law and matter of fact being now fully weighed and adjusted. Judgment *may, however, for certain causes be *suspended*, or finally *arrested*: for it cannot be entered till the next term after trial had, and that upon notice to the other party. So that if any defect of justice happened at the trial, by surprise, inadvertence, or misconduct, the party may have relief in the court above, by obtaining a new trial; or if, notwithstanding the issue of fact be regularly decided, it appears that the complaint was either not actionable in itself, or not made with sufficient precision and accuracy, the party may supersede it by arresting or staying the judgment.

*387]

(a) Append. No. II. § 6.

[1] As to the *postea* in general, see Tidd, 8th ed. 931 to 934. The verdict is entered on the back of the record of nisi prius, which entry, from the Latin word it began with, is called the *postea*. When the cause is tried in the King's Bench in London or Middlesex, the record is delivered to the attorney of the successful party, and he afterwards endorses the *postea* from the associate's minute on the panel: but in country causes the associate keeps the record till the next term, and then delivers it, with the *postea* endorsed, to the party obtaining the verdict. The practice is in some respects different in the Common Pleas, where in town causes also the record remains with the associate till the *quarto die post* of the return of the *habeas corpora juratorum*, who endorses the *postea* upon the record; but, by a recent order, it is not to be delivered till the morning of the fifth day of the term. See 1 Brod. & B. 298. 3 Moore, 643. If the *postea* be lost, a new one may, in some cases, be made out from the record above and the associate's notes, (2 Stra. 1264;) if wrong, it may be amended by the plea-roll, (1 Ld. Raym. 133.) by the memory or notes of the judge, (Cro. Car. 338. Bull. N. P. 320. 2 Stra. 1197. 6 T. R. 694. 1 Bar. & Ald. 161. 2 Cha. R. 352.) or the notes of the associate or clerk of assize. 2 Chitt. R. 352. 1 Bos. & Pul. 329. The application to amend by the judge's notes must be made to the judge who tried the cause. 1 Chitt. R. 283. The court will not alter a verdict unless it appear on the face of it that the alteration would be according to the intention of the jury, (1 H. Bla. 78;) but not after a considerable lapse of time to increase damages, although the jury join in an affidavit stating their intention to have been to give the increased sum, and thought they had in effect done so. 2 T. R. 281; *sed vide* 1 Burr. 383, where a verdict was rectified which had been mistakenly delivered by the foreman. Where the jury had found the treble value in an action of debt on the statute for not setting out tithes, on a writ of inquiry, the inquisition was amended by the insertion of nominal damages. 1 Bingh. R. 182. In an action by one defendant in assumpsit against a co-defendant for contribution, the *postea* is evidence to prove the amount of the damages. 2 Stark. R. 364. See 9 Price, 359. Tidd, 8th ed. 932, 933. The production of the *postea* is not sufficient evidence of a judgment: a copy of the judgment founded thereon must also be produced. Bull. N. P. 234. Willes, 367. But the nisi prius record, with the *postea* endorsed, is sufficient to prove that the cause came on to be tried, (1 Stra. 162. Willes, 368,) or the day of trial. 6 Esp. R. 80, 83. See 9 Price, 359. Tidd, 8th ed. 977.—Chitty.

1. Causes of *suspending* the judgment, by granting a *new* trial,[2] are at present wholly *extrinsic*, arising from matter foreign to, or *dehors* the record. Of this sort are want of notice of trial; or any flagrant misbehaviour of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehaviour of the jury among themselves: also if it appears by the judge's report, certified by the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith;(*b*) or if they have given exorbitant damages;(*c*) or if the judge himself has misdirected the jury, so that they found an unjustifiable verdict: for these, and other reasons of the like kind, it is the practice of the court to award a *new*, or second, *trial*. But if two juries agree in the same or a similar verdict, a third trial is seldom awarded:(*d*) for the law will not readily suppose that the verdict of any one subsequent jury can countervail the oaths of the two preceding ones.

(*b*) Law of Nisi Prius, 303, 304. (*c*) Comb. 357. (*d*) 6 Mod. 22. Salk. 649.

[2] As to new trials in general, see Tidd, 8th ed. 934 to 949. When there are two contrary verdicts, it is not of course, but in the discretion of the court, to grant a new trial. 2 Bla. R. 963. In an inferior court it is said a new trial cannot be had upon the merits, but only for irregularity, (1 Salk. 201. 2 Salk. 650. 1 Stra. 113, 499. 1 Burr. 572. Doug. 380. 2 Chitty's R. 250;) but it may set aside a regular interlocutory judgment to let in a trial of the merits. 1 Burr. 571. The principal grounds for setting aside a verdict or non-suit, and granting a new trial, besides those mentioned in the text, are—1st. The discovery of new and material evidence since the trial. 2 Bla. Rep. 955. 2d. If the witnesses on whose testimony the verdict was obtained have been since convicted of perjury in giving their evidence, (M. 22 Geo. III. K. B.;) or if probable ground be laid to induce the court to believe that the witnesses are perjured, they will stay the proceedings on the finding of a bill of indictment against them for perjury, till the indictment is tried, (ib.:) but the circumstance of an indictment for perjury having been found against a witness is no ground of motion for new trial. 4 M. & S. 140. 8 Taunt. 182. 3d. For excessive damages, indicating passion or partiality in the jury. 1 Stra. 692. 1 Burr. 609. 3 Wils. 18. 2 Bl. Rep. 929. Cowp. 230. 5 T. R. 257. 7 ib. 529. 11 East, 23. It is not usual to grant a new trial for smallness of damages, (2 Salk. 647. 2 Stra. 940. Doug. 509. Barnes, 455, 456;) in which latter case it is said, if the demand is certain, as on a promissory-note, the court will set aside a verdict for too small damages, but not where the damages are uncertain. Lastly, it is a general rule not to grant a new trial, except for the misdirection of the judge, (4 T. R. 753. 5 ib. 19. 6 East, 316, (b). 1 Marsh. 555;) or where a point has been saved at the trial, (1 B. & P. 338;) in a penal, (2 Stra. 899. 10 East, 268. 4 M. & S. 338. 2 Chitty's R. 273,) hard, or trifling action, (2 Salk. 653. 3 Burr. 1306;) and an action is considered trifling in this respect when the sum to be recovered is under 20*l*. (5 Taunt. 537. 1 Chitty's R. 265, (a.),) unless the trial is to settle a right of a permanent nature. Ib. In all these cases, if the verdict be agreeable to equity and justice, the court will not grant a new trial, though there may have been an error in the admission or rejection of evidence, or in the direction of the judge, if it appear to the court on the whole matter disclosed by the report that the verdict ought to be confirmed. 4 T. R. 468.

A new trial cannot be granted in civil cases at the instance of *one* of several defendants, (12 Mod. 275. 2 Stra. 814,) nor for a *part* only of the cause of action. 2 Burr. 1224. 3 Wils. 47. But there may be cases in which the new trial is restricted to a particular part of the record, as if the judge give leave to move on one part or point only, on a stipulation that counsel shall not move for any thing else; or if the court think injustice may be done by setting the whole matter at large again, they may restrict the second trial to certain particular points. 4 Taunt. 566.

In *criminal* cases no new trial can be granted where the defendant has been acquitted. 6 East, 315. 4 M. & S. 337. 1 B. & A. 64. Where several defendants are tried at the same time for a misdemeanour, and some are acquitted and others convicted, the court may grant a new trial to those convicted, if they think the conviction improper. 6 East, 619. See further, on this subject, Tidd, 8th ed. 934. In civil cases a motion for a new trial cannot be made after an unsuccessful motion in arrest of judgment. 4 Bar. & Cres. 160. The granting of a new trial is either without or upon payment of the costs of the former trial; or such costs are directed to abide the event of the suit. The general rule seems to be, that if the new trial be granted for the misbehaviour of the jury or the misdirection of the judge, the costs are not required to be paid by the party applying for a new trial; but where the mere error of the jury, or the discovery of fresh evidence, is the ground, the costs must be paid by the party moving to set aside the former verdict. See Tidd, 8th ed. 945.—CHITTY.

The exertion of these superintendent powers of the king's courts, in setting aside the verdict of a jury and granting a new trial, on account of misbehaviour in the jurors, is of a date extremely antient. There are instances, in the year-books of the reigns of Edward III.,(*e*) Henry IV.,(*f*) and Henry VII.,(*g*) of *388] judgments being stayed (even after a trial at bar) and *new *venires* awarded, because the jury had eat and drank without consent of the judge, and because the plaintiff had privately given a paper to a juryman before he was sworn. And upon these the chief justice Glynn, in 1655, grounded the first precedent that is reported in our books(*h*) for granting a new trial upon account of *excessive damages* given by the jury: apprehending, with reason, that notorious partiality in the jurors was a principal species of misbehaviour. A few years before, a practice took rise in the common pleas,(*i*) of granting new trials upon the mere certificate of the judge (unfortified by any report of the evidence) that the verdict had passed against his opinion; though chief justice Rolle (who allowed of new trials in case of misbehaviour, surprise, or fraud, or if the verdict was notoriously contrary to evidence)(*k*) refused to adopt that practice in the court of king's bench. And at that time it was clearly held for law,(*l*) that whatever matter was of force to avoid a verdict ought to be returned upon the *postea*, and not merely surmised by the court; lest posterity should wonder why a new *venire* was awarded, without any sufficient reason appearing upon the record. But very early in the reign of Charles the Second new trials were granted upon *affidavits*;(*m*) and the former strictness of the courts of law, in respect of new trials, having driven many parties into courts of equity to be relieved from oppressive verdicts, they are now more liberal in granting them: the maxim at present adopted being this, that (in all cases of moment) where justice is not done upon one trial, the injured party is entitled to another.(*n*)

Formerly the principal remedy, for reversal of a verdict unduly given, was by writ of *attaint;* of which we shall speak in the next chapter, and which is at least as old as the institution of the grand assize by Henry II.,(*o*) in lieu of *389] the Norman trial by battle. Such a sanction was probably thought *necessary when, instead of appealing to Providence for the decision of a dubious right, it was referred to the oath of fallible or perhaps corrupted men. Our ancestors saw that a jury might give an erroneous verdict, and, if they did, that it ought not finally to conclude the question in the first instance: but the remedy, which they provided, shows the ignorance and ferocity of the times, and the simplicity of the points then usually litigated in the courts of justice. They supposed that, the law being told to the jury by the judge, the proof of fact must be always so clear, that, if they found a wrong verdict, they must be wilfully and corruptly perjured. Whereas a juror may find a just verdict from unrighteous motives, which can only be known to the great Searcher of hearts: and he may, on the contrary, find a verdict very manifestly wrong, without any bad motive at all; from inexperience in business, incapacity, misapprehension, inattention to circumstances, and a thousand other innocent causes. But such a remedy as this laid the injured party under an insuperable hardship, by making a conviction of the jurors for perjury the condition of his redress.

The judges saw this; and therefore very early, even upon writs of assize, they devised a great variety of distinctions, by which an attaint might be avoided, and the verdict set to rights in a more temperate and dispassionate method.(*p*) Thus, if excessive damages were given, they were moderated by the discretion of the justices.(*q*) And if, either in that or in any other instance, justice was not completely done, through the error of either the judge or the recognitors, it was remedied by *certificate of assize*, which was neither

(*e*) 24 Edw. III. 24. Bro. Abr. tit. *verdite*, 17.
(*f*) 11 Hen. IV. 18. Bro. Abr. tit. *enquest*, 75.
(*g*) 14 Hen. VII. 1. Bro. Abr. tit. *verdite*, 18.
(*h*) Styl. 466.
(*i*) Ibid. 238.
(*k*) 1 Sid. 235. Styl. Pract. Reg. 310, 311, edit. 1657.
(*l*) Cro. Eliz. 616. Palm. 325. 1 Brownl. 207.
(*m*) 1 Sid. 235. 2 Lev. 140.
(*n*) 4 Burr. 395.
(*o*) *Ipsi regali institutioni eleganter inserta.* Glanv. *l.* 2, c. 19.
(*p*) Bract. *l.* 4, *tr.* 5, c. 4.
(*q*) Ibid. *tr.* 1, c. 19, § 8.

more nor less than a second trial of the same cause by the same jury.(r) And, in mixed or personal actions, as trespass and the like, (wherein no attaint originally lay,) if the jury gave a wrong verdict, the judges did not think themselves warranted thereby to pronounce an iniquitous judgment; but amended it, if possible, by subsequent inquiries of their own; and, if that *could not be, they referred it to another examination.(s) When afterwards [*390 attaints, by several statutes, were more universally extended, the judges frequently, even for the misbehaviour of jurymen, instead of prosecuting the writ of attaint, awarded a second trial; and subsequent resolutions for more than a century past have so amplified the benefit of this remedy that the attaint is now as obsolete as the trial by battle which it succeeded: and we shall probably see the revival of the one as soon as the revival of the other. And here I cannot but again admire(t) the wisdom of suffering time to bring to perfection new remedies, more easy and beneficial to the subject, which by degrees, from the experience and approbation of the people, supersede the necessity or desire of using or continuing the old.

If every verdict was final in the first instance, it would tend to destroy this valuable method of trial, and would drive away all causes of consequence to be decided according to the forms of the imperial law, upon depositions in writing, which might be reviewed in a course of appeal. Causes of great importance, titles to land, and large questions of commercial property come often to be tried by a jury, merely upon the general issue, where the facts are complicated and intricate, the evidence of great length and variety, and sometimes contradicting each other, and where the nature of the dispute very frequently introduces nice questions and subtleties of law. Either party may be surprised by a piece of evidence which, had he known of its production, he could have explained or answered; or he may be puzzled by a legal doubt which a little recollection would have solved. In the hurry of a trial, the ablest judge may mistake the law and misdirect the jury; he may not be able so to state and range the evidence as to lay it clearly before them, nor to take off the artful impressions which have been made on their minds by learned and experienced advocates. The jury are to give their *opinion *instanter;* that is, before they separate, eat, or drink. And under these circumstances the most intelligent [*391 and best-intentioned men may bring in a verdict which they themselves upon cool deliberation would wish to reverse.

Next to doing right, the great object in the administration of public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of bystanders, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive: he would arraign the determination as manifestly unjust, and abhor a tribunal which he imagined had done him an injury without a possibility of redress.

Granting a new trial, under proper regulations, cures all these inconveniences, and at the same time preserves entire and renders perfect that most excellent method of decision which is the glory of the English law. A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of court for awarding such second trial on the other: and the subsequent verdict, though contrary to the first, imports no tittle of blame upon the former jury, who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject; and nothing is now tried but the real merits of the case.

A sufficient ground must, however, be laid before the court, to satisfy them that it is necessary to justice that the cause should be further considered. If

(r) Ibid. l. 4. tr. 5. c. 6. § 2. F. N. B. 181. 2 Inst. 415.

(s) *Si juratores erraverint, et justiciarii secundum eorum dictum judicium pronuntiaverint, falsam faciunt pronuntiationem; et ideo sequi non debent eorum dictum, sed illud emendare tenentur per diligentum examinationem. Si autem dijudicare nesciant, recurrendum erit ad majus judicium.* Bract. l. 4. tr. 5, c. 4. § 2.

(t) See page 268.

the matter be such as did not or could not appear to the judge who presided at *nisi prius*, it is disclosed to the court by *affidavit:* if it arises from what passed at the trial, it is taken from the judge's information, who usually makes a special and minute report of the evidence. Counsel are heard on both sides *392] to impeach *or establish the verdict, and the court give their reasons at large why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colours are taken off, and all points of law which arose at the trial are upon full deliberation clearly explained and settled.

Nor do the courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case. A new trial is not granted where the value is too inconsiderable to merit a second examination. It is not granted upon nice and formal objections, which do not go to the real merits. It is not granted in cases of strict right or *summum jus*, where the rigorous exaction of extreme legal justice is hardly reconcilable to conscience. Nor is it granted where the scales of evidence hang nearly equal: that which leans against the former verdict ought always very strongly to preponderate.

In granting such further trial (which is matter of sound discretion) the court has also an opportunity, which it seldom fails to improve, of supplying those defects in this mode of trial which were stated in the preceding chapter; by laying the party applying under all such equitable terms as his antagonist shall desire and mutually offer to comply with: such as the discovery of some facts upon oath; the admission of others not intended to be litigated; the production of deeds, books, and papers; the examination of witnesses, infirm or going beyond sea; and the like. And the delay and expense of this proceeding are so small and trifling, that it seldom can be moved for to gain time or to gratify humour. The motion must be made within the first four days of the next succeeding term, within which term it is usually heard and decided. And it is worthy observation, how infinitely superior to all others the trial by jury approves itself, even in the very mode of its revision. In every other country of Europe, and in those of our own tribunals which conform themselves to the *393] *process of the civil law, the parties are at liberty, whenever they please, to appeal from day to day, and from court to court, upon questions merely of fact; which is a perpetual source of obstinate chicane, delay, and expensive litigation.(*u*) With us no new trial is allowed unless there be a manifest mistake, and the subject-matter be worthy of interposition. The party who thinks himself aggrieved may still, if he pleases, have recourse to his writ of attaint after judgment; in the course of the trial he may demur to the evidence, or tender a bill of exceptions. And, if the first is totally laid aside, and the other two very seldom put in practice, it is because long experience has shown that a motion for a second trial is the shortest, cheapest, and most effectual cure for all imperfections in the verdict; whether they arise from the mistakes of the parties themselves, of their counsel, or attorneys, or even of the judge or jury.

2. Arrests of judgment[3] arise from *intrinsic* causes, appearing upon the face

(*u*) Not many years ago an appeal was brought to the house of lords from the court of session in Scotland, in a cause between Napier and Macfarlane. It was instituted in March, 1745, and (after many interlocutory orders and sentences below, appealed from and reheard as far as the course of proceedings would admit) was finally determined in April, 1749,—the question being only on the property in an ox, adjudged to be of the value of three guineas. No pique or spirit could have made such a cause, in the court of King's Bench or Common Pleas, have lasted a tenth of that time, or have cost a twentieth part of the expense.

[3] The parties cannot move in arrest of judgment for any thing that is aided after verdict at common law, or by the statute of amendments, or cured, as matter of form, by the statute of jeofails. See 1 Saund. 228, n. (1.) It is a general rule that a verdict will aid a title imperfectly set out, but not an imperfect title. 2 Burr. 1159. 3 Wils. 275. 4 T. R. 472. The defendant cannot move in arrest of judgment for any thing which he might have pleaded in abatement. 2 Bla. R. 1120. Surplusage will not vitiate after verdict: as in trover stating the possession of the goods in plaintiff on the 3d of March, and the conversion by defendant "afterwards *to wit on the* 1*st of March*," it was held that after-

of the record. Of this kind are, first, where the declaration varies totally from the original writ; as where the writ is in debt or detinue, and the plaintiff declares in an action on the case for an *assumpsit;* for, the original writ out of chancery being the foundation and warrant of the whole proceedings in the common pleas, if the declaration does not pursue the nature of the writ, the court's authority totally fails.[4] Also, secondly, where the verdict materially differs from the pleadings and issue thereon; as if, in an action for words, it is laid in the declaration that the defendant said, "the plaintiff *is* a bankrupt;" and the verdict finds specially that he said, "the plaintiff *will be* a bankrupt." Or, thirdly, if the case laid in the declaration is not sufficient in point of law to found an action upon. And this is an invariable *rule with regard to arrests of judgment upon matter of law, "that whatever is alleged in [*394 arrest of judgment must be such matter as would upon demurrer have been sufficient to overturn the action or plea." As if, on an action for slander in calling the plaintiff a Jew, the defendant denies the words, and issue is joined thereon; now if a verdict be found for the plaintiff, that the words were actually spoken, whereby the fact is established, still the defendant may move in arrest of judgment, that to call a man a Jew is not actionable: and, if the court be of that opinion, the judgment shall be arrested and never entered for the plaintiff. But the rule will not hold *e converso,* "that every thing that may be alleged as cause of demurrer will be good in arrest of judgment;" for if a declaration or plea omits to state some particular circumstance, without proving of which at the trial it is impossible to support the action or defence, this omission shall be aided by a verdict. As if, in an action of trespass, the declaration doth not allege that the trespass was committed on any certain day;(*w*) or if the defendant justifies, by prescribing for a right of common for his cattle, and does not plead that his cattle were *levant* and *couchant* on the land;(*x*)[5] though either of these defects might be good cause to demur to the declaration or plea, yet if the adverse party omits to take advantage of such omission in due time, but takes issue, and has a verdict against him, these exceptions cannot after verdict be moved in arrest of judgment. For the verdict ascertains those facts, which before from the inaccuracy of the pleadings might be dubious; since the law will not suppose, that a jury under the inspection of a judge would find a verdict for the plaintiff or defendant, unless he had proved those circumstances, without which his general allegation is defective.(*y*)[6] Exceptions therefore that

(*w*) Carth. 389. (*x*) Cro. Jac. 44. (*y*) 1 Mod. 292.

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wards might stand, and the other words be treated as surplusage. Cro. C. 428. The motion in arrest of judgment, &c. may be made in the King's Bench at any time before judgment is given, (5 T. R. 445. 2 Stra. 845,) though a new trial has been previously moved for. Doug. 745, 746. In the Common Pleas, the motion must be made before or on the appearance-day of the return of the *habeas corpora juratorum.* Barnes, 445. In the Exchequer, the motion must be made within the first four days of the next term after the trial, and it may be made after an unsuccessful motion for a new trial. See Manning's Ex. Prac. 353. Tidd, 960, 961; but see 7 Price, 566.

If the judgment be arrested in consequence of mistake of the form of action, or otherwise, the plaintiff is at liberty to proceed *de novo* in a fresh action. 1 Mod. 207. Vin. Abr. tit. Judgment, Q. 4. Bla. R. 831. Each party pays his own costs upon the judgment being arrested. Cowp. 407.—CHITTY.

[4] Now no form of action is stated in the writ. Com. Law Proc. Act, 1853, s. 3.—STEWART.

[5] See, however, 1 Saund. 228, note 1.—CHITTY.

[6] It is correctly observed, upon this passage, that though Sir W. Blackstone has stated with correctness the principle upon which defects are aided by a verdict at common law, yet his two examples are instances of defects aided after verdict by the statute of jeofails. See *post,* 408. Stewart *vs.* Hogg, 1 Saund. 228, n. (1.) In the first case the trespass was alleged to *have been* committed on a day not yet come, this was clearly no omission of any circumstance necessary in the proof, but a formal misstatement. So again, where the party stated a prescriptive right of common, but neglected to bring his case formally within it by averring the levancy and couchancy of the cattle, which was one condition of the prescription, the issue being taken on the prescription itself, no proof was necessary that the particular cattle were levant and couchant in fact; the omission of

are moved in arrest of judgment must be much more material and glaring than such as will maintain a demurrer: or, in other words, many inaccuracies and omissions, which would be fatal if early observed, are cured by a subsequent verdict; and not suffered, in the last stage of a cause, to unravel the whole proceedings. *But if the thing omitted be essential to the action or defence, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is totally defective in itself,(z) or if to an action of debt the defendant pleads *not guilty* instead of *nil debet*,(a) these cannot be cured by a verdict for the plaintiff in the first case, or for the defendant in the second.

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If, by the misconduct or inadvertence of the pleaders,[7] the issue be joined on a fact totally immaterial, or insufficient to determine the right, so that the court upon the finding cannot know for whom judgment ought to be given; as if, in an action on the case in *assumpsit* against an executor, he pleads that he himself (instead of the testator) made no such promise:(b) or if, in an action of debt on bond conditioned to pay money *on* or *before* a certain day, the defendant pleads payment *on* the day:(c) (which issue, if found for the plaintiff, would be inconclusive, as the money might have been paid *before;*) in these cases the court will after verdict award a *repleader quod partes replacitent;* unless it appears from the whole record that nothing material can possibly be pleaded in any shape whatsoever, and then a repleader would be fruitless.(d) And, whenever a repleader is granted, the pleadings must begin *de novo* at that stage of them, whether it be the plea, replication, or rejoinder, &c., wherein there appears to have been the first defect, or deviation from the regular course.(e)

If judgment is not by some of these means arrested within the first four days of the next term after the trial, it is then to be entered on the roll or record.[8] Judgments are the sentence of the law, pronounced by the court upon the matter contained in the record; and are of four sorts. First, where the facts are confessed by the parties, and the law determined by the court; as in case of judgment upon *demurrer:* secondly, where the law is admitted by the parties, and the facts disputed; as in case of judgment on a *verdict:* thirdly, where *both the fact and the law arising thereon are admitted by the defendant; which is the case of judgments by *confession* or *default:* or, lastly, where the plaintiff is convinced that either fact, or law, or both, are insufficient

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(z) Salk. 305.
(a) Cro. Eliz. 778.
(b) 2 Ventr. 190.
(c) Stra. 994.
(d) 4 Burr. 301, 302.
(e) Raym. 458. Salk. 579.

that fact therefore was not the omission of a circumstance necessary in the proof: in other words, the verdict in neither case raises a presumption that the fact omitted was proved to the jury. But an instance in point may be put thus: if a man states the grant of a reversion, which can only be conveyed by deed, without alleging it to have been by deed, here if the fact of the grant be put in issue and found by the jury, the verdict covers the omission; for without proof of the deed the presumption is that it could not have been so found.—Coleridge.

[7] The following rules have been laid down on this subject. A repleader ought never to be allowed till trial, because the fault of the issue may be helped after the verdict by the statute of jeofails. 2dly. If a repleader be denied where it should be granted, or granted where it should be denied, it is error. 3dly. The judgment of repleader is general, and the parties must begin again at the first fault which occasioned the immaterial issue. 1 Lord Raym. 169. Thus, if the declaration be ill, and the bar and replication are also ill, the parties must begin *de novo;* but if the bar be good and the replication ill, at the replication. 3 Keb. 664. 4thly. No costs are allowed on either side. 6 T. R. 131. 2 B. & P. 376. 5thly. That a repleader cannot be awarded after a default at nisi prius; to which may be added, that it can never be awarded after a demurrer or writ of error, but only after issue joined, (3 Salk. 306,) nor where the court can give judgment on the whole record, (Willes, 532;) and it is not grantable in favour of the person who made the first fault in pleading. Doug. 396. See 2 Saund. 319, b.—Chitty.

[8] If a verdict is taken generally, with entire damages, judgment may be arrested if any one count in the declaration is bad; but if there is a general verdict of guilty upon an indictment consisting of several counts, and any one count is good, that is held to be sufficient. Doug. 730.—Chitty.

to support his action, and therefore abandons or withdraws his prosecution; which is the case in judgments upon a *non-suit* or *retraxit*.

The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of *the law*. It is the conclusion that naturally and regularly follows from the premises of law and fact, which stand thus: against him, who hath rode over my corn, I may recover damages by law: but A. hath rode over my corn; therefore I shall recover damages against A. If the major proposition be denied, this is a demurrer in law: if the minor, it is then an issue of fact: but if both be confessed (or determined) to be right, the conclusion or judgment of the court cannot but follow. Which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. The judgment, in short, is the remedy prescribed by law for the redress of injuries; and the suit or action is the vehicle or means of administering it. What that remedy may be, is indeed the result of deliberation and study to point out; and therefore the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own; but, "it is considered," *consideratum est per curiam*, that the plaintiff do recover his damages, his debt, his possession, and the like: which implies that the judgment is none of their own; but the act of law, pronounced and declared by the court, after due deliberation and inquiry.

All these species of judgments are either *interlocutory* or *final*. *Interlocutory* judgments are such as are given in the middle of a cause, upon some plea, proceeding, or default which is only intermediate, and does not finally determine or complete the suit. Of this nature are all judgments for the plaintiff upon pleas in abatement of the suit or action: in *which it is considered [*397 by the court, that the defendant do answer over, *respondeat ouster;* that is, put in a more substantial plea.(*f*) It is easy to observe, that the judgment here given is not final, but merely interlocutory; for there are afterwards further proceedings to be had, when the defendant has put in a better answer.

But the interlocutory judgments, most usually spoken of, are those incomplete judgments, whereby the *right* of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained: which is a matter that cannot be done without the intervention of a jury. As by the old Gothic constitution the cause was not completely finished, till the *nembda* or jurors were called in "*ad executionem decretorum judicii, ad æstimationem pretii, damni lucri, &c.*"(*g*) This can only happen where the plaintiff recovers; for, when judgment is given for the defendant, it is always complete as well as final. And this happens, in the first place, where the defendant suffers judgment to go against him by default, or *nihil dicit;* as if he puts in no plea at all to the plaintiff's declaration: by confession or *cognovit actionem*, where he acknowledges the plaintiff's demand to be just: or by *non sum informatus*, when the defendant's attorney declares he has no instruction to say any thing in answer to the plaintiff, or in defence of his client; which is a species of judgment by default. If these, or any of them, happen in actions where the specific thing sued for is recovered, as in actions of debt for a sum certain, the judgment is absolutely complete. And therefore it is very usual, in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to some attorney named by the creditor, empowering him to confess a judgment by either of the ways just now mentioned (by *nihil dicit*, *cognovit actionem*, or *non sum informatus*) in an action of debt to be brought by the creditor against the debtor for the specific sum due:[9] which

(*f*) 2 Saund. 30. (*g*) Stiernhook, *de jure Goth. l.* 1, c. 4.

[9] For the purpose of preventing frauds upon creditors by secret warrants of attorney to confess judgment, it is enacted, by statute 3 Geo. IV. c. 39, enlarged by 6 & 7 Vict. c. 66, that the clerk of the dockets of the court of Queen's Bench shall cause a book in which the particulars of every warrant of attorney and *cognovit actionem* shall be entered; and also a book or index shall be kept of names of persons to whom warrants of attorney are given, which shall be open to inspection. And by the Bankrupt-Law Consolidation Act, 1849, s. 137, every judge's order given by a trader defendant, whereby the plaintiff

judgment, when confessed, is absolutely complete and binding; provided the *398] same (as is also required in all other judgments) be regularly *docquetted*, that is, abstracted and entered in a book, *according to the directions of statute 4 & 5 W. and M. c. 20.[10] But, where damages are to be recovered, a jury must be called in to assess them; unless the defendant, to save charges, will confess the whole damages laid in the declaration: otherwise the entry of the judgment is, "that the plaintiff ought to recover his damages, (indefinitely,) but, because the court know not what damages the said plaintiff hath sustained, therefore the sheriff is commanded, that by the oaths of twelve honest and lawful men he inquire into the said damages, and return such inquisition into court." This process is called a *writ of inquiry:* in the execution of which the sheriff sits as judge, and tries by a jury, subject to nearly the same laws and conditions as the trial by jury at *nisi prius*, what damages the plaintiff hath really sustained; and when their verdict is given, which must assess *some* damages, the sheriff returns the inquisition, which is entered upon the roll in manner of a *postea;* and thereupon it is considered, that the plaintiff do recover the exact sum of the damages so assessed. In like manner, when a demurrer is determined for the plaintiff upon an action wherein damages are recovered, the judgment is also incomplete, without the aid of a writ of inquiry.[11]

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is authorized to sign judgment or issue execution, (or a copy of this order,) must be filed with the clerk of the docquets in the Queen's Bench within twenty-one days after the making of such order: otherwise judgment signed thereon, or execution issued, shall be null and void. And by stat.1 & 2 Vict., c. 110, a more important alteration has been made in the same respecting warrants of attorney and cognovits. By s. 9, after reciting that it is expedient that provision should be made for giving every person executing such instruments due information of the nature thereof, it is enacted that no warrant of attorney or cognovit shall be of any force unless an attorney of one of the superior courts shall be present on behalf of the person executing it and shall subscribe his name as a witness. And by s. 10, a warrant of attorney or cognovit not formally executed shall be invalid.—Stewart.

[10] The judgment must be re-registered every five years, in order to remain in force and preserve its priority of subsequent judgment-creditors. 1 & 2 Vict. c. 110. 3 & 4 Vict. c. 82, s. 2. 2 Vict. c. 11, s. 1. 18 & 19 Vict. c. 15, s. 4. Freer *vs.* Hesse, 22 L. F. Chanc. 597.—Kerr.

[11] It has been said by C. J. Wilmot that "this is an inquest of office to inform the conscience of the court, who, if they please, may themselves assess the damages." 3 Wils. 62. Hence a practice is now established in the courts of King's Bench and Common Pleas, in actions where judgment is recovered by default upon a bill of exchange or a promissory-note, to refer it to the master or prothonotary to ascertain what is due for principal, interest, and costs, whose report supersedes the necessity of a writ of inquiry. 4 T. R. 275. 1 H. Bla. 541. And this practice is now adopted by the court of exchequer. 4 Price, 134. See, further, Tidd, 8th ed. 817, 818, 819. In cases of difficulty and importance, the court will give leave to have the writ of inquiry executed before a judge at sittings or nisi prius; and then the judge acts only as an assistant to the sheriff. The number of the jurors sworn upon this inquest need not be confined to twelve; for when a writ of inquiry was executed at the bar of the court of King's Bench, in an action of *scandalum magnatum* brought by the duke of York (afterwards James the Second) against Titus Oates, who had called him a traitor, fifteen were sworn upon the jury, who gave all the damages laid in the declaration,—viz., 100,000*l.* In that case the sheriffs of Middlesex sat in court, covered, at the table below the judges. 3 St. Tr. 987.—Christian.

Before the 8 & 9 W. III. c. 11, the penalty in a bond for the performance of covenants became forfeited upon a single breach thereof; but now, by the 8th section of that statute, though the plaintiff is permitted to enter up judgment for the whole penalty, it can only stand as a security for the damages actually sustained. The plaintiff must then proceed by suggesting breaches on the roll, of which it is usual to give a copy to the defendant, with notice of inquiry for the sittings or assizes; and the damages are assessed upon the writ in the usual way by a jury; and, upon payment of them, execution upon the judgment entered up is stayed, the judgment itself remaining as a security against further breaches. See Tidd, 8th ed. 632. This statute does not extend to a bond conditioned for the payment of a sum certain at a day certain, as a post-obit bond, (2 B. & C. 82,) nor a common money bond, (4 Anne, c. 16, s. 13. 1 Saund. 58,) nor a warrant of attorney payable by instalments. (3 Taunt. 74. 5 Taunt. 264,) though a bond be also given, (2 Taunt. 195,) nor to a bail-bond, (2 B. & P. 446,) nor a petitioning

Final judgments are such as at once put an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. In which case, if the judgment be for the plaintiff, it is also considered that the defendant be either amerced, for his wilful delay of justice in not immediately obeying the king's writ by rendering the plaintiff his due;(*h*) or be taken up, *capiatur*, till he pays a fine to the king for the public misdemeanour which is coupled with the private injury in all cases of force,(*i*) of falsehood in denying his own deed,(*k*) or unjustly claiming property in replevin, or of contempt by disobeying the command of the king's writ or the express prohibition of any statute.(*l*) But now in case of trespass, ejectment, assault, and false imprisonment, it is provided, by the statute 5 & 6 W. and M. c. 12, *that no writ of *capias* shall issue for this fine, nor any fine be paid; but the plaintiff shall pay 6*s.* 8*d.* to the proper officer, and be allowed it against the defendant among his other costs. And therefore upon such judgments in the common pleas they used to enter that the fine was remitted; and now in both courts they take no notice of any fine or *capias* at all.(*m*) But if judgment be for the defendant, then, in case of fraud and deceit to the court or malicious or vexatious suits, the plaintiff may also be fined;(*n*) but in most cases it is only considered that he and his pledges of prosecuting be (nominally) amerced for his false claim, *pro falso clamore suo*, and that the defendant may go thereof without a day, *eat inde sine die*, that is, without any further continuance or adjournment; the king's writ, commanding his attendance, being now fully satisfied, and his innocence publicly cleared.(*o*)[12] [*399

Thus much for judgments; to which costs are a necessary appendage; it being now as well the maxim of ours as of the civil law that "*victus victori in expensis condemnandus est:*"(*p*) though the common law did not pro-

(*h*) 8 Rep. 40, 61.
(*i*) 8 Rep. 59. 11 Rep. 43. 5 Mod. 285. See Append. No. II. § 4.
(*k*) F. N. B. 121. Co. Litt. 131. 8 Rep. 60. 1 Roll. Abr. 219. Lill. Entr. 379, C. B. Hil. 4 Ann. *rot.* 430.
(*l*) 8 Rep. 60.
(*m*) Salk. 54. Carth. 390.
(*n*) 8 Rep. 59, 60.
(*o*) Append. No. III. § 6.
(*p*) Cod. 3, 1, 13.

creditor's bond. 3 East, 22. 7 T. R. 300. But all other bonds, either for payment of money by instalments, or of annuities, or for the performance of any covenants or agreements, are within the statute. See 8 T. R. 126. 6 East, 550. 2 Saund. 187, n. (c.) 3 M. & S. 156. 1 Chitty on Pl. 507, where the parties in a bond agree that the sum mentioned to be paid on a breach of any of its covenants shall be taken to be, and be considered as, *stipulated damages*, the case is not then within the statute, and the whole sum becomes at once payable, according to the terms of the agreement; for, where the precise sum is the ascertained damage, the jury are confined to it. See 4 Burr. 2225. 2 B. & P. 346. 1 Camp. 78. 2 T. R. 32. Holt, Rep. 43.—CHITTY.

[12] At common law the *death* of a sole plaintiff or sole defendant at any time before *final* judgment abated the suit; but now, by 17 Car. II. c. 8, where either party dies between *verdict* and judgment, it may still be entered up within two terms after the verdict. This statute does not apply where either party dies after *interlocutory* judgment and before the return of the inquiry. 4 Taunt. 884. There must be a *scire facias* to revive the judgment thus entered up before execution. 1 Wils. 302. By the 8 & 9 W. III. c. 11, the *casus omissus* in the statute of Charles II. is supplied. It provides that in case of either party dying between interlocutory and final judgment in any action which might have been maintained by or against the personal representative of the party dying; or in case of one or more of the plaintiffs or defendants dying, in an action the cause of which would by law survive to the survivors, the action shall not abate by reason thereof, but, the death being suggested on the record, the action shall proceed. The death of either party in the interval of hearing and deciding upon motions in arrest of judgment, special verdicts, and the like, does not deprive the party of the right to enter up judgment, though the delay thus occasioned by the court may exceed two terms after verdict. See Tidd, 8th ed. 966, 967, 1168, 1169. It has been held that if the party die after the assizes begin, though before the trial of the cause, it is within the statute, which, being remedial, must be construed favourably, the assizes being considered but as one day in law. 1 Salk. 8. 7 T. R. 31. See 2 Ld. Raym. 1415, n. But, in the Common Pleas, a verdict and judgment were set aside when the defendant died the night before trial at the sittings in term. 3 B. & P. 549. And where the verdict has been taken subject to a reference, the death of a party before an award revokes the authority of the arbitrator. 1 Marsh. 366. 2 B. & A. 394. 2 Chitt. R. 432.—CHITTY.

fessedly allow any, the amercement of the vanquished party being his only punishment. The first statute which gave costs, *eo nomine*, to the demandant in a real action was the statute of Gloucester, 6 Edw. I. c. 1, as did the statute of Marlberge, 52 Hen. III. c. 6, to the defendant in one particular case, relative to wardship in chivalry; though in reality costs were always considered and included in the *quantum* of damages in such actions where damages are given; and even now costs for the plaintiff are always entered on the roll as increase of damages by the court.(*q*) But because those damages were frequently inadequate to the plaintiff's expenses, the statute of Gloucester orders costs to be also added; and further directs that the same rule shall hold place in all cases where the party is to recover damages. And therefore, in such actions where no *400] damages were then recoverable, (as in *quare impedit*, in which *damages were not given till the statute of Westm. 2, 13 Edw. I.,) no costs are now allowed,(*r*) unless they have been expressly given by some subsequent statute.[13] The statute 3 Hen. VII. c. 10 was the first which allowed any costs on a writ of error. But no costs were allowed the *defendant* in any shape till the statutes 23 Hen. VIII. c. 15, 4 Jac. I. c. 3, 8 & 9 W. III. c. 11, 4 & 5 Anne, c. 16, which very equitably gave the defendant, if he prevailed, the same costs as the plaintiff would have had in case he had recovered. These costs, on both sides, are taxed and moderated by the prothonotary, or other proper officer of the court.

The king (and any person suing to his use)(*s*) shall neither pay nor receive costs; for, besides that he is not included under the general words of these statutes, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them.[14] And it seems reasonable to suppose that the queen-consort participates of the same privilege; for in actions brought by her she was not at the common law obliged to find pledges of prosecution, nor could be amerced in case there was judgment against her.(*t*) In two other cases an exemption also lies from paying costs. Executors and administrators, when suing in the right of the deceased, shall pay none;(*u*) for the statute 23 Hen. VIII. c. 15 doth not give costs to the defendants unless where the action supposeth the contract to be made with, or the wrong to be done to, the plaintiff himself.[15] And paupers, that is, such as will swear themselves not worth five pounds, are, by statute 11 Hen. VII. c. 12, to have original writs and *subpœnas gratis*, and counsel and attorney assigned them without fee; and are excused from paying costs when plaintiffs, by the statute 23 Hen. VIII. c. 15, but shall

(*q*) Append. No. II. § 4.
(*r*) 10 Rep. 116.
(*s*) Stat. 24 Hen. VIII. c. 8.
(*t*) F. N. B. 101. Co. Litt. 133.
(*u*) Cro. Jac. 229. 1 Ventr. 92.

[13] Wherever a party has sustained damage, and a new act gives another than the common-law remedy, such party may recover costs as well as damages; for the statute of Gloucester extends to give costs in all cases where damages are given to any plaintiff, in any action, by any statute after that parliament. 2 Inst. 289. 6 T. R. 355.—Chitty.

[14] There are some exceptions to the rule that the king neither pays nor receives costs. Thus, by 33 Hen. VIII. c. 39, s. 54, the king in all suits, upon any obligations or specialties made to himself or to his use, shall have and recover his just debts, *costs*, and damages, as other common persons used to do. By the 25 Geo. III. c. 35, if the goods and chattels are insufficient, (3 Price, 40,) and the lands are sold towards discharging the debt due to the crown in such case, "all *costs* and expenses incurred by the crown in enforcing the payment of such debt are to be paid." By 43 Geo. III. c. 99, s. 41, *costs* may be levied against collectors of taxes in certain cases. See 3 Price, 280. In equity, the attorney-general receives costs where he is made a defendant in respect of legacies given to charities, or in respect of the immediate rights of the crown in cases of intestacy. And see 1 S. & S. 394.—Chitty.

[15] If executors sue as executors for money paid to their use after the testator's death, they shall pay costs. 5 T. R. 234. Tidd, 1014. When executors and administrators are defendants, they pay costs like other persons. Tidd, 8th ed. 1016. Or wherever the cause of action arises in the time of the executor, as the conversion in the case of trover, the executor shall pay costs, because it is not necessary to bring the action in the character of executor. 7 T. R. 358. So an executor or administrator is liable to pay the costs of a non-pros. 6 T. R. 654. See, in general, Tidd, 8th ed. 1014.—Christian.

suffer other punishment at the discretion of the judges. And it was formerly usual to give such paupers, if non-suited, their election either to be whipped or pay the costs:(*w*) though that practice is now disused.(*x*)[16] It seems,*however, agreed, that a pauper may recover costs, though he pays none;[17] [*401 for the counsel and clerks are bound to give their labour to *him*, but not to his antagonist.(*y*) To prevent also trifling and malicious actions for words, for assault and battery, and for trespass, it is enacted, by statutes 43 Eliz. c. 6,[18] 21 Jac. I. c. 16, and 22 & 23 Car. II. c. 9, § 136, that where the jury who try any of these actions shall give less damages than 40*s*. the plaintiff shall be allowed no more costs than damages, unless the judge before whom the cause is tried shall certify under his hand on the back of the record that an actual battery (and not an assault only) was proved, or that in trespass the freehold or title of the land came chiefly in question.[19] Also, by statute 4 & 5 W. and M. c. 23, and 8 & 9 W. III. c. 11, if the trespass were committed in hunting or sporting by an inferior tradesman, or if it appear to be wilfully and maliciously committed, the plaintiff shall have full costs,(*z*) though his damages as assessed by the jury amount to less than 40*s*.

After *judgment* is entered, *execution* will immediately follow, unless the party condemned thinks himself unjustly aggrieved by any of these proceedings; and then he has his remedy to reverse them by several writs in the nature of appeals, which we shall consider in the succeeding chapter.

(*w*) 1 Sid. 261. 7 Mod. 114.
(*x*) Salk. 506.
(*y*) 1 Eq. Ca. Abr. 125.
(*z*) See pages 214, 215.

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[16] But, as observed in Tidd Prac. 8th ed. 94, it does not appear that so disgraceful a proceeding was ever adopted by inflicting the punishment.—CHITTY.

[17] 1 Bos. & P. 39. The pauper in such case can only recover as costs the sums he *is actually* out of pocket, not such sums as would have been so paid in an ordinary suit by any other plaintiff: and it seems that he and his solicitor may be required to state on oath the amount thus expended in equity. Hullock on Costs, 228.—CHITTY.

[18] The 43 Eliz. c. 6 enacts that where the plaintiff in any personal action, except for any title or interest in lands, or for a battery, recovers less than 40*s*., he shall have no more costs than damages, if the judge certifies that the debt or damages were under 40*s*. But if the judge does not grant such a certificate to the defendant, the plaintiff recovers full costs. Actions of trespass *vi et armis*, as for beating a dog, are within the statute. 3 T. R. 38. The certificate under the statute may be granted after the trial. This certificate, it will be remarked, is to restrain the costs; but a certificate under the 22 & 23 Car. II. c. 9 is given in favour of the plaintiff to extend them from a sum under 40*s*. to full costs. If the defendant justifies the battery, the plaintiff shall have full costs without the judge's certificate, though the damages are under 40*s*., for it is held the admission of the defendant precludes the necessity of the certificate. But a justification of the assault only will not be sufficient for this purpose; for the judge must certify an actual battery. 3 T. R. 391. This certificate also may be granted a reasonable time after the trial. 2 Bar. & Cres. 621 & 580.

In declarations for assault and battery there is sometimes a count for tearing the plaintiff's clothes; and if this is stated as a substantive injury, and the jury find it to have been such and not to have happened in consequence of the beating, the plaintiff will be entitled to full costs, (1 T. R. 656:) unless the judge should assist the defendant under the 43 Eliz. c. 6. So in a trespass upon land, the carrying away, or *asportavit*, of any independent personal property will entitle the plaintiff to full costs, unless the asportation, as by digging and carrying away turves, is a mode or qualification of the trespass upon the land. Doug. 780. See these acts and the cases upon them fully collected, Tidd, 987, 988, 996 to 1005.—CHRISTIAN.

[19] The account given of the 43 Eliz. c. 6 is not quite correct. That statute is not confined to the causes of action specified in the text, (indeed, it specifically excludes one of them, battery,) but extends generally to all personal actions; and its object was to confine suits for trifling matters to inferior courts. It does not require a certificate to *give* full costs, but to take them away; and it was the unwillingness of the judges to interpose under this statute which induced the legislature to pass the statutes of James and Charles upon a different system, these last restraining *generally* the costs in certain cases, unless the judge by his certificate deemed it proper to grant them.—COLERIDGE.

CHAPTER XXV.

OF PROCEEDINGS IN THE NATURE OF APPEALS.

*402] *Proceedings, in the nature of *appeals* from the proceedings of the king's courts of law, are of various kinds: according to the subject-matter in which they are concerned. They are principally four.

I. A writ of *attaint:*[1] which lieth to inquire whether a jury of *twelve* men gave a false verdict;(*a*) that so the judgment following thereupon may be reversed: and this must be brought in the lifetime of him for whom the verdict was given; and of two at least of the jurors who gave it. This lay at the common law only upon writs of *assize;* and seems to have been coeval with that institution by king Henry II., at the instance of his chief justice Glanvil: being probably meant as a check upon the vast power then reposed in the recognitors of assize, of finding a verdict according to their own personal knowledge, without the *403] examination of witnesses. And even here it extended no further than to such instances *where the issue was joined upon the very point of assize, (the heirship, disseisin, &c.,) and not on any collateral matter; as villenage, bastardy, or any other disputed fact. In these cases the *assize* was said to be turned into an *inquest* or a *jury*, (*assisa vertitur in juratum.*) or that the assize should be taken *in modum juratæ et non in modum assisæ;* that is, that the issue should be tried by a common jury or inquest, and not by recognitors of assize:(*b*) and then I apprehend that no attaint lay against the inquest or jury that determined such collateral issue.(*c*) Neither do I find any mention made by our antient writers, of such a process obtaining after the trial by inquest or jury, in the old Norman or feodal actions prosecuted by writ of *entry*. Nor did any attaint lie in *trespass*, *debt*, or other action personal, by the old common law: because those were always determined by common inquests or juries.(*d*) At length the statute of Westm. 1, 3 Edw. I. c. 38, allowed an attaint to be sued upon *inquests*, as well as *assizes*, which were taken upon any plea of *land* or of *freehold*. But this was at the king's discretion, and is so understood by the author of Fleta,(*e*) a writer contemporary with the statute; though Sir Edward Coke(*f*) seems to hold a different opinion. Other subsequent statutes(*g*) introduced the same remedy in all pleas of *trespass*, and the statute 34 Edw. III. c. 7 extended it to *all* pleas whatsoever, personal as well as real; except only the writ of *right*, in such cases where the mise or issue is joined on the *mere right*, and not on any *collateral* question. For though the attaint seems to have been generally allowed in the reign of Henry the Second,(*h*) at the first introduction of the grand assize, (which at that time might consist of only *twelve* recognitors, *404] in case they were all unanimous,) yet subsequent *authorities have holden that no attaint lies on a false verdict given upon the mere right, either at common law or by statute; because that is determined by the grand assize, appealed to by the party himself, and now consisting of *sixteen* jurors.(*i*)

The jury who are to try this false verdict must be twenty-four, and are called the grand jury; for the law wills not that the oath of one jury of twelve men should be attainted or set aside by an equal number, nor by less indeed than double the former.(*k*) If the matter in dispute be of forty pounds' value in personals, or of forty shillings a year in lands and tenements, then, by statute 15 Hen. VI. c. 5, each grand juror must have freehold to the annual value of twenty pounds. And he that brings the attaint can give no other evidence to the grand jury, than what was originally given to the petit. For as their verdict

(*a*) Finch, L. 484.
(*b*) Bract. *l.* 4, *tr.* 1, c. 34, §§ 2, 3, 4; *tr.* 3, c. 17; *tr.* 5, c. 4, §§ 1, 2. Flet. *l.* 5, c. 22, § 8. Co. Entr. 61, b. Booth, 213.
(*c*) Bract. 4, 1, 34, 2. Flet. ibid.
(*d*) Year-book, 28 Edw. III. 15, 17. *Ass.* pl. 15. Flet. 5, 22, 16.
(*e*) *L.* 5, c. 22, §§ 8, 16.
(*f*) 2 Inst. 130, 237.
(*g*) Stat. 1 Edw. III. st. 1, c. 6. 5 Edw. III. c. 7. 28 Edw. III. c. 8.
(*h*) See page 389.
(*i*) Bract. 290. Flet. 5, 22, 7. Britt. 242, b. 12 Hen. VI. 6 Bro. Abr. tit. *atteint*, 42. 1 Roll. Abr. 289.
(*k*) Bract. *l.* 4, *tr.* 5, c. 4, § 1. Flet. *l.* 5, c. 22, § 7.

[1] Abolished, by stat 6 Geo. IV. c. 60, *ante*.

is now trying, and the question is, whether or no they did right upon the evidence that appeared to them, the law adjudged it the highest absurdity to produce any subsequent proof upon such trial, and to condemn the prior jurisdiction for not believing evidence which they never knew. But those against whom it is brought are allowed, in affirmance of the first verdict, to produce new matter;(*l*) because the petit jury may have formed their verdict upon evidence of their own knowledge, which never appeared in court. If the grand jury found the verdict a false one, the judgment by the common law was, that the jurors should lose their *liberam legem* and become forever infamous; should forfeit their goods and the profits of their lands; should themselves be imprisoned, and their wives and children thrown out of doors; should have their houses razed, their trees extirpated, and their meadows ploughed; and that the plaintiff should be restored to all that he lost by reason of the unjust verdict. But as the severity of this punishment had its usual effect, in preventing the law from being executed, therefore by the *statute 11 Hen. VII. c. 24, revived by 23 [*405 Hen. VIII. c. 3, and made perpetual by 13 Eliz. c. 25, an attaint is allowed to be brought after the death of the party, and a more moderate punishment was inflicted upon attainted jurors; viz., perpetual infamy, and, if the cause of action were above 40*l.* value, a forfeiture of 20*l.* apiece by the jurors, or, if under 40*l.*, then 5*l.* apiece: to be divided between the king and the party injured. So that a man may now bring an attaint either upon the statute or at common law, at his election;(*m*) and in both of them may reverse the former judgment. But the practice of setting aside verdicts upon motion, and granting *new trials*, has so superseded the use of both sorts of attaints, that I have observed very few instances of an attaint in our books later than the sixteenth century.(*n*) By the old Gothic constitution, indeed, no certificate of a judge was allowed, in matters of evidence, to countervail the oath of the jury; but their verdict, however erroneous, was absolutely final and conclusive. Yet there was a proceeding from whence our attaint may be derived.—If, upon a lawful trial before a superior tribunal, the jury were found to have given a false verdict, they were fined, and rendered infamous for the future.(*o*)

II. The writ of *deceit*, or action on the case in nature of it, may be brought in the court of common pleas, to reverse a judgment there had by fraud or collusion in a real action, whereby lands and tenements have been recovered to the prejudice of him that hath right.[2] But of this enough hath been observed in a former chapter.(*p*)[3]

III. An *audita querela* is where a defendant, against whom judgment is recovered, and who is therefore in danger of execution, *or perhaps [*406 actually in execution, may be relieved upon good matter of discharge, which has happened since the judgment: as if the plaintiff hath given him a general release; or if the defendant hath paid the debt to the plaintiff without procuring satisfaction to be entered on the record. In these and the like cases, wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it, (either at the beginning of the suit, or *puis darrein continuance*, which, as was shown in a former chapter,(*q*) must always be before judgment,) an *audita querela* lies, in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It is a writ directed to the court, stating that the

(*l*) Finch, L. 486.
(*m*) 3 Inst. 164.
(*n*) Cro. Eliz. 309. Cro. Jac. 90.
(*o*) "*Si tamen evidenti argumento falsum jurasse convincantur (id quod superius judicium cognoscere debet) mulectantur in bonis, de cætero perjuri et intestabiles.*" Stiernh. *de jure Goth. l.* 1, c. 4.
(*p*) See page 165.
(*q*) See page 310.

[2] The writ has been abolished, by 3 & 4 W. IV. c. 27, s. 36.—STEWART.

[3] By stat. 9 Geo. IV. c. 14, s. 6, no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, liability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods, unless such representation or assurance be made in writing signed by the party to be charged therewith. Statute not to take effect till the 1st of January, 1829.—CHITTY.

complaint of the defendant hath been heard, *audita querela defendentis*, and then, setting out the matter of the complaint, it at length enjoins the court to call the parties before them, and, having heard their allegations and proofs, to cause justice to be done between them.(*r*) It also lies for bail, when judgment is obtained against them by *scire facias* to answer the debt of their principal, and it happens afterwards that the original judgment against their principal is reversed: for here the bail, after judgment had against them, have no opportunity to *plead* this special matter, and therefore they shall have redress by *audita querela*;(*s*) which is a writ of a most remedial nature, and seems to have been invented lest in any case there should be an oppressive defect of justice, where a party who hath a good defence is too late to make it in the ordinary forms of law. But the indulgence now shown by the courts in granting a summary relief upon motion, in cases of such evident oppression,(*t*) has almost rendered useless the writ of *audita querela*, and driven it quite out of practice.[4]

IV. But, fourthly, the principal method of redress for erroneous judgments in the king's court of record is by *writ of error* to some superior court of appeal.

*407] *A writ of error(*u*) lies for some supposed mistake in the proceedings of a court of record; for to amend errors in a base court, not of record, a writ of *false judgment* lies.(*v*) The writ of error only lies upon matter of *law* arising upon the face of the proceedings; so that no evidence is required to substantiate or support it; there being no method of reversing an error in the determination of *facts*, but by an attaint, or a new trial, to correct the mistakes of the former verdict.[5]

(*r*) Finch, L. 488. F. N. B. 102.
(*s*) 1 Roll. Abr. 308.
(*t*) Lord Raym. 439.
(*u*) Append. No. III. § 6.
(*v*) Finch, L. 484.

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[4] Ch. J. Eyre says, "I take it to be the modern practice to interpose in a summary way, in all cases where the party would be entitled to relief on an *audita querela*." 1 Bos. & Pul. 428. In general the courts will not put the defendant to the trouble and expense of an *audita querela*, but will relieve him in a summary way on motion, (4 Burr. 2287:) but where the ground of his relief is a release, when there is some doubt about the execution, or some matter of fact which cannot be clearly ascertained by affidavit, and therefore proper to be tried, the court has driven the defendant to his *audita querela*. 1 Salk. 93, 264. 1 Ld. Raym. 439. 12 Mod. 240. 2 Ld. Raym. 1295. 2 Stra. 1198. See also 5 Taunt. 561. 2 Marsh. 37. And, indeed, the indulgence which of late has been shown by courts of law in granting summary relief upon motion in most cases of evident oppression, for which the only remedy was formerly by *audita querela*, has occasioned this remedy now to be very rarely resorted to. An *audita querela* may be brought in the same court in which the record on which it is founded remains, or returnable in the same court; and yet the defendant may have an *audita querela* out of chancery, returnable in the Common Pleas or King's Bench; and so it is sometimes judicial, sometimes original. F. N. B. 239, 240, b., 7th ed. An *audita querela* is no *supersedeas*, and therefore execution may be taken out, unless a *supersedeas* be sued forth; and if an *audita querela* be founded on a deed, it must be proved in court before a *supersedeas* shall be granted. 1 Salk. 92. 1 Sid. 351. But an *audita querela* was lately brought in the case of Nathan *vs.* Giles, (7 Taunt. 557. 1 Marsh. 226, S. C.:) and it was there held that a writ of *audita querela* need not be moved for, but is a proceeding of common right and *ex debito justiciæ*. However, the *supersedeas* founded thereon must be moved for. If the plaintiff be non-suited, he may have a new *audita querela*, but he shall not have a *supersedeas*. F. N. B. 104, o., 9th ed. In Nathan *vs.* Giles, the court declared their opinion that there can be no motion in arrest of judgment on an *audita querela*. 2 Saund. 148, a., f.—Chitty.

[5] A writ of error lies for some error or defect in substance that is not aided, amendable, or cured at common law or by some of the statutes of jeofails. And it lies to the *same* court in which the judgment was given, if it be erroneous in matter of fact only; for error in fact is not the error of the judges, and reversing it is not reversing their own judgment: as where an infant appeared by attorney instead of guardian, or the plaintiff or defendant at the time of commencing the suit was a married woman. If a judgment in the King's Bench be erroneous in matter of *fact* only, and not in point of law, it may be reversed in the same court by writ of error *coram nobis*, or *quæ coram nobis resident*, so called from its being founded on the record and process, which are stated in the writ to remain in the court of the lord the king, before the king himself. But if the error be in the *judgment* itself, and not in the process, a writ of error does not lie in the same court

Formerly, the suitors were much perplexed by writs of error brought upon very slight and trivial grounds, as mis-spellings and other mistakes of the clerks, all which might be amended at the common law, while all the proceedings were in *paper*.(*w*) for they were then considered as only in *fieri*, and therefore subject to the control of the courts. But, when once the record was made up, it was formerly held that by the common law no amendment could be permitted, unless within the very terms in which the judicial act so recorded was done: for during the term the record is in the breast of the court, but afterwards it admitted of no alteration.(*x*) But now the courts are become more liberal, and, where justice requires it, will allow of amendments at any time while the suit is depending, notwithstanding the record be made up, and the term be past. For they at present consider the proceedings as in *fieri*, till judgment is given; and therefore, that till then they have power to permit amendments by the common law; but when judgment is once given and enrolled, no amendment is permitted in any subsequent term.(*y*) Mistakes are also effectually helped by the statutes of amendment and *jeofails:* so called because when a pleader perceives any slip in the form of his proceedings and acknowledges such error, (*jeo faile,*) he is at liberty by those statutes to amend it; which amendment is seldom actually made, but the benefit of the *acts is attained by the court's overlooking the exception.(*z*) These statutes are many in number, and the provisions in them too minute to be here taken notice of otherwise than by referring to the statutes themselves;(*a*) by which all trifling exceptions are so thoroughly guarded against that writs of error cannot now be maintained but for some material mistake assigned.[6] [*408

This is at present the general doctrine of amendments; and its rise and history are somewhat curious. In the early ages of our jurisprudence, when all pleadings were *ore tenus*, if a slip was perceived and objected to by the opposite party or the court, the pleader instantly acknowledged his error and rectified his plea; which gave occasion to that length of dialogue reported in the ancient year-books. So liberal were then the sentiments of the crown as well as the judges, that in the statute of Wales, made at Rothelan, 12 Edw. I., the pleadings are directed

(*w*) 4 Burr. 1099.
(*x*) Co. Litt. 260.
(*y*) Stat. 11 Hen. IV. c. 3.
(*z*) Stra. 1011.
(*a*) Stat. 14 Edw. III. c. 6. 9 Hen. V. c. 4. 4 Hen. VI. c. 3. 8 Hen. VI. c. 12 and 15. 32 Hen. VIII. c. 30. 18 Eliz. c. 14. 21 Jac. I. c. 13. 16 & 17 Car. II. c. 8, (styled in 1 Ventr. 100 an omnipotent act.) 4 & 5 Anne, c. 16. 9 Anne, c. 20. 5 Geo. I. c. 13.

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upon such judgment. 1 Roll. Abr. 746. In the Common Pleas, the record and process being stated to remain before the king's justices, the writ is called a writ of error *coram vobis*, or *quæ coram vobis resident*. On a judgment against *several* parties, the writ of error must be brought in all their names, (6 Co. 25. 3 Mod. 134. 5 ib. 16. 1 Ld. Raym. 244. 2 ib. 1532. 3 Burr. 1792. 2 T. R. 737:) but if one or more die, the survivors may bring the writ of error, (Palm. 151. 1 Stra. 234;) or if it be brought in the names of several, and one or more refuse to appear and assign errors, they must be summoned and severed, and then the rest may proceed alone. Yelv. 4. Cro. Eliz. 892. 6 Mod. 40. 1 Stra. 234. Ca. *temp*. Hardw. 135, 136.—CHITTY.

But this writ cannot be brought after twenty years, unless in case of personal disability from infancy, coverture, persons of unsound mind, prisoners, or beyond seas; these respectively ceasing, the writ must be brought within five years afterwards. See stat. 10 & 11 W. III. c. 14.—CHITTY.

[6] And now, by stat. 9 Geo. IV. c. 15, every court of record holding plea in civil actions, any judge sitting at nisi prius, and any court of oyer and terminer and general gaol-delivery in England, &c. and Ireland, if any such court or judge shall see fit to do so, may cause the record on which any trial may be pending before any such judge or court, in any civil action, or in any indictment or information for any misdemeanour, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record, wherein the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs, if any, to the other party as such judge or court shall think reasonable, and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at nisi prius, the order for the amendment shall be endorsed on the *postea*, and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued shall be awarded accordingly.—CHITTY.

to be carried on in that principality, "*sine calumpnia verborum, non observata illa dura consuetudine, qui cadit a syllaba cadit a tota causa.*" The judgments were entered up immediately by the clerks and officers of the court; and if any misentry was made, it was rectified by the minutes, or by the remembrance of the court itself.

When the treatise by Britton was published, in the name and by authority of the king, (probably about the 13 Edw. I., because the last statutes therein referred to are those of Winchester and Westminster the second,) a check seems intended to be given to the unwarrantable practices of some judges, who had made false entries on the rolls to cover their own misbehaviour, and had taken upon them by amendments and rasures to falsify their own records. The king therefore declares,(*b*) that "although we have granted to our justices to *409] *make record of pleas pleaded before them, yet we will not that their own record shall be a warranty for their own wrong, nor that they may rase their rolls, nor amend them, nor record them contrary to their original enrolment." The whole of which, taken together, amounts to this, that a record surreptitiously or erroneously made up, to stifle or pervert the truth, should not be a sanction for error; and that a record, originally made up according to the truth of the case, should not afterwards by any private rasure or amendment be altered to any sinister purpose.

But when afterwards king Edward, on his return from his French dominions in the seventeenth year of his reign, after upwards of three years' absence, found it necessary (or convenient, in order to replenish his exchequer) to prosecute his judges for their corruption and other mal-practices, the perversion of judgments and other manifold errors,(*c*) occasioned by their erasing and altering records, were among the causes assigned for the heavy punishments inflicted upon almost all the king's justices, even the most able and upright.(*d*) The severity of which proceedings seems to have alarmed the *succeeding judges, that through *410] a fear of being said to do wrong, they hesitated at doing what was right. As it was so hazardous to alter a record duly made up, even from compassionate motives, (as happened in Hengham's case, which in strictness was certainly indefensible,) they resolved not to touch a record any more; but held that even palpable errors, when enrolled and the term at an end, were too sacred to be rectified or called in question: and, because Britton had forbidden all criminal and clandestine alterations, to make a record speak a falsity, they conceived that they might not judicially and publicly amend it, to make it agreeable to truth. In Edward the Third's time, indeed, they once ventured (upon the certificate of the justice in eyre) to estreat a larger fine than had been recorded by the clerk of the court below;(*e*) but instead of amending the clerk's erroneous record, they made a second enrolment of what the justice had declared *ore tenus;* and left it to be settled by posterity in which of the two rolls that absolute verity resides which every record is said to import in itself.(*f*) And, in the reign of Richard

(*b*) Brit. *proem.* 2, 3.

(*c*) *Judicia perverterunt, et in aliis erraverunt.* Matth. West. A.D. 1289.

(*d*) Among the other judges, Sir Ralph Hengham, chief-justice of the King's Bench, is said to have been fined 7000 marks; Sir Adam Stratton, chief-baron of the exchequer, 34,000 marks; and Thomas Wayland, chief-justice of the Common Pleas, to have been attainted of felony, and to have abjured the realm, with a forfeiture of all his estates: the whole amount of the forfeitures being upwards of 100,000 marks, or 70,000 pounds, (3 Pryn. Rec. 401, 402.)—an incredible sum in those days, before paper credit was in use, and when the annual salary of a chief-justice was only sixty marks. *Claus.* 6 *Edw. I. m.* 6. Dugd. *Chron. Ser.* 26. The charge against Sir Ralph Hengham (a very learned judge, to whom we are obliged for two excellent treatises of practice) was only, according to a tradition that was current in Richard the Third's time, (Year-book, M. 2 Ric. III. 10,) his altering, out of mere compassion, a fine which was set upon a very poor man from 18*s.* 4*d.* to 6*s.* 8*d.*, for which he was fined 800 marks,—a more probable sum than 7000. It is true the book calls the judge so punished *Ingham*, and not *Hengham;* but I find no judge of the name of *Ingham* in Dugdale's Series and Sir Edward Coke (4 Inst. 955) and Sir Matthew Hale (1 P. C. 646) understand it to have been the chief-justice. And certainly his offence (whatever it was) was nothing very atrocious or disgraceful; for though removed from the King's Bench at this time, (together with the rest of the judges,) we find him, about eleven years afterwards, one of the justices in eyre for the general perambulation of the forest, (*Rot. perambul. forest. in turri Lond.*, 29 Edw. I. *m.* 8,) and the next year made chief-justice of the Common Pleas. (*Pat.* 29 Edw. I. *m.* 7. Dugd. *Chron. Ser.* 32,) in which office he continued till his death, in 2 Edw. II. *Claus.* 1 Edw. II. *m.* 19. *Pat.* 2 Edw. II. *p.* 1, *m.* 9. Dugd. 34. Selden, pref. to Hengham. There is an appendix to this tradition, remembered by justice Southcote in the reign of queen Elizabeth, (3 Inst. 72. 4 Inst. 255.) that with this fine of chief-justice Hengham a clock-house was built at Westminster, and furnished with a clock, to be heard into Westminster hall. Upon which story I shall only remark that (whatever early instances may be found of the private exertion of mechanical genius in constructing horological machines) clocks came not into common use till a hundred years afterwards, about the end of the fourteenth century. *Encyclopedie*, tit. *Horloge*, 6 Rym. *Fœd.* 590. Derham's Artif. Clockmaker, 91.

(*e*) 1 Hal. P. C. 647.

(*f*) 1 Leon. 183. Co. Litt. 117. See page 331.

the Second, there are instances(*g*) of their refusing to amend the most palpable errors and mis-entries, unless by the authority of parliament.

To this real sullenness, but affected timidity, of the judges, such a narrowness of thinking was added, that every slip (even of a syllable or letter)(*h*) was now held to be fatal to the *pleader, and overturned his client's cause.(*i*) If they durst not, or would not, set right mere formal mistakes at any time, [*411 upon equitable terms and conditions, they at least should have held, that trifling objections were at all times inadmissible, and that more solid exceptions in point of form came too late when the merits had been tried. They might, through a decent degree of tenderness, have excused themselves from amending in criminal, and especially in capital, cases. They needed not have granted an amendment, where it would work an injustice to either party; or where he could not be put in as good a condition as if his adversary had made no mistake. And, if it was feared that an amendment after trial might subject the jury to an attaint, how easy was it to make waiving the attaint the condition of allowing the amendment! And yet these were among the absurd reasons alleged for never suffering amendments at all!(*k*)

The precedents then set were afterwards most religiously followed,(*l*) to the great obstruction of justice, and ruin of the suitors: who have formerly suffered as much by this scrupulous obstinacy and literal strictness of the courts, as they could have done even by their iniquity. After verdicts and judgments upon the merits, they were frequently reversed for slips of the pen or mis-spellings; and justice was perpetually entangled in a net of mere technical jargon. The legislature hath therefore been forced to interpose, by no less than twelve statutes, to remedy these opprobrious niceties: and its endeavours have been of late so well seconded by judges of a more liberal cast, that this unseemly degree of strictness is almost entirely eradicated, and will probably in a few years be no more remembered than the learning of essoigns and defaults, or the counterpleas of voucher, are at present. But to return to our writs of error.

If a writ of error be brought to reverse any judgment of an inferior [410 court of record, where the damages are less than ten pounds; or if it is brought to reverse the judgment of any superior court after verdict, he that brings the writ, or that is plaintiff in error, must (except in some peculiar cases) find substantial pledges of prosecution, or bail:(*m*) to prevent delays by frivolous pretences to appeal; and for securing payment of costs and damages, which are now payable by the vanquished party in all except in a few particular instances, by virtue of the several statutes recited in the margin.(*n*)[7]

(*g*) 1 Hal. P. C. 648.
(*h*) Stat. 14 Edw. III. c. 6.
(*i*) In those days it was strictly true, what Ruggle (in his *Ignoramus*) has humorously applied to more modern pleadings:—"*in nostra lege unum comma evertit totum placitum.*"
(*k*) Styl. 207.
(*l*) 8 Rep. 156, &c.
(*m*) Stat. 3 Jac. I. c. 8. 13 Car. II. c. 2. 16 & 17 Car. II. c 8. 19 Geo. III. c. 70.
(*n*) 3 Hen. VII. c. 10. 13 Car. II. c. 2. 8 & 9 W. III. c. 11. 4 & 5 Anne, c. 16.

[7] By the 3 Jac. I. c. 8, (made perpetual by 3 Car. I. c. 4, s. 4,) to restrain unnecessary delays of execution, it was provided "that in the actions therein specified no writ of error should be allowed, unless the party bringing the same, with *two sufficient sureties*, shall first be bound unto the party for whom the judgment is given, by recognizance to be acknowledged in the same court, in double the sum, to be recovered by the former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay if the said judgment be affirmed or the writ of error nonprossed, all and singular the debts, damages, and costs adjudged upon the former judgment, and all costs and damages to be awarded for the delaying of the execution." And now, by the 6 Geo. IV. c. 96, for further preventing the delays occasioned by frivolous writs of error, it is enacted that upon *any* judgment hereafter to be given in any of the courts of record at Westminster, in the counties palatine, and in the courts of great session in Wales, in *any* personal action, execution shall not be stayed or delayed by any writ of error, or supersedeas thereupon, without the special order of the court, or some judge thereof, unless a recognizance, with a condition according to the 3 Jac. I. c. 8, (above noticed,) be first acknowledged in the same court. After final judgment, and before execution executed, a writ of error is, generally speaking, a supersedeas of execution from the time of its allowance, (1 Vent. 31. 1 Salk. 321. 1 T. R. 280. 2 B. & P. 370. 2 East. 439. 5 Taunt. 204. 1 Gow. 66. 1 Chitty R. 238, 241. 3 Moore, 89;) but it is no supersedeas unless bail in error be put

A writ of error lies from the inferior courts of record in England into the king's bench,(o) and not into the common pleas.(p)[8] Also from the king's bench in Ireland to the king's bench in England.[9] It likewise may be brought from the common pleas at Westminster to the king's bench; and then from the king's bench the cause is removable to the house of lords. From proceedings on the law side of the exchequer a writ of error lies into the court of exchequer chamber before the lord chancellor, lord treasurer, and the judges of the court of king's bench and common pleas;[10] and from thence it lies to the house of peers. From proceedings in the king's bench, in debt, detinue, covenant, account, case, ejectment, or trespass, originally begun therein by bill, (except where the king is party,) it lies to the exchequer chamber, before the justices of the common pleas, and barons of the exchequer; and from thence also to the house of lords;(q) but where the proceedings in the king's bench do not first commence therein by bill, but by original writ sued out of chancery.(r) this takes **411] the case out of the general rule **laid down by the statute;(s) so that the writ of error then lies, without any intermediate state of appeal, directly to the house of lords, the dernier resort for the ultimate decision of every civil action.[11] Each court of appeal, in their respective stages, may, upon hearing the matter of law in which the error is assigned, reverse or affirm the judgment of the inferior courts; but none of them are final, save only the house of peers, to whose judicial decisions all other tribunals must therefore submit, and conform their own. And thus much for the reversal or affirmance of judgments at law by writs in the nature of appeals.[12]

(o) See ch. 4.
(p) Finch, L. 480. Dyer, 250.
(q) Stat. 27 Eliz. c. 8.
(r) See page 43
(s) 1 Roll. Rep. 264. 1 Sid. 424. 1 Saund. 340. Carth. 180. Comb. 295.

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in, and notice thereof given within the time limited by the rules of the court. 2 Dowl. & Ry. 85. And when it is apparent to the court that a writ of error is brought against good faith, (2 T. R. 183. 8 Taunt. 434,) or for the mere purpose of delay, (4 T. R. 436. 2 M. & S. 474, 476. 1 Bar. & Cres. 287,) or it is returnable of a term previous to the signing of final judgment, (Barnes, 197,) it is not a supersedeas. Tidd, 8th ed. 1202. In Tidd, 1199, 8th ed. it is said that there must be fifteen days between the teste and return of a writ of error; but it was said in Laidler *vs.* Foster, where there was an interval of twelve days only, that there is a distinction between writs of error and those which are the commencement of a suit; and the usual course of practice was followed in this case, (viz., not to pass over more than one return between the teste and return:) the court therefore refused to quash the writ. 4 Bar. & Cres. 116. And in another case the court of King's Bench held that the court could not quash a writ of error upon a judgment of the Common Pleas of Durham. nor award execution upon the judgment of an inferior court. 4 Dowl. & Ry. 153.—Chitty.

[8] It is not correct that a writ of error does not lie from an inferior court into the court of Common Pleas. There is a modern instance of such a proceeding in Bower *vs.* Wait, 1 M. & G. 1, in a learned note to which (p. 2, note a.) the opinion in the text is controverted.—Couch.

[9] This appeal is taken away by 23 Geo. III. c. 21. Since the union, however, a writ of error lies from the superior courts in Ireland to the house of lords. Before the union with Scotland, a writ of error lay not in this country upon any judgment in Scotland; but it is since given, by statute 6 Anne, c. 26. s. 12, from the court of Exchequer in Scotland, returnable in parliament. And see the 48 Geo. III. c. 151, concerning appeals to the house of lords from the court of session in Scotland.—Chitty.

[10] The 31 Edw. III. c. 12 directs that the chancellor and treasurer shall take to their assistance the judges of the other courts, and *autres sages come lour semblera.* But the 20 Car. II. c. 4 has dispensed with the presence of the lord treasurer when the office is vacant; and it is the practice for the two chief justices alone to sit in this court of error, who report their opinion to the chancellor, and the judgment is pronounced by him.—Chitty.

[11] But now, by statute 1 Will. IV. c. 70, and the Common-Law Procedure Act, 1852, error upon any judgment of the Queen's Bench, Common Pleas, or Exchequer must be brought in the Exchequer chamber before the judges, or judges and barons, as the case may be, of the other two courts, whence it again lies to the house of lords.—Stewart.

[12] In this chapter Sir W. Blackstone has considered only the modes by which a judgment may be reversed by writ of error brought in a court of appeal, and has stated that this can only be done for error in law. There is, however, a proceeding to reverse a judg-

CHAPTER XXVI.

OF EXECUTION.

*IF the regular judgment of the court, after the decision of the suit, be not suspended, superseded, or reversed by one or other of the methods [*412 mentioned in the two preceding chapters, the next and last step is the *execution* of that judgment; or putting the sentence of the law in force. This is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered.

If the plaintiff recovers in an action real or mixed, whereby the seisin or possession of land is awarded to him, the writ of execution shall be an *habere facias seisinam*, or writ of seisin, of a freehold; or an *habere facias possessionem*, or writ of possession,(*a*) of a chattel interest.(*b*) These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land so recovered: in the execution of which the sheriff may take with him the *posse comitatus*, or power of the county; and may justify breaking open doors, if the possession be not quietly delivered. But, if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of the door, in the name of seisin, is sufficient execution of the writ. Upon a presentation to a benefice recovered in a *quare impedit*, or assize of *darrein presentment*, *the execution is by a writ [*413 *de clerico admittendo;* directed, not to the sheriff, but to the bishop or archbishop, and requiring him to admit and institute the clerk of the plaintiff.[1]

In other actions, where the judgment is that something in special be done or rendered by the defendant, then, in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff according to the nature of the case. As, upon an assize of nuisance, or *quod permittat prosternere*, where one part of the judgment is *quod nocumentum amoveatur*, a writ goes to the sheriff to abate it at the charge of the party, which likewise issues even in case of an indictment.(*c*)[2] Upon a replevin, the writ of execution is the writ *de retorno habendo:*(*d*) and, if the distress be eloigned, the defendant shall have a *capias in withernam;*(*e*) but on the plaintiff's tendering the damages and submitting to a fine, the process *in withernam* shall be stayed.(*f*) In detinue, after judgment, the plaintiff shall have a *distringas*, to compel the defendant to deliver the goods, by repeated distresses of his chattels:(*g*) or else a *scire facias* against any third person in whose hands they may happen to be, to show

(*a*) Append. No. II. § 4.
(*b*) Finch, L. 470.
(*c*) Comb. 10.
(*d*) See page 150.
(*e*) See page 149.
(*f*) 2 Leon. 174.
(*g*) 1 Roll. Abr. 737. Rast. Ent. 215.

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ment by writ of error in the same court, where the error complained of is *in fact* and not in law, and where of course no fault is imputed to the court in pronouncing its judgment. This writ is called the writ *coram nobis* or *coram vobis*, according as the proceedings are in the King's Bench or Common Pleas, because the record is stated to *remain* before us (the king) if in the former, and before you (the judges) if in the latter, and is not removed to another court. In this proceeding it is of course necessary to suggest a new fact upon the record, from which the error in the first judgment will appear: thus, supposing the defendant, being an infant, has appeared by attorney instead of guardian, it will be necessary to suggest the fact of his infancy of which the court was not before informed. There is therefore no inconsistency in bringing this writ of error before the same judges who pronounced the judgment in the first instance; because they are required to pronounce upon a new state of facts, without impeachment of the former judgment on the facts as they then stood.—COLERIDGE.

[1] The writ recites the judgment of the court and orders him to admit a fit person to the rectory and parish church at the presentation of the plaintiff; and if upon this order he refuse to admit accordingly, the patron may sue the bishop in a *quare non admisit*, and recover ample satisfaction in damages. 2 Selw. Prac. 330.—CHITTY.

[2] That is, if it be stated in the indictment that the nuisance is still existing. If it does not appear in the indictment that the nuisance was then in existence, it would be absurd to give judgment to abate a nuisance which does not exist. 8 T. R. 144.—CHITTY.

cause why they should not be delivered: and if the defendant still continues obstinate, then (if the judgment hath been by default or on demurrer) the sheriff shall summon an inquest to ascertain the value of the goods, and the plaintiff's damages; which (being either so assessed, or by the verdict in case of an issue)(*h*) shall be levied on the person or goods of the defendant. So that, after all, in replevin and detinue, (the only actions for recovering the specific possession of personal chattels,) if the wrong-doer be very perverse, he cannot be compelled to a restitution of the identical thing taken or detained; but he still has his election, to deliver the goods, or their value:(*i*) an imperfection in the law, that results from the nature of personal property, which is easily concealed or conveyed out of the reach of justice, and not always amenable to the magistrate.

*414] *Executions in actions where money only is recovered, as a debt or damages, (and not any specific chattel,) are of five sorts: either against the body of the defendant; or against his goods and chattels; or against his goods and the *profits* of his lands; or against his goods and the *possession* of his lands; or against all three, his body, lands, and goods.

1. The first of these species of execution is by writ of *capias ad satisfaciendum*;(*j*) which addition distinguishes it from the former *capias ad respondendum*, which lies to compel an appearance at the beginning of a suit. And, properly speaking, this cannot be sued out against any but such as were liable to be taken upon the former *capias*.(*k*) The intent of it is, to imprison the body of the debtor till satisfaction be made for the debt, costs, and damages; it therefore doth not lie against any privileged persons, peers, or members of parliament, nor against executors or administrators, nor against such other persons as could not be originally held to bail. And Sir Edward Coke also gives us a singular instance,(*l*) where a defendant in 14 Edw. III. was discharged from a *capias*, because he was of so advanced an age *quod pœnam imprisonamenti subire non potest*. If an action be brought against a husband and wife for the debt of the wife, when sole, and the plaintiff recovers judgment, the *capias* shall issue to take both husband and wife in execution:(*m*) but, if the action was originally brought against herself, when sole, and pending the suit she marries, the *capias* shall be awarded against her only, and not against her husband.(*n*) Yet, if judgment be recovered against a husband and wife for the contract, nay, even for the personal misbehaviour(*o*) of the wife during her coverture, the *capias* shall issue against the husband only: which is one of the many great privileges of English wives.[3]

*415] *The writ of *capias ad satisfaciendum* is an execution of the highest nature inasmuch as it deprives a man of his liberty, till he makes the

(*h*) Bro. Abr. tit. *damages*, 29.
(*i*) Keilw. 64.
(*j*) Append. No. III. § 7.
(*k*) 3 Rep. 12. Moor. 767.
(*l*) 1 Inst. 289.
(*m*) Moor. 704.
(*n*) Cro. Jac. 323.
(*o*) Cro. Car. 513.

[3] There are many cases in which the defendant may be taken in execution after judgment, though he could not be arrested at the commencement of the suit; but it is an universal rule that whenever a capias is allowed on *mesne* process before judgment, it may be had upon the judgment itself. 3 Salk. 286. 3 Co. 12. It lies against peers, or members of parliament, upon a statute merchant, or staple, or recognizance in nature thereof. 2 Leon. 173. 1 Cromp. 345. But, by 57 Geo. III. c. 99, s. 47, no penalty or costs incurred by any spiritual person, by reason of non-residence on his benefice, shall be levied by execution against his body, whilst he holds the same or any other benefice, out of which the same can be levied by sequestration within the term of three years. An infant seems liable to this process. 2 Stra. 1217; see id. 708. 1 B. & P. 480. Husband and wife may be taken in execution in an action against both, and she shall not be discharged unless it appear she has no separate property out of which the demand can be satisfied, (T. 2 Geo. IV. C. P.; see 5 B. & A. 759,) or that there is fraud and collusion between the plaintiff and her husband to keep her in prison. 2 Stra. 1167, 1237. 1 Wils. 149. 2 Bla. R. 720. Volunteer soldiers and seamen are protected by several statutes from being taken in execution unless the original debt, in the case of soldiers, amounted to 20*l.*, or in the case of seamen the debt and costs, &c. are of that amount, and that the debt was contracted when the defendant did not belong to any ship in his majesty's service. See 11 East, 25. Nor can parties be taken in execution at the time or place when and where they are privileged from arrest. Tidd, 1065, 1066, 1067.—Chitty.

satisfaction awarded; and therefore, when a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods. Only, by statute 21 Jac. I. c. 24, if the defendant dies while charged in execution upon this writ, the plaintiff may, after his death, sue out a new execution against his lands, goods, or chattels. The writ is directed to the sheriff, commanding him to take the body of the defendant and have him at Westminster on a day therein named, to make the plaintiff satisfaction for his demand. And, if he does not then make satisfaction, he must remain in custody till he does. This writ may be sued out, as may all other executory process, for costs, against a plaintiff as well as a defendant, when judgment is had against him.

When a defendant is once in custody upon this process, he is to be kept in *arcta et salva custodia:* and if he be afterwards seen at large, it is an *escape;* and the plaintiff may have an action thereupon against the sheriff for his whole debt. For though, upon arrests, and what is called *mesne* process, being such as intervenes between the commencement and end of a suit,(*p*) the sheriff, till the statute 8 & 9 W. III. c. 27, might have indulged the defendant as he pleased, so as he produced him in court to answer the plaintiff at the return of the writ; yet, upon a taking in execution, he could never give any indulgence; for, in that case, confinement is the whole of the debtor's punishment, and of the satisfaction made to the creditor.[4] Escapes are either voluntary, or negligent. Voluntary are such as are by the express consent of the keeper; after which he never can retake his prisoner again,(*q*) (though the plaintiff may retake him at any time,)(*r*) but the sheriff must answer for the debt. Negligent escapes are where the prisoner escapes without his keeper's knowledge or consent; and then upon fresh pursuit the defendant may *be retaken, and the sheriff shall be excused, if he has him again before any action brought against himself for the escape.(*s*) A rescue of a prisoner *in execution*, either going to gaol or in gaol, or a breach of prison, will not excuse the sheriff from being guilty of and answering for the escape; for he ought to have sufficient force to keep him, since he may command the power of the county.(*t*) But by statute 32 Geo. II. c. 28, if a defendant charged in execution for any debt not exceeding 100*l.* will surrender all his effects to his creditors, (except his apparel, bedding, and tools of his trade, not amounting in the whole to the value of 10*l.*,) and will make oath of his punctual compliance with the statute, the prisoner may be discharged, unless the creditor insists on detaining him; in which case he shall allow him 2*s.* 6*d.* per week, to be paid on the first day of every week, and on failure of regular payment the prisoner shall be discharged. Yet the creditor may at any future time have execution against the lands and goods of such defendant, though never more against his person.[5] And, on the other [*416

(*p*) See page 279.
(*q*) 3 Rep. 52. 1 Sid. 330.
(*r*) Stat. 8 & 9 W. III. c. 27.
(*s*) F. N. B. 130.
(*t*) Cro. Jac. 419.

[4] But execution by imprisonment is considered so far a satisfaction of the debt, that if the creditor release the debtor from confinement he cannot afterwards have recourse to any other remedy, though the discharge be on terms which are not afterwards complied with, (4 Burr. 2482. 6 T. R. 526. 7 ib. 420;) or upon giving a fresh security which afterwards becomes ineffectual, (1 T. R. 557;) the execution being considered *quoad* the defendant as a satisfaction of the debt. Hob. 59. But the plaintiff may take out execution against other persons liable to the same debt or damages. Ib; and see 5 Taunt. 614. 1 Marsh. 250, S. C. If, however, the plaintiff consent to discharge the only one of several defendants taken on a *joint* capias, he cannot afterwards retake either him or take any of the other defendants. 6 T. R. 525.—CHITTY.

[5] The statute mentioned in the text is that which is commonly known by the appellation of the Lords' Act, from the circumstance of its originating in the upper house of parliament. By the 33 Geo. III. c. 5, made perpetual by 39 Geo. III. c. 50, the regulations of the former act are extended to debts amounting to 300*l.* And by other statutes, (see Tidd, 379.) persons in custody for contempt by the non-payment of money or costs ordered by courts of equity (49 Geo. III. c. 6) or common law, are declared within the provisions for the relief of prisoners in custody for debt only. But a defendant in a *qui tam* action is not entitled to the benefit of the lords' act, (3 Burr. 1322. 1 Bla. R. 372;) nor a defendant in custody under a writ *de excommunicato capiendo* for contumacy in not

hand, the creditors may, as in case of bankruptcy, compel (under pain of transportation for seven years) such debtor charged in execution for any debt under 100*l.* to make a discovery and surrender of all his effects for their benefit, whereupon he is also entitled to the like discharge of his person.[6]

If a *capias ad satisfaciendum* is sued out, and a *non est inventus* is returned thereon, the plaintiff may sue out a process against the bail, if any were given: who, we may remember, stipulated in this triple alternative, that the defendant should, if condemned in the suit, satisfy the plaintiff his debt and costs; or that he should surrender himself a prisoner; or, that they would pay it for him: as therefore the two former branches of the alternative are neither of them complied with, the latter must immediately take place.(*u*) In order to which, a writ of *scire facias* may be sued out against the bail, commanding them to show

(*u*) Lutw. 1269–1273.

paying a sum for alimony, and also for costs in the ecclesiastical court. 11 East, 231. When the prisoner is charged in execution above twenty miles from Westminster hall, or the court out of which the execution issued, he must be brought up to the next assizes, or, by 52 Geo. III. c. 34, before the justices at quarter sessions, to be examined and discharged. The application is directed to be made by the prisoner before the end of the first term after his arrest: but ignorance or mistake will excuse a delay beyond that period. When the debt recovered does not exceed 20*l.*, exclusive of costs, the 48 Geo. III. c. 123 provides for the discharge of the debtor's person after he has lain in prison twelve months. But, this statute being confined to persons in execution upon a judgment, it has been holden that one in custody on an attachment for non-payment of a sum under 20*l.* found due upon an award made a rule of court is not entitled to his discharge under it. 10 East, 408. 2 B. & A. 61.

The 1 Geo. IV. c. 119 established a new court of record, called the Court for the Relief of Insolvent Debtors, which is held twice a week in London throughout the year, with a short vacation in the summer: and by the 5 Geo. IV. c. 16 it is provided that the judges of this court, who are four in number, shall make three circuits in the year for the discharge of insolvents. A prisoner discharged under these acts becomes personally free, having first delivered a schedule on oath of all his debts, &c. and assigned all his property in possession or expectancy for the benefit of his creditors, to whose demands all property which he may afterwards acquire is made liable. If upon his examination it appear that he has been guilty of bad practices or fraud, in contracting debts, or have opposed a vexatious defence to any action brought against him for the recovery of any debt, concealed credits, or debts, given a voluntary preference to any creditor, or made away with his property, or his imprisonment be for damages recovered in an action of crim. con., seduction, or malicious injury, or does not answer satisfactorily to the court, he may be sent back to prison for two or three years, at the discretion of the court. A fraudulent concealment of property in his schedule subjects him to the additional punishment of hard labour. If a voluntary preference be given by him within three months before filing his petition for discharge, it is void.—Chitty.

[6] The creditors who can compel the surrender of the debtor's effects, and who are to have the benefit of it, are only those who have charged him in execution. This statute—the 32 Geo. II. c. 28—is generally called the lords' act. By the 26 Geo. III. c. 44, the provisions of it were extended to 200*l.*, and by the 33 Geo. III. c. 5, they have been still further enlarged to 300*l.* By the 37 Geo. III. c. 85, one creditor shall agree in writing, in order to detain such a debtor, to make him a weekly allowance of 3*s.* 6*d.*; and where two or more shall agree to detain him, they shall pay him what the court shall direct, not exceeding 2*s.* a week each. See the clauses of the act in 2 Burn, tit. Gaol. The prisoner shall never afterwards be liable to be arrested on any action for the same debt, unless convicted of perjury. But a prisoner to have the benefit of this act must petition the court from which the process issued upon which he shall be in custody, before the end of the first term after he is arrested, unless he afterwards shows his neglect arose from ignorance or mistake.—Christian.

Although the prisoner cannot avail himself of the benefit of the lords' act if his debts exceed 300*l.*, yet he is liable to the compulsory clause upon any debt within that amount, whatever may be the amount of all his debts for which he is in execution. 5 B. & A. 537.

The judges of King's Bench have decided that an insolvent brought up under the compulsory clause in the lords' act is not bound to answer questions as to the disposition of his property *during* his imprisonment, but merely as to the amount and condition of it at the time of making his schedule: and that the form of the oath must be altered conformably with this construction of the statute. Per Holroyd, J., in Re. Askew, 24th Nov., 1825.—Chitty

cause why the plaintiff should not have execution against them for his *debt and damages: and on such writ, if they show no sufficient cause, [*417 or the defendant does not surrender himself on the day of the return, or of showing cause, (for afterwards is not sufficient,) the plaintiff may have judgment against the bail, and take out a writ of *capias ad satisfaciendum*, or other process of execution against them.[7]

2. The next species of execution is against the goods and chattels of the defendant, and is called a writ of *fieri facias*,(*w*) from the words in it where the sheriff is commanded, *quod fieri faciat de bonis*, that he cause to be made of the goods and chattels of the defendant the sum or debt recovered.[8] This lies as well against privileged persons, peers, &c. as other common persons; and against executors or administrators with regard to the goods of the deceased. The sheriff may not break open any outer doors,(*x*) to execute either this or the former writ, but must enter peaceably; and may then break open any inner door, belonging to the defendant, in order to take the goods.(*y*) And he may sell the goods and chattels (even an estate for years, which is the chattel real)(*z*) of the defendant, till he has raised enough to satisfy the judgment and costs:[9] first paying the landlord of the premises, upon which the goods are found, the arrears of rent then due, not exceeding one year's rent in the whole.(*a*)[10] If part only of the debt be levied on a *fieri facias*, the plaintiff may have a *capias ad satisfaciendum* for the residue.(*b*)[11]

3. A third species of execution is by writ of *levari facias;* which affects a man's goods and the *profits* of his lands, by commanding the sheriff to levy the

(*w*) Append. No. III. § 7.
(*x*) 5 Rep. 92.
(*y*) Palm. 54.
(*z*) 8 Rep. 171.
(*a*) Stat. 8 Anne, c. 14.
(*b*) 1 Roll. Abr. 904. Cro. Eliz. 344.

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[7] The undertaking of the bail does not subject them to execution against the body in the Common Pleas.—CHITTY.

[8] If, upon a judgment in tort against two or more, execution be levied for the whole damages upon one only, (1 Camp. 343,) that one cannot recover a moiety against the other for his contribution; but he may maintain an action for the moiety, if the original action were founded upon contract. 8 T. R. 186. See also 2 Camp. 452.—CHITTY.

[9] And, by a late statute,—viz., 43 Geo. III. c. 46,—to satisfy also the costs of the writ of execution, together with the sheriff's fees, poundage, &c. But the statute does not extend to give the like costs, fees, poundages, &c. to the defendant. But *query* whether "expenses of execution" include expenses of levying? Ramsey *vs.* Tuffnell, 9 J. B. Moore, 425.—CHITTY.

[10] The statute enacts that such payment shall be made out of the proceeds, provided the sheriff have notice of the landlord's claim at any time while the goods or the proceeds remain in his hands. See Arnitt *vs.* Garnett, 3 B. & A. 440. In this case the goods had been removed from the premises previously to the notice. And where the sheriff takes corn in the blade under a *fi. fa.*, and sells it before the rent is due, he is not liable to account to the landlord for rent accruing subsequent to the levy and sale, although he have given notice, and though the corn be not removed from the premises until long afterwards. Gwilliam *vs.* Barker, 1 Price, 274. And where the sheriff knows the fact of the arrear of rent, no other specific notice is needful to bind him, (Andrews *vs* Dixon, 3 B. & A. 645;) and, *semble*, he need not set about finding out what rent is due. Smith *vs.* Russel, 3 Taunt. 400. And the sheriff is bound only as to the rent actually due at the time of the taking, and not such rent as shall have accrued due whilst he is in possession. Hoskins *vs.* Knight, and Bassett *vs.* Same, 1 M. & S. 245.—CHITTY.

[11] By stat. 1 & 2 Vict. c. 110, s. 12, the effect of a writ of *fieri facias* is also much extended. The sheriff may now seize and take any money or bank-notes, cheques, bills of exchange, promissory-notes, bonds, specialties, or other securities for money belonging to the person against whose effects such *fieri facias* is sued out, and may pay the money or bank-notes to the execution-creditor, and sue for the amount secured by the bills of exchange and other securities. The same statute, extended by stat. 3 & 4 Vict. c. 82, it may here be mentioned, provided a means by which stock in the public funds and stock or shares in public companies, standing in the name of the debtor of any person in trust for him, or in which the debtor has an interest, whether in possession, reversion, or remainder, vested or contingent, may be charged with the payment of the amount for which judgment shall have been recovered. Such stock or shares may be charged by order of a judge, which order may be made in the first instance *ex parte*, and, on notice to the bank or company, shall operate as a *distringas*.—STEWART.

plaintiff's debt on the lands and goods of the defendant; whereby the sheriff may seize all his goods, and receive the rents and profits of his lands, till satisfaction be made to the plaintiff.(c) Little use *is now made of this writ; *418] the remedy by *elegit*, which takes possession of the lands themselves, being much more effectual. But of this species is a writ of execution proper only to ecclesiastics; which is given when the sheriff, upon a common writ of execution sued, returns that the defendant is a beneficed clerk, not having any lay fee. In this case a writ goes to the bishop of the diocese, in the nature of a *levari* or *fieri facias*,(d) to levy the debt and damage *de bonis ecclesiasticis*, which are not to be touched by lay hands: and thereupon the bishop sends out a *sequestration* of the profits of the clerk's benefice, directed to the churchwardens, to collect the same and pay them to the plaintiff, till the full sum be raised.(e)

4. The fourth species of execution is by the writ of *elegit;* which is a judicial writ given by the statute Westm. 2, 13 Edw. I. c. 18, either upon a judgment for a debt, or damages, or upon the forfeiture of a recognizance taken in the king's court. By the common law a man could only have satisfaction of goods, chattels, and the present profits of lands, by the two last-mentioned writs of *fieri facias*, or *levari facias;* but not the possession of the lands themselves; which was a natural consequence of the feodal principles, which prohibited the alienation, and of course the encumbering, of the fief with the debts of the owner. And, when the restriction of alienation began to wear away, the consequence still continued; and no creditor could take the possession of lands, but only levy the growing profits: so that, if the defendant aliened his lands, the plaintiff was ousted of his remedy. The statute therefore granted this writ, (called an *elegit*, because it is in the choice or election of the plaintiff whether he will sue out this writ or one of the former,) by which the defendant's goods and chattels are not sold, but only appraised; and all of them (except oxen and beasts of the plough) are delivered to the plaintiff, at such reasonable appraisement and price, in part of satisfaction of his debt. If the goods are not sufficient, then *419] the moiety or *one half of his freehold lands, which he had at the time of the judgment given,(f) whether held in his own name, or by any other trust for him,(g)[12] are also to be delivered to the plaintiff; to hold, till out of the rents and profits thereof the debt be levied, or till the defendant's interest be expired; as till the death of the defendant, if he be tenant for life or in tail.[13] During this period the plaintiff is called tenant by *elegit*, of whom we spoke in

(c) Finch, L 471.
(d) *Registr. Orig.* 300, *juric.* 22. 2 Inst. 4.
(e) 2 Burn, Eccl. Law, 329.
(f) 2 Inst. 395.
(g) Stat. 29 Car. II. c. 3.

[12] The words in the statute referred to (29 Car. II. c. 3) are *at the time of the said execution sued*, and refer to the seisin of the trustee; therefore, if the trustee has conveyed the lands before execution sued, though he was seised in trust for the defendant at the time of the judgment, the lands cannot be taken in execution. Com. Rep. 227.—Chitty.

[13] And the sheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c. making in value a moiety of the whole. Doe d. Taylor *vs.* Earl of Abingdon, 2 Doug. 473. He should return that he had delivered an equal moiety of the premises, and should set it out by metes and bounds, or the return is void. Fenny d. Masters *vs.* Durrent, 1 B. & A. 40. And where the sheriff delivered one moiety, upon a second *elegit*, the other was held to be wholly void. Morris *vs.* Jones, 3 D. & R. 603. 2 B. & C. 232, S. C.

It has been considered in practice that although the sheriff might deliver the moiety to the plaintiff in *elegit*, yet that executory ejectment was necessary to complete his title; but, *semble*, that entry is good under the writ. Rogers *vs.* Pitcher, 6 Taunt. 202.

An examined copy of the judgment-roll, containing the award of the *elegit*, is evidence of the plaintiff's title; and, in action for use and occupation against the tenant, the production of a copy of the *elegit* and of the inquisition thereunder is unnecessary. Ramsbottom *vs.* Buckhurst, 2 M. & S. 565.

The defendant, in the writ of *elegit*, may, on motion, obtain a reference to the master to take an account of rents, &c. received by the plaintiff; and if it appear that the debt and costs have been satisfied, possession will be restored. Price *vs.* Varney, 5 D. & R. 612. 3 B. & C. 733, S. C.—Chitty.

a former part of these commentaries.(*h*) We there observed that till this statute, by the antient common law, lands were not liable to be charged with, or seised for, debts; because by these means the connection between lord and tenant might be destroyed, fraudulent alienations might be made, and the services be transferred to be performed by a stranger; provided the tenant incurred a large debt, sufficient to cover the land. And therefore, even by this statute, only one half was, and now is, subject to execution; that out of the remainder sufficient might be left for the lord to distrain upon for his services. And upon the same feodal principle, copyhold lands are at this day not liable to be taken in execution upon a judgment.(*i*)[14] But, in case of a debt to the king, it appears by *magna carta*, c. 8, that it was allowed by the common law for him to take possession of the lands till the debt was paid. For he, being the grand superior and ultimate proprietor of all landed estates, might seise the lands into his own hands, if any thing was owing from the vassal; and could not be said to be defrauded of his services, when the ouster of the vassal proceeded from his own command. This execution, or seising of lands by *elegit*, is of so high a nature, that after it the body of the defendant cannot be taken: but if execution can only be had of the goods, because there are no lands, and such goods are not sufficient to pay the debt, a *capias ad satisfaciendum* may then be had after the *elegit;* for such *elegit* is in this case no more in effect than a *fieri facias*.(*j*) So that body and goods may be taken in execution, or land and goods; but not body and land too, upon any judgment between subject and subject in the course of the common law. But,

5. Upon some prosecutions given by statute; as in the case of recognizances or debts acknowledged on statutes merchant, or *statutes staple, (pursuant to the statutes 13 Edw. I. *de mercatoribus*, and 27 Edw. III. c. 9;) [*420 upon forfeiture of these, the body, lands, and goods may all be taken at once in execution to compel the payment of the debt. The process hereon is usually called an *extent*,[15] or *extendi facias*, because the sheriff is to cause the lands, &c. to be appraised to their full extended value before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be satisfied.(*k*) And by statute 33 Hen. VIII. c. 39, all obligations made to the king shall have the same force and of consequence the same remedy to recover them as a statute staple; though, indeed, before this statute the king was entitled to sue out execution against the body, lands, and goods of his accountant or debtor.(*l*)

(*h*) Book ii. ch. 10.
(*i*) 1 Roll. Abr. 888.
(*j*) Hob. 58.
(*k*) F. N. B. 131.
(*l*) 3 Rep. 12.

[14] By the statute 1 & 2 Vict. c. 110, a great alteration has been made in the law in this respect. By s. 11, the sheriff is empowered to deliver unto the judgment-creditor *all* lands, tenements, and hereditaments, including those of *copyhold* or customary tenure, which the person against whom execution is so sued out, or any person in trust for him, shall have been seised or possessed of at the time of entering up the judgment, or over which the judgment-debtor at the time has, or at any time afterwards shall have, a disposing power capable of being exercised for his own benefit.—STEWART.

[15] The writ in aid was formerly grossly abused; the king's name often became an engine of great fraud or oppression,—to remedy which stat. 57 Geo. III. c. 117 was passed. The abuse to which I have adverted was this: not only any person indebted or likely to be indebted to the crown on specialty or record, but any one so indebted in part, or by simple contract only, might obtain the extent in aid to be issued in his favour. The instant that the writ issued, all the property of the debtor became liable to the extent at the suit of the crown; and thus his creditors were deprived of participation in such property, the whole perhaps being absorbed by the alleged crown-debtor. But the statute mentioned above limits the issuing of this writ to cases where a debt shall be actually due to and previously demanded on the part of the crown. Before the statute, it was sufficient that the party suggested the existence of the debt to entitle him to sue out the writ and to the money levied thereon; but now the writ cannot be issued unless the sum actually due to his majesty be stated and specified in the fiat endorsed thereon; and, when levied, the sheriff is to pay the amount over to his majesty's use. Any overplus is to be paid into court, subject to its disposition on summary application. The expectation of preference formerly capable of being realized is by the statute, therefore, in a great degree defeated.—CHITTY.

And his debt shall, in suing out execution, be preferred to that of any other creditor who hath not obtained judgment before the king commenced his suit.(*m*) The king's judgment also affects all lands which the king's debtor hath at or after the time of contracting his debt, or which any of his officers mentioned in the statute 13 Eliz. c. 4 hath at or after the time of his entering on the office; so that, if such officer of the crown aliens for a valuable consideration, the land shall be liable to the king's debt even in the hands of a *bona fide* purchaser; though the debt due to the king was contracted by the vendor many years after the alienation.(*n*) Whereas, judgment between subject and subject related, even at common law, no further back than the first day of the term in which they were recovered, in respect of the lands of the debtor, and did not bind his goods and chattels but from the date of the writ of execution; and now, by the statute of frauds, 29 Car. II. c. 3, the judgment shall not bind the land in the hands of a *bona *fide* purchaser, but only from the day of actually signing the same; which is directed by the statute to be punctually entered on the record: nor shall the writ of execution bind the goods in the hands of a stranger or the purchaser,(*o*) but only from the actual delivery of the writ to the sheriff or other officer, who is therefore ordered to endorse on the back of it the day of his receiving the same.

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These are the methods which the law of England has pointed out for the execution of judgments: and when the plaintiff's demand is satisfied, either by the voluntary payment of the defendant or by this compulsory process or otherwise, satisfaction ought to be entered on the record, that the defendant may not be liable to be hereafter harassed a second time on the same account. But all these writs of execution must be sued out within a year and a day after the judgment is entered; otherwise the court concludes *prima facie* that the judgment is satisfied and extinct: yet, however, it will grant a writ of *scire facias*, in pursuance of statute Westm. 2, 13 Edw. I. c. 45, for the defendant to show cause why the judgment should not be revived, and execution had against him; to which the defendant may plead such matter as he has to allege in order to show why process of execution should not be issued; or the plaintiff may still bring an action of debt, founded on this dormant judgment, which was the only method of revival allowed by the common law.(*p*)[16]

In this manner are the several remedies given by the English law for all sorts of injuries, either real or personal, administered by the several courts of justice, and their respective officers. In the course therefore of the present book, we have, first, seen and considered the nature of remedies, by the mere act of the parties, or mere operation of law, without any suit in courts. We have next taken a review of remedies by suit or action in courts; and therein have contemplated, first, the nature and species of courts, instituted for the redress of injuries in general; and then have shown in what particular courts application must be made for the redress of particular injuries, or the doctrine of jurisdictions and *cognizance. We afterwards proceeded to consider the nature and distribution of wrongs and injuries affecting every species of personal and real rights, with the respective remedies by suit, which the law of the land has afforded for every possible injury. And, lastly, we have deduced and pointed out the method and progress of obtaining such remedies in the courts of justice: proceeding from the first general complaint or *original* writ, through all the stages of *process*, to compel the defendant's appearance; and of *pleading*, or formal allegation on the one side, and excuse or denial on the other; with the examination of the validity of such complaint or excuse, upon *demurrer;* or the

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(*m*) Stat. 33 Hen. VII. c. 39, § 74.
(*n*) 10 Rep. 55, 56.
(*o*) Skin. 257.
(*p*) Co. Litt. 290.

[16] But the writ of *scire facias* for the ordinary purpose of reviving a judgment, now called a "writ of reviver," is retained. During the lives of the parties to a judgment; or those of them, during whose lives execution may at present issue within a year and a day without a *scire facias;* and within six years from the recovery of the judgment, execution may now, however, issue without revival of the judgment. Com. Law Proc. Act, 1852, s 128.—Stewart.

truth of the facts alleged and denied, upon *issue* joined, and its several *trials;* to the *judgment* or sentence of the law, with respect to the nature and amount of the redress to be specifically given: till, after considering the suspension of that judgment by writs in the nature of *appeals*, we have arrived at its final *execution;* which puts the party in specific possession of his right by the intervention of ministerial officers, or else gives him an ample satisfaction, either by equivalent damages, or by the confinement of his body who is guilty of the injury complained of.

This care and circumspection in the law,—in providing that no man's right shall be affected by any legal proceeding without giving him previous notice, and yet that the debtor shall not by receiving such notice take occasion to escape from justice; in requiring that every complaint be accurately and precisely ascertained in writing, and be as pointedly and exactly answered; in clearly stating the question either of law or of fact; in deliberately resolving the former after full argumentative discussion, and indisputably fixing the latter by a diligent and impartial trial; in correcting such errors as may have arisen in either of those modes of decision, from accident, mistake, or surprise; and in finally enforcing the judgment, when nothing can be alleged to impeach it;—this anxiety to maintain and restore to every individual the enjoyment of his civil rights, without intrenching upon those of any other individual in the nation, this parental solicitude *which pervades our whole legal constitution, is [*423 the genuine offspring of that spirit of equal liberty which is the singular felicity of Englishmen. At the same time it must be owned to have given a handle, in some degree, to those complaints of delay in the practice of the law, which are not wholly without foundation, but are greatly exaggerated beyond the truth. There may be, it is true, in this, as in all other departments of knowledge, a few unworthy professors; who study the science of chicane and sophistry rather than of truth and justice; and who, to gratify the spleen, the dishonesty and wilfulness of their clients, may endeavour to screen the guilty, by an unwarrantable use of those means which were intended to protect the innocent. But the frequent disappointments, and the constant discountenance, that they meet with in the courts of justice, have confined these men (to the honour of this age be it spoken) both in number and reputation to indeed a very despicable compass.

Yet some delays there certainly are, and must unavoidably be, in the conduct of a suit, however desirous the parties and their agents may be to come to a speedy determination. These arise from the same original causes as were mentioned in examining a former complaint;(*q*) from liberty, property, civility, commerce, and an extent of populous territory: which, whenever we are willing to exchange for tyranny, poverty, barbarism, idleness, and a barren desert, we may then enjoy the same despatch of causes that is so highly extolled in some foreign countries. But common sense and a little experience will convince us, that more time and circumspection are requisite in causes where the suitors have valuable and permanent rights to lose, than where their property is trivial and precarious, and what the law gives them to-day may be seized by their prince to-morrow. In Turkey, says Montesquieu,(*r*) where little regard is shown to the lives or fortunes of the subject, all causes are quickly decided: the basha, on a summary hearing, orders which party he pleases to be bastinadoed, and then sends them about their business. But in *free states the trouble, [*424 expense, and delays of judicial proceedings are the price that every subject pays for his liberty: and in all governments, he adds, the formalities of law increase, in proportion to the value which is set on the honour, the fortune, the liberty and life of the subject.

From these principles it might reasonably follow, that the English courts should be more subject to delays than those of other nations; as they set a greater value on life, on liberty, and on property. But it is our peculiar felicity to enjoy the advantage, and yet to be exempted from a proportionable share of the burden. For the course of the civil law, to which most other nations con-

(*q*) See page 327. (*r*) Sp. L. b. 6, c. 2.

form their practice, is much more tedious than ours; for proof of which I need only appeal to the suitors of those courts in England, where the practice of the Roman law is allowed in its full extent. And particularly in France, not only our Fortescue(s) accuses (on his own knowledge) their courts of most unexampled delays in administering justice; but even a writer of their own(t) has not scrupled to testify, that there were in his time more causes there depending than in all Europe besides, and some of them a hundred years old. But (not to enlarge on the prodigious improvements which have been made in the celerity of justice by the disuse of real actions, by the statutes of amendment and jeofails,(u) and by other more modern regulations, which it now might be indelicate to remember, but which posterity will never forget) the time and attendance afforded by the judges in our English courts are also greater than those of many other countries. In the Roman calendar there were in the whole year but twenty-eight judicial or triverbial (w) days allowed to the prætor for deciding causes:(x) whereas, with us, one-fourth of the year is term-time, in which three courts constantly sit for the despatch of matters of law; besides the very close attendance of the court of chancery for determining *suits in equity, and the numerous courts of assize and *nisi prius* that sit in vacation for the trial of matters of fact. Indeed, there is no other country in the known world, that hath an institution so commodious and so adapted to the despatch of causes, as our trial by jury in those courts for the decision of facts; in no other nation under heaven does justice make her progress twice in each year into almost every part of the kingdom, to decide upon the spot by the voice of the people themselves the disputes of the remotest provinces.

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And here this part of our commentaries, which regularly treats only of redress at the common law, would naturally draw to a conclusion. But, as the proceedings in the courts of equity are very different from those at common law, and as those courts are of a very general and extensive jurisdiction, it is in some measure a branch of the task I have undertaken, to give the student some general idea of the forms of practice adopted by those courts. These will therefore be the subject of the ensuing chapter.

CHAPTER XXVIII.

OF PROCEEDINGS IN THE COURTS OF EQUITY.

*426] *Before we enter on the proposed subject of the ensuing chapter, viz., the nature and method of proceedings in the courts of equity, it will be proper to recollect the observations which were made in the beginning of this book(a) on the principal tribunals of that kind, acknowledged by the constitution of England; and to premise a few remarks upon those particular causes, wherein any of them claims and exercises a sole jurisdiction, distinct from and exclusive of the other.[1]

(s) *De Laud. LL.* c. 53.
(t) Bodin *de republ. l.* 6, c. 6.
(u) See page 407.
(w) Otherwise called *dies fasti in quibus licebat prætori fari tria verba, do, dico, addico. Calv. Lex* 285.
(x) Spelman of the Terms, § 4, c. 2.
(a) Pages 45, 50, 78.

[1] That the courts of equity and courts of law are not opposed to each other, and often concur in the exercise of their powers, to promote the ends of substantial justice, is not now disputed. It is said that matters of fact should be left to courts of law for the decision of a jury, (1 Ridgway's Parl. Car. 9:) and issues are oftentimes directed for that purpose; yet "there is no doubt," says lord Eldon, "that according to the constitution of this court it may take upon itself the decision of every fact put in issue upon the record." And again, "This court has a right (to be exercised very tenderly and sparingly) of deciding without issues." 9 Ves. 168. The general rule is that a court of equity will never exercise jurisdiction over criminal proceedings. Yet in a case where the plaintiffs indicted defendant's agent at the sessions, where the plaintiffs themselves were judges, for a breach of the peace, lord Hardwicke made an order to restrain the prosecution till

I have already(*b*) attempted to trace (though very concisely) the history, rise, and progress of the extraordinary court, or court of equity, in chancery. The same jurisdiction is exercised, and the same system of redress pursued, in the

(*b*) Page 50, &c.

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after hearing of the cause and further order; and where a bill is brought to quiet possession, if the plaintiff afterwards prefer an indictment for forcible entry, this court will stop the proceedings upon such indictment. 2 Atk. 302. The court of chancery has no jurisdiction to prevent a crime, except in the protection of infants. Therefore it is said that the publication of a libel cannot be restrained. 2 Swan. 413. Nor will the court compel a discovery in aid of criminal proceedings. 2 Ves. 398. The court of chancery has a concurrent jurisdiction with the admiralty, (Gilb. Eq. Rep. 228,) and may repeal letters of reprisal after a peace, though there is a clause in the patent that no treaty of peace shall prejudice it. 1 Vern. 54. So equity may relieve after verdict in King's Bench or Common Pleas, and even grant a perpetual injunction after five trials at law on the same point, and verdicts the same way; but equity is very tender in the exercise of this power. 2 P. W. 425. 10 Mod. 1. And a court of equity will not review the orders of the Exchequer as a court of revenue; nor interfere where that court, as a court of revenue, is competent to decide the subject-matter. 3 Ridgw. P. C. 80.

Matters arising out of England.—A question concerning the right and title to the Isle of Man may be determined in a court of chancery. 1 Ves. 202. Where the defendant is in England, though the cause of suit arose in the plantations, if the bill be brought here, the court *agens in personam* may, by compulsion of the person, force him to do justice; for the jurisdiction of the chancellor is not ousted, (3 Atk. 589. See 1 Jac. & W. 27;) and this although in general all questions respecting real estates belong to the country where they are situate. Elliott *vs.* Lord Minto. 6 Mod. 16.

1st. It is assistant to the common law by removing legal impediments to a fair decision of a question depending in those courts; as preventing the setting up of outstanding terms, &c. 5 Mad. 428. 2 J. & W. 391.

2d. It acts concurrently with the common law by compelling a discovery which may enable those courts to decide according to the real facts and justice of the case; as where the discovery is to ascertain whether the defendant did not promise to marry, (Forrest, Rep. 42;) or to disprove the defendant's plea, that he had made no promise within six years, and to compel him to state whether he has not promised within that time, (5 Mad. 331;) but he has a right to protect himself in equity by the statute of limitations from a discovery as to the original constitution of the debt, or whether it has since been paid. 5 Mad. 331. So he may be required to disclose whether he is an alien or not, (2 Ves. Sen. 287, 494;) but where a discovery would subject a party to penalty or forfeiture it is not to be obtained, (1 Ves. 56. 2 Ch. Rep. 68. 2 Atk. 392. 2 Ves. 265. 1 Eq. Abr 131, p. 10;) except in cases under the stock-jobbing act, (7 Geo. II. c. 8, s. 1, 2 Marsh Rep. 125,) and some other particular provisions. Nor will the court compel a discovery in aid of criminal proceedings. 2 Ves. 398. *Vide* Mitf. Pl. 150. It exercises concurrent jurisdiction in perpetuating testimony in danger of being lost before it can be used; by preserving property during litigation; by counteracting fraudulent judgments; by setting bounds to oppressive litigation; and in cases of fraud, accident, mistake, account, partition, and dower.

3d. It claims *exclusive jurisdiction* in matters of trust and confidence, and whenever, upon the principles of universal justice, the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent. 1 Fonb. Eq. p. 9. n. (f.)

The matters over which the court of chancery maintains an equitable jurisdiction have been arranged in the following alphabetical order; and, as this analysis has the recommendation of practical utility, we shall proceed to embody the principal rules and decisions under each head respectively.

1st. ACCIDENT AND MISTAKE.
2d. ACCOUNT.
3d. FRAUD.
4th INFANTS.
5th. SPECIFIC PERFORMANCE OF AGREEMENTS.
6th. TRUSTS.

1st. ACCIDENT AND MISTAKE.—By accident is meant, where a case is distinguished from others of the like nature by unusual circumstances; for the court of chancery cannot control the maxims of the common law, because of general inconveniences; but only where the observation of a rule is attended with some unusual and particular inconvenience. 10 Mod. 1.

1. *Bonds, &c.*—Equity will relieve against the loss of deeds (3 V. & B. 54) or bonds, (5 Ves. 235. 6 Ves. 81.,) but not if the bond be voluntary. 1 Ch. Ca. 77. It will also set

equity court of the exchequer; with a distinction, however, as to some few matters, peculiar to each tribunal, and in which the other cannot interfere. And, first, of those peculiar to the chancery.

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up a bond so lost, or destroyed, against sureties, though the principal be out of the jurisdiction. 3 Atk. 93. 1 Ch. Ca. 77. 9 Ves. 464. Bonds made *joint*, instead of several, may be modified according to intent in some cases. 2 Atk. 33. 9 Ves. 118. 17 Ves. 514. 1 Meriv. 564.

Boundaries, &c.—Equity will ascertain the boundaries, or fix the value, where lands have been intermixed by unity of possession. 2 Meriv. 507. 1 Swanst. 9. So to distinguish copyhold from freehold lands within the manor. 4 Ves. 180. Nels. 14.

Penalties, Forfeitures, &c., incurred by accident, are relieved against, (2 Vern. 594. 1 Stra. 453. 1 Bro. C. C. 418. 2 Sch. & Lef. 685,) where the thing may be done afterwards, or a compensation made for it. 1 Ch. Ca. 24. 2 Ventr. 352. 9 Mod. 22. 18 Ves. 63. But no relief is given in the case of a voluntary composition payable at a fixed period. Ambl. 332. See 1 Vern. 210. 2 Atk. 527. 3 Atk. 585. 16 Ves. 372. Equity will not relieve against the payment of stipulated, or, as they are sometimes called, liquidated, damages, (2 Atk. 194. Finch. 117. 2 Cha. Ca. 198. 6 Bro. P. C. 470. 1 Cox. 27. 2 Bos. & P. 346. 3 Atk. 395;) and forfeitures under acts of parliament, or conditions in law, which do not admit of compensation, or a forfeiture which may be considered as a limitation of an estate, which determines it when it happens, cannot be relieved against. 1 Ball & Bat. 373, 478. 1 Stra. 447, 452. Prec. Ch. 574.

Mistake.—A defective conveyance *to charitable uses* is always aided, (1 Eden, 14. 2 Vern. 755. Prec. Ch. 16. 2 Vern. 453. Hob. 136;) but neither a mistake in a fine (if after death of conusor) or in the names in a recovery is supplied, especially against a purchasor, (2 Vern. 3. Ambl. 102,) nor an erroneous recovery in the manorial court. 1 Vern. 367. Mistakes in a deed or contract, founded on *good consideration*, may be rectified. 1 Ves. 317. 2 Atk. 203. And if a bargain and sale be made and not enrolled within six months, equity will compel the vendor to make a good title by executing another bargain and sale which may be enrolled. 6 Ves. 745. A conveyance defective in form may be rectified, (1 Eq. Abr. 320. 1 P. W. 279,) even against assignees (2 Vern. 564. 1 Atk. 162. 4 Bro. C. C. 472) or against representatives. 1 Anst. 14. So defects in surrenders of copyhold, (2 Vern. 564. Salk. 449. 2 Vern. 151,) but not the omission of formalities required by act of parliament in conveyances. 5 Ves. 240. 3 Bro. C. C. 571. 13 Ves. 588. 15 Ves. 60. 6 Ves. 745. 11 Ves. 626. Defects in the mode of conveyance may be remedied. 4 Bro. C. C. 382. So the execution of powers. 2 P. Wms. 623.

2d. Account.—*Mutual* dealings and demands between parties, which are too complex to be accurately taken by trial at law, may be adjusted in equity, (1 Sch. & Lefroy, 309. 13 Ves. 278, 279. 1 Mad. Ch. 86, and note (i.);) but if the subject be matter of set-off at law, and capable of proof, a bill will not lie, (6 Ves. 136;) and the difficulty in adjusting the account constitutes no legal objection to an action. 5 Taunt. 481. 1 Marsh. 115. 2 Camp. 238.

3d. Fraud.—Equity has so great an abhorrence of fraud that it will set aside its own decrees if founded thereupon; and a bill lies to vacate letters-patent obtained by fraud. 13 Vin. Abr. 543, pl. 9. 1 Vern. 277. All deceitful practices and artful devices contrary to the plain rules of common honesty are frauds at common law, and punishable there; but for some frauds or deceits there is no remedy at law, in which cases they are cognizable in equity as one of the chief branches of its original jurisdiction. 2 Ch. Ca. 103. Finch, 161. 2 P. Wms. 270. 2 Vern. 189. 2 Atk. 324. 3 P. Wms. 130. Bridg. Ind. tit. Fraud, pl. 1. Where a person is prevented by fraud from executing a deed, equity will regard it as already done. 1 Jac. & W. 99.

1. *Trustees* are in no case permitted to purchase from themselves the trust estate, (1 Vern. 465,) nor their solicitor, (3 Mer. 200;) nor in bankruptcy are the commissioners (6 Ves. 617) or assignees, (6 Ves. 627,) nor their solicitors, (10 Ves. 381;) nor committee or keeper of a lunatic, (13 Ves. 156,) nor an executor, (1 Ves. & B. 170. 1 Cox, 134,) nor governors of charities. 17 Ves. 500.

2dly. *Attorney and Client.*—Fraud in transactions between attorneys and client is guarded against most watchfully. 2 Ves. Jr. 201. 1 Mad. Ch. 114, 115, 116.

3dly. *Heirs, Sailors, &c.*—Equity will protect improvident heirs against agreements binding on their future expectancies negotiated during some temporary embarrassment, provided such agreement manifest great inadequacy of consideration. 1 Vern. 169. 2 Vern. 27. 1 P. Wms. 510. 1 Bro. C. C. 1. 2 Ves. 157. It will also set aside unequal contracts obtained from sailors respecting their prize-money, (Newl. Cont. 443. 1 Wils 229. 2 Ves. 281, 516;) and the fourth section of 20 Geo. III. c. 24 declares all bargains, &c. concerning any share of a prize taken from any of his majesty's enemies, &c. void. *Vide* Newl. Cont. 444.

4thly. *Guardian.*—Fraud between guardian and ward is also the subject of strict cog-

1. Upon the abolition of the court of wards, the care, which the crown was bound to take as guardian of its infant tenants, was totally extinguished in every feodal view; but *resulted to the king in his court of chancery, together with the general protection(c) of all other *infants* in the kingdom. When [*427

(c) F. N. B. 27.

nizance in the court of chancery. For the details under this head, see 1 book, ch. xvii. and notes.

5thly. *Injunctions.*—In a modern work the subject of injunctions is considered under the head of fraud, (see 1 Mad. Ch. 125;) but it seems to deserve a distinct consideration. An injunction is a method by which the court of chancery interferes to prevent the commission of fraud and mischief. The exercise of this authority may be obtained,—1st. To stay proceedings in other courts. 2d. To restrain infringements of patent. 3d. To stay waste. 4th. To preserve copyright. 5th. To restrain negotiation of bills, &c. or the transfer of stock. 6th. To prevent nuisances, and in most cases where the rights of others are invaded and the remedy by action at law is too remote to prevent increasing damage. See 1 Mad. Ch. 157 to 165. An injunction to stay proceedings at law does not extend to a distress for rent, (1 Jac. & W. 392;) nor has equity any jurisdiction to stop goods in transitu in any case; nor will the court restrain the sailing of a vessel for such purpose by injunction. 2 Jac. & W. 349.

6thly. *Bills of Peace*, which form an essential check on litigation. 1 Bro. P. C. 266. 2 Bro. P. C. 217. Bunb. 158. 1 P. Wms. 671. Prec. Cha. 262. 1 Stra. 404. For this purpose a perpetual injunction will be granted. See 10 Mod. 1. 1 Bro. P. C. 268. This bill cannot hold in disputes between two persons only. 2 Atk. 483, 391. 4 Bro. C. C. 157. Vin. tit. Ch. 425, pl. 35. 3 P. Wms. 156.

7thly. *Bill of Interpleader* will lie to prevent fraud or injustice, where two or more parties claim adversely to each other, from him in possession; otherwise it will not lie, (1 Mer. 495;) for in such case it is necessary the two claimants should settle their rights before the person holding possession be required to give up to either. 2 Ves. Jr. 310. Mitf. Pl. 39. 1 Mad. Ch. 173. And, on the same principle,

8thly. *Bills or Writs of Certiorari*, to remove a cause from an inferior or incompetent jurisdiction.

9thly. *Bills to perpetuate testimony* in danger of being lost before the right can be ascertained.

10thly. *Bills to discover evidence* in possession of defendant, whereof plaintiff would be otherwise wholly deprived, or of deeds, &c. in defendant's custody.

11thly. *Bills of Quia Timet*, for the purpose of preventing a possible future injury, and thereby quieting men's minds and estates, &c. 1 Mad. Ch. 224. Newl. on Contr. 93, 493.

12thly. *Bills for the delivering up of Deeds.*—As where an instrument is void at common law, as being against the policy of the law, it belongs to the jurisdiction of equity to order it to be delivered up. 11 Ves. 535. In Mayor, &c. of Colchester *vs.* Lowton, lord Eldon says, "My opinion has always been (differing from others) that a court of equity has jurisdiction and duty to order a void deed to be delivered up and placed with those whose property may be affected by it, if it remains in other hands." 1 Ves. & B. 244.

13th. Bills for *apportionment* or *contribution* between persons standing in particular relations one to another. 5 Ves. 792. 2 Freem. 97.

14th. For *dower* and *partition.*

15th. To establish *moduses.*

16th. Bills to *marshal securities.*

17th. Bills to secure property in litigation in *other courts.* And

18th and lastly. Bills to compel lords of manors to hold courts, or to admit copyholders and bills to reverse erroneous judgments in copyhold courts. *Vide* 1 Madd. Ch. 242 to 253.

4th. INFANTS.—The protection and care which the court of chancery exercises over infants have already been incidentally noticed. *Vide* 1 book, chs. xvi. xvii. and notes.

Wards of Court.—To make a child a ward of court, it is sufficient to file a bill; and it is a contempt to marry a ward of court, though the infant's father be living. Ambl. 301. The court of chancery, representing the king as *parens patriæ*, has jurisdiction to control the right of the father to the possession of his infant; but the court of King's Bench has not any portion of that delegated authority. The court of chancery will restrain the father from removing his child, or doing any act towards removing it, out of the jurisdiction. So will the court refuse the possession of the child to its mother if she has withdrawn herself from her husband. 10 Ves. 52. Co. Litt. 89, (a) n. 70. 2 Fonb. Tr Eq. 224, n. (a.) 2 Bro. C. C. 499. 1 P. Wms. 705. 4 Bro. C. C. 101. 2 P. Wms. 102. The court retains its jurisdiction over the property of a ward of court after twenty-one, if it remains in court, and, if the ward marries, will order a proper settlement to be made, or

therefore a fatherless child has no other guardian, the court of chancery has a right to appoint one; and from all proceedings relative thereto, an appeal lies to the house of lords. The court of exchequer can only appoint a guardian *ad litem*, to manage the defence of the infant if a suit be commenced against him; a power which is incident to the jurisdiction of every court of justice:(*d*) but

(*d*) Cro. Jac. 641. 2 Lev. 103. T. Jones, 90.

reform an improper one, unless the ward consents to the settlement either in court or under a commission. 2 Sim. & Stu. 123, n. (a.) In case the husband assign the property of the wife, who is a ward of court, it shall not prevail, but the court will direct even the whole of the property in question to be settled on the wife and her children, and the assignee will not be entitled even to the arrear of interest accrued since the marriage. 3 Ves. 506.

5th. Specific Performance of Agreements.—The jurisdiction of the courts of equity in matters of this kind, though certainly as ancient as the reign of Edward IV., did not obtain an unresisting and uniform acquiescence on the part of the public till many years afterwards. See 1 Roll. Rep. 354. 2 ib. 443. Latch. 172.

Realty.—Thus equity enforces agreements for the purchase of lands, or things which relate to realties, but not (generally) those which relate to personal chattels, as the sale of stock, corn, hops, &c.: in such cases the remedy is at law. 3 Atk. 383. Newl. Contr. 87.

That which is agreed to be done is in equity considered as already done, (2 P. Wms. 222;) and therefore when a husband covenants on his marriage to make a settlement charged upon his lands, which he is afterwards prevented from completing by sudden death, the heir shall make satisfaction of the settlement out of the estate. Ib. 233.

Personalty.—In agreements, with penalties for the breach of them, it is necessary to distinguish the cases of a penalty intended as a security for a collateral object from those where the contract itself has *assessed the damages* which the party is to pay upon his doing or omitting to do the particular act. In these latter cases equity will not interfere either to prevent or to enforce the act in question, or to restrain the recovery of damages after they have become due; but in the former, where it plainly appears that the specific performance of that act was the primary object of the agreement, and the penalty intended merely to operate as a collateral security for its being done, though at law the party might make his election either to do the particular act or to pay the penalty, a court of equity will not permit him to exercise such right, but will compel him to perform the object of the agreement. Newl. Contr. cap. 17. Thus, as the principle whereon a specific performance of agreement relating to personals is refused is that there is as complete a remedy to be obtained at law, therefore, where a party sues merely on a memorandum of agreement, (a mere memorandum not being regarded as valid at law,) a court of equity will give relief; for equity suffers not a right to be without a remedy. 3 Atk. 382, 385. But it is only where the legal remedy is inadequate or defective that courts of equity interfere. 8 Ves. 163. Equity will not enforce an agreement for the transfer of stock, (10 Ves. 161;) but it has been held that a bill will lie for performance of agreement for purchase of government-stock where it prays for the delivery of the *certificates* which give the legal title to stock. 1 Sim. & Stu. 590. And it seems the court will entertain a suit for the specific performance of a contract for the purchase of a debt. 5 Price, 325. So to sell the good will of a trade and the exclusive use of a secret in dyeing, (1 Sim. & Stu. 74;) but not without great caution. See 1 P. Wms. 181.

6th. Trusts.—Trusts may be created of real or personal estate, and are either, 1st, *Express;* or, 2d, *Implied.* Under the head of implied trusts may be included all resulting trusts, and all such trusts as are not express. Express trusts are created by deed or will. Implied trusts arise in general by construction of law upon the acts or situation of parties. 1 Mad. Cha. 446.

Lunatics.—The custody of the persons and estates of lunatics was a power not originally in the crown, but was given to it by statute for the benefit of the subject. 1 Ridgw. P. C. 224; *et vid.* 2 Inst. 14. And now, by the statute *de prerogativâ regis*, (17 Edw. II. c. 9 & 10,) the king shall have the real estates of idiots to his own use, and he shall provide for the safe keeping of the real estates of lunatics, so that they shall have a competent maintenance, and the residue is to be kept for their use. 1 Ridgw. P. C. 519, 535. A liberal application of the property of a lunatic is made to secure every comfort his situation will admit, (6 Ves. 8,) without regard to expectants on estate. 1 Ves. Jr. 297. The power of the chancellor extends to making grants from time to time of the lunatic's estate, and as this power is derived under the sign-manual, in virtue of the prerogative of the crown, the chancellor, who is usually invested with it, is responsible to the crown alone for the right exercise of it. Per Ld. Hardw., 3 Atk. 635. It is said that since the revolution the king has always granted the surplus profits of the estate of an idiot to some of his family. Ridgw. P. C. 519, App. note, (1.)

when the interest of a minor comes before the court judicially, in the progress of a cause, or upon a bill for that purpose filed, either tribunal indiscriminately will take care of the property of the infant.

2. As to *idiots* and *lunatics:* the king himself used formerly to commit the custody of them to proper committees, in every particular case; but now, to avoid solicitations and the very shadow of undue partiality, a warrant is issued by the king(*e*) under his royal sign-manual to the chancellor or keeper of his seal to perform this office for him; and, if he acts improperly in granting such custodies, the complaint must be made to the king himself in council.(*f*) But the previous proceedings on the commission, to inquire whether or no the party be an idiot or a lunatic, are on the law side of the court of chancery, and can only be redressed (if erroneous) by writ of error in the regular course of law.

(*e*) See book i. ch. 8. (*f*) 3 P. Wms. 108. See Reg. Br. 267.

Charities.—The general controlling power of the court over charities does not extend to a charity regulated by governors under a charter, unless they have also the management of the revenues and abuse their trust; which will not be presumed, but must be apparent and made out by evidence. 2 Ves. Jr. 42. The internal management of a charity is the exclusive subject of visitorial jurisdiction; but under a trust as to the revenue, abuse by misapplication is controlled in chancery. 2 Ves. & B. 134.

Executors.—Where an executor has an express legacy, the court of chancery looks upon him as a trustee with regard to the surplus, and will make him account, though the spiritual court has no such power. 1 P. Wms. 7. And where an executor, who was directed to lay out the testator's personalty in the funds, unnecessarily sold out stock, kept large balances in his hand, and resisted payment of debts by false pretences of outstanding demands, he was charged with five per cent. interest and costs, but the court refused to make rests in the account. 1 Jac. & W. 586. And see, on this subject, *ante*, 2 book, ch. 32.

Marshalling Assets.—The testator's whole personal property, whether devised or not, is assets both in law and equity, to which creditors by simple contract, or of any higher order, may have recourse for the satisfaction of their demands. But the testator may, by clear and explicit words, exempt his personalty from payment of debts as against the devisee of his realty, though not as against creditors. The rule in equity is, that in case even of a specialty debt the personal assets shall be first applied, and if deficient, and there be no devise for payment of debts, the heir shall then be charged for assets descended. 2 Atk. 426, 434. For lands are in equity a favoured fund, insomuch that the heir at law or devisee of a mortgagor may demand to have the estate mortgaged by such devisor himself, cleared out of the personalty. Vin. Abr. tit. Heir, U. pl. 35. 1 Atk. 487. And a specific devisee of a mortgaged estate is entitled to have it exonerated out of real assets descended. 3 Atk. 439, 439. But at law there is no such distinction of favour shown to lands; a bond-creditor may if he please proceed immediately against the heir without suing the personal representative of his deceased debtor. As to the order in which real assets shall be applied in equity for payment of debts, (after exhausting the personal effects, supposing them not exempted,) the general rule is, first to take lands devised simply for that purpose, then lands descended, and lastly estates specifically devised, even though they are *generally charged with the payment of debts.* 2 Bro. 263.

Equitable assets are such as at law cannot be reached by a creditor as a devise in trust to pay debts of an equity of redemption subject to a mortgage *in fee*, or where the descent is broken by a devise to sell for the payment of debts. 1 Vern. 411. 1 Ch. Ca. 128, n. 2 Atk. 290. But lands so devised, subject to a mortgage *for years*, are *legal* assets.

Bankruptcy.—See the consolidation act, (6 Geo. IV. c. 16,) commencing its operation with the present year, and the decisions applicable to its several enactments, *ante*, 2 book, ch. 31.—CHITTY.

By stat. 9 Geo. IV. c. 41, s. 41, all persons wheresoever in England (not keeping licensed houses, and not being relatives, or a committee appointed by the lord chancellor) receiving into their exclusive care and maintenance any insane person or persons, or represented or alleged to be insane, are required, under pain of misdemeanour, to have a certificate of insanity, an order for reception of every such person so received after 1st of August, 1828, and to transmit copies thereof within five days to the office of metropolitan commissioners in lunacy, to be marked "private return," and also forthwith to give notice of the death or removal of any such person.

And by s. 36 of the same statute, the persons by whose authority any patient shall be delivered into the care of the keeper of any licensed house for the reception of the insane, are, under like pain, required in person, or by some other person appointed in writing, under hand and seal, to visit such person once at least every six months during

3. The king, as *parens patriæ*, has the general superintendence of all *charities;* which he exercises by the keeper of his conscience, the chancellor. And therefore whenever it is necessary, the attorney-general, at the relation of some informant, (who is usually called the *relator*,) files *ex officio* an information in the court of chancery to have the charity properly established. By statute also 43 Eliz. c. 4, authority is given to the lord chancellor or lord keeper, and to the chancellor of the duchy of Lancaster, respectively, to grant *commis-
*428] sions under their several seals, to inquire into any abuses of charitable donations, and rectify the same by decree; which may be reviewed in the respective courts of the several chancellors, upon exceptions taken thereto. But, though this is done in the petty-bag office in the court of chancery, because the commission is there returned, it is not a proceeding at common law, but treated as an original cause in the court of equity. The evidence below is not taken down in writing, and the respondent in his answer to the exceptions may allege what new matter he pleases; upon which they go to proof, and examine witnesses in writing upon all the matters in issue: and the court may decree the respondent to pay all the costs, though no such authority is given by the statute. And as it is thus considered as an original cause throughout, an appeal lies of course from the chancellor's decree to the house of peers,(*g*) notwithstanding any loose opinions to the contrary.(*h*)[3]

4. By the several statutes relating to *bankrupts,* a summary jurisdiction is given to the chancellor in many matters consequential or previous to the commissions thereby directed to be issued; from which the statutes give no appeal.[4]

On the other hand, the jurisdiction of the court of chancery doth not extend to some causes wherein relief may be had in the exchequer. No information can be brought, in chancery, for such mistaken charities as are given to the king by the statutes for suppressing superstitious uses. Nor can chancery give any relief against the king, or direct any act to be done by him, or make any decree disposing of or affecting his property; not even in cases where he is a royal trustee.(*i*)[5] Such causes must be determined in the court of exchequer, as a court of revenue; which alone has power *over the king's treasury,
*429] and the officers employed in its management: unless where it properly

(*g*) Duke's Char. Uses, 62, 128. Corporation of Burford *vs.* Lenthall, *Canc.* 9 May, 1743.
(*h*) 2 Vern. 118.
(*i*) Huggins *vs.* York Buildings' Company, *Canc.* 24 Oct. 1740. Reeve *v.* Attorney General, *Canc.* 27 Nov. 1741. Lightboun *vs.* Attorney General, *Canc.* 2 May. 1743.

his confinement, and to enter, in the journal kept at such houses for registering the visits of the commissioners, the date of such visit.—Chitty.

The proceedings of the court of chancery in the exercise of this branch of its jurisdiction are now regulated by the statute 16 & 17 Vict. c. 70, called "The Lunacy Regulation Act, 1853."—Kerr.

[3] The latest and most important piece of legislation on this subject is "The Charitable Trusts Act, 1853," of which the professed object is to secure the due administration of charitable trusts, and in certain cases a more beneficial application of charitable funds than that previously in operation.—Kerr.

[4] The summary jurisdiction of the court of equity in cases of bankruptcy must be personally exercised by the chancellor, lord keeper, or the lords commissioners of the great seal. 2 Woodd. 400.—Christian.

But, by stat. 1 & 2 W. IV. c. 56, this jurisdiction was transferred to the court of bankruptcy.—Stewart.

[5] Where the rights of the crown are concerned, if they extend only to the superintendence of a public trust, as in the case of a charity, the king's attorney-general may be made a party to sustain those rights; and, in other cases where the crown is not in possession, a title vested in it is not impeached, and its rights only incidentally concerned. It has generally been considered that the king's attorney-general may be made a party in respect of those rights; and the practice has been accordingly. 1 P. Wms. 445. But where the crown is in possession, or any title is vested in it which the suit seeks to divest, or its rights are the immediate and sole object of the suit, the application must be to the king, by petition of right, (Reeve *vs.* Attorney-General, mentioned in Penn *vs.* Lord Baltimore, 1 Ves. 445, 446,) upon which, however, the crown may refer it to the chancellor to do right, and may direct that the attorney-general shall be made a party to a suit for that purpose. The queen has also the same prerogative. 2 Roll. Abr. 213. Mitf. Treat. on Pleadings in Chancery.—Christian.

belongs to the duchy court of Lancaster, which hath also a similar jurisdiction as a court of revenue, and, like the other, consists of both a court of law and a court of equity.

In all other matters, what is said of the court of equity in chancery will be equally applicable to the other courts of equity. Whatever difference there may be in the forms of practice, it arises from the different constitution of their officers: or, if they differ in any thing more essential, one of them must certainly be wrong; for truth and justice are always uniform, and ought equally to be adopted by them all.

Let us next take a brief, but comprehensive, view of the general nature of *equity*, as now understood and practised in our several courts of judicature. I have formerly touched upon it,(*k*) but imperfectly: it deserves a most complete explication. Yet as nothing is hitherto extant, that can give a stranger a tolerable idea of the courts of equity subsisting in England, as distinguished from the courts of law, the compiler of these observations cannot but attempt it with diffidence: those who know them best are too much employed to find time to write; and those who have attended but little in those courts must be often at a loss for materials.

Equity, then, in its true and genuine meaning, is the soul and spirit of all law: *positive* law is construed, and *rational* law is made, by it. In this, equity is synonymous to justice; in that, to the true sense and sound interpretation of the rule. But the very terms of a court of *equity*, and a court of *law*, as contrasted to each other, are apt to confound and mislead us: as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illustration to be met with, which now draws a line between the two jurisdictions, by setting law and equity *in opposition to each other, will be found either totally erroneous, or erroneous to a certain degree. [*430

1. Thus in the first place it is said,(*l*) that it is the business of a court of equity in England to abate the rigour of the common law. But no such power is contended for. Hard was the case of bond-creditors whose debtor devised away his real estate; rigorous and unjust the rule which put the devisee in a better condition than the heir;(*m*) yet a court of equity had no power to interpose. Hard is the common law still subsisting, that land devised, or descending to the heir, shall not be liable to simple contract debts of the ancestor or devisor,(*n*) although the money was laid out in purchasing the very land; and that the father shall never immediately succeed as heir to the real estate of the son;(*o*) but a court of equity can give no relief; though in both these instances the artificial reason of the law, arising from feodal principles, has long ago entirely ceased. The like may be observed of the descent of lands to a remote relation of the whole blood, or even their escheat to the lord, in preference to the owner's half-brother;(*p*) and of the total stop to all justice, by causing the *parol* to *demur*,(*q*) whenever an infant is sued as heir, or is party to a real action. In all such cases of positive law, the courts of equity, as well as the courts of law, must say, with Ulpian,(*r*) "*hoc quidem perquam durum est, sed ita lex scripta est.*"

2. It is said,(*s*) that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound, and equally profess, to interpret statutes according to the true intent of the legislature. In general law all cases cannot be foreseen, or, if foreseen, cannot be expressed: some will arise that will fall within the *meaning, though not within the words, of the legislator; and others, which may fall within the letter, may be [*431 contrary to his meaning, though not expressly excepted. These cases, thus out of the letter, are often said to be within the equity, of an act of parliament; and so cases within the letter are frequently out of the equity. Here by *equity*

(*k*) Book i. introd. §§ 2, 3. *ad calc.*
(*l*) Lord Kaims, Princ. of Equity, 44.
(*m*) See book ii. ch. 23, p. 378.
(*n*) Ibid. ch. 15, pages 243, 244; ch. 23. p. 377.
(*o*) Ibid. ch. 14, p. 208.
(*p*) Ibid. p. 227.
(*q*) See page 300.
(*r*) *Ff.* 40. 9, 12.
(*s*) Lord Kaims, Princ. of Equity, 177.

we mean nothing but the sound interpretation of the law; though the words of the law itself may be too general, too special, or otherwise inaccurate or defective. These then are the cases which, as Grotius(*t*) says, "*lex non exacte definit, sed arbitrio boni viri permittit;*" in order to find out the true sense and meaning of the lawgiver, from every other topic of construction. But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in the courts both of law and equity: the construction must in both be the same: or, if they differ, it is only as one court of law may also happen to differ from another. Each endeavours to fix and adopt the true sense of the law in question; neither can enlarge, diminish, or alter that sense in a single title.

3. Again, it hath been said(*u*) that *fraud*, *accident*, and *trust* are the proper and peculiar objects of a court of equity. But every kind of *fraud* is equally cognizable, and equally adverted to, in a court of law; and some frauds are cognizable only there: as fraud in obtaining a devise of lands, which is always sent out of the equity courts to be there determined. Many *accidents* are also supplied in a court of law; as, loss of deeds, mistakes in receipts or accounts, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies: and many cannot be relieved even in a court of equity; as, if by accident a recovery is ill suffered, a devise ill executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement. A technical *trust*, indeed, created by the limitation of a second use, was forced into *the courts of equity in the manner formerly mentioned;(*w*) and this species of trust, extended by inference and construction, have ever since remained as a kind of *peculium* in those courts. But there are other trusts which are cognizable in a court of law; as deposits, and all manner of bailments; and especially that implied contract, so highly beneficial and useful, of having undertaken to account for money received to another's use,(*x*) which is the ground of an action on the case almost as universally remedial as a bill in equity.

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4. Once more: it has been said that a court of equity is not bound by rules or precedents, but acts from the opinion of the judge,(*y*) founded on the circumstance of every particular case. Whereas the system of our courts of equity is a laboured, connected system, governed by established rules, and bound down by precedents from which they do not depart, although the reason of some of them may perhaps be liable to objection. Thus, the refusing a wife her dower in a trust-estate,(*z*) yet allowing the husband his curtesy; the holding the penalty of a bond to be merely a security for the debt and interest, yet considering it sometimes as the debt itself, so that the interest shall not exceed that penalty;(*a*) the distinguishing between a mortgage at *five per cent.* with a clause of a reduction to *four* if the interest be regularly paid, and a mortgage at *four per cent.* with a clause of enlargement to *five* if the payment of the interest be deferred; so that the former shall be deemed a conscientious, the latter an unrighteous, bargain:(*b*) all these, and other cases that might be instanced, are plainly rules of positive law, supported only by *the reverence that is shown, and generally very properly shown, to a series of former determinations, that the rule of property may be uniform and steady. Nay, sometimes a precedent is so strictly followed that a particular judgment founded upon special circumstances(*c*) gives rise to a general rule.

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In short, if a court of equity in England did really act as many ingenious writers have supposed it (from theory) to do, it would rise above all law, either common or statute, and be a most arbitrary legislator in every particular case.

(*t*) *De æquitate*, § 3.
(*u*) 1 Roll. Abr. 374. 4 Inst. 84, 10. Mod. 1.
(*w*) Book ii. ch. 20.
(*x*) See page 163.
(*y*) This is stated by Mr. Selden (Table-Talk, tit. Equity) with more pleasantry than truth. "For *law* we have a measure, and know what to trust to: *equity* is according to the conscience of him that is chancellor; and as that is larger and narrower, so is equity. 'Tis all one as if they should make the standard for the measure a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing with the chancellor's conscience."
(*z*) 2 P. Wms. 640. See book ii. page 337.
(*a*) Salk. 154.
(*b*) 2 Vern. 289, 316. 3 Atk. 520.
(*c*) See the case of Foster and Munt (1 Vern. 473) with regard to the undisposed *residuum* of personal estates.

No wonder they are so often mistaken. Grotius, or Puffendorf, or any other of the great masters of jurisprudence, would have been as little able to discover by their own light the system of a court of equity in England as the system of a court of law; especially as the notions before mentioned of the character, power, and practice of a court of equity were formerly adopted and propagated (though not with approbation of the thing) by our principal antiquaries and lawyers, Spelman,(*d*) Coke,(*e*) Lambard,(*f*) and Selden, (*g*) and even the great Bacon(*h*) himself. But this was in the infancy of our courts of equity, before their jurisdiction was settled, and when the chancellors themselves, partly from their ignorance of law, (being frequently bishops or statesmen,) partly from ambition or lust of power, (encouraged by the arbitrary principles of the age they lived in,) but principally from the narrow and unjust decisions of the courts of law, had arrogated to themselves such unlimited authority as hath totally been disclaimed by their successors for now above a century past. The decrees of a court of equity were then rather in the nature of awards formed on the sudden *pro re nata* with more probity of intention than knowledge of the subject, *founded on no settled principles, as being never designed, and therefore never used, for precedents. But the systems of jurisprudence [*434 in our courts, both of law and equity, are now equally artificial systems, founded on the same principles of justice and positive law, but varied by different usages in the forms and mode of their proceedings; the one being originally derived (though much reformed and improved) from the feodal customs as they prevailed in different ages in the Saxon and Norman judicatures; the other (but with equal improvements) from the imperial and pontifical formularies introduced by their clerical chancellors.

The suggestion, indeed, of every bill to give jurisdiction to the courts of equity (copied from those early times) is, that the complainant hath no remedy at the common law. But he who should from thence conclude that no case is judged of in equity where there might have been relief at law, and at the same time casts his eye on the extent and variety of the cases in our equity reports, must think the law a dead letter indeed. The rules of property, rules of evidence, and rules of interpretation in both courts are, or should be, exactly the same; both ought to adopt the best, or must cease to be courts of justice. Formerly some causes, which now no longer exist, might occasion a different rule to be followed in one court from what was afterwards adopted in the other, as founded in the nature and reason of the thing; but the instant those causes ceased, the measure of substantial justice ought to have been the same in both. Thus, the penalty of a bond, originally contrived to evade the absurdity of those monkish constitutions which prohibited taking interest for money, was therefore very pardonably considered as the real debt in the courts of law, when the debtor neglected to perform his agreement for the return of the loan with interest; for the judges could not, as the law then stood, give judgment that the interest should be specifically paid. But when afterwards the taking of interest became legal, as the necessary companion of commerce,(*i*) nay, after the statute of 37 Hen. VIII. c. 9 had declared the *debt or loan itself to be "the just and true intent" for which the obligation was given, [*435 their narrow-minded successors still adhered wilfully and technically to the letter of the antient precedents, and refused to consider the payment of principal, interest, and costs as a full satisfaction of the bond. At the same time, more liberal men, who sat in the courts of equity, construed the instrument according to its "just and true intent," as merely a security for the loan, in which light it was certainly understood by the parties, at least after these determinations, and therefore this construction should have been universally received. So in mortgages, being only a landed as the other is a personal security for the money lent, the payment of principal, interest, and costs

(*d*) *Quæ in summis tribunalibus multi a legum canone decernunt judices, solus (si res exigerit) exhibet cancellarius ex arbitrio; nec aliter decretis tenetur suæ curiæ vel sui ipsius, quin, eluente nova ratione, recognoscat quæ voluerit, mutet et deleat prout suæ videbitur prudentiæ.* Gloss. 108.

(*e*) See pages 54, 55.

(*f*) *Archeion.* 71, 72, 73.

(*g*) *Ubi supra.*

(*h*) *De Augm. Scien. l.* 8. c. 3.

(*i*) See book ii. page 456.

ought at any time before judgment executed to have saved the forfeiture in a court of law as well as in a court of equity. And the inconvenience as well as injustice of putting different constructions in different courts upon one and the same transaction obliged the parliament at length to interfere, and to direct, by the statutes 4 & 5 Anne, c. 16, and 7 Geo. II. c. 20, that, in the cases of bonds and mortgages, what had long been the practice of the courts of equity should also for the future be universally followed in the courts of law; wherein it had before these statutes in some degree obtained a footing.(*j*)

Again: neither a court of equity nor of law can vary men's wills or agreements, or (in other words) make wills or agreements for them. Both are to understand them truly, and therefore both of them uniformly. One court ought not to extend, nor the other abridge, a lawful provision deliberately settled by the parties, contrary to its just intent. A court of equity, no more than a court of law, can relieve against a penalty in the nature of stated damages; as a rent of 5*l.* an acre for ploughing up antient meadow:(*k*) nor against a lapse of time, where the time is material to the contract; as in covenants for renewal of leases. Both courts will equitably construe, but neither pretends to control or change, a lawful stipulation or engagement.

*436] *The rules of decision are in both courts equally apposite to the subjects of which they take cognizance. Where the subject-matter is such as requires to be determined *secundum æquum et bonum*, as generally upon actions on the case, the judgments of the courts of law are guided by the most liberal equity. In matters of positive right, both courts must submit to and follow those antient and invariable maxims "*quæ relicta sunt et tradita.*"(*l*) Both follow the law of nations, and collect it from history and the most approved authors of all countries, where the question is the object of that law: as in the case of the privileges of embassadors,(*m*) hostages, or ransom-bills.(*n*) In mercantile transactions they follow the marine law,(*o*) and argue from the usages and authorities received in all maritime countries. Where they exercise a concurrent jurisdiction, they both follow the law of the proper *forum*:(*p*) in matters originally of ecclesiastical cognizance, they both equally adopt the canon or imperial law, according to the nature of the subject;(*q*) and, if a question came before either, which was properly the object of a foreign municipal law, they would both receive information what is the rule of the country,(*r*) and would both decide accordingly.

Such then being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist? It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief. Upon these, and upon two other accidental grounds of jurisdiction, which were formerly driven into those courts by narrow decisions of the courts of law, viz., the true construction of securities for money lent, and the form and effect *of a trust or second use; upon these main pillars hath been gradually erected that structure of jurisprudence which prevails in our courts of equity, and is inwardly bottomed upon the same substantial foundations as the legal system which hath hitherto been delineated in these commentaries; however different they may appear in their outward form, from the different taste of their architects.

*437]

1. And, first, as to the mode of *proof*. When facts, or their leading circumstances, rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him upon oath with regard to the truth of the transaction; and, that being once discovered, the judgment is the same in equity as it would have been at law. But, for want of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every other court in all matters of account.(*s*) As incident to accounts, they take a concurrent cognizance of the administration of personal assets,(*t*) consequently of debts, lega-

(*j*) 2 Keb. 553, 555. Salk. 597. 6 Mod. 11, 60, 101.
(*k*) 2 Atk 239.
(*l*) *De jure naturæ cogitare per not atque dicere debemus; de jure populi Romani, quæ relicta sunt et tradita.* Cic. *de Leg. l. 3, ad calc.*
(*m*) See book i. page 253.
(*n*) Ricord *vs.* Bettenham, Tr. 5 Geo. III B. R.
(*o*) See book i. page 75. Book ii. pages 459, 461, 467.
(*p*) See book ii. page 513.
(*q*) Ibid. 504.
(*r*) Ibid. 463.
(*s*) 1 Cha. Ca. 57.
(*t*) 2 P. Wms. 145.

cies, the distribution of the residue, and the conduct of executors and administrators.(*u*) As incident to accounts, they also take the concurrent jurisdiction of tithes, and all questions relating thereto;(*w*) of all dealings in partnership,(*x*) and many other mercantile transactions; and so of bailiffs, receivers, factors, and agents.(*y*) It would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to or end in accounts.

From the same fruitful source, the compulsive discovery upon oath, the courts of equity have acquired a jurisdiction over almost all matters of fraud;(*z*) all matters in the private knowledge of the party, which, though concealed, are binding in conscience; and all judgments at law, obtained through such fraud or concealment. And this, not by *impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking any advantage [*438 of a judgment obtained by suppressing the truth;(*a*) and which, had the same facts appeared on the trial as now are discovered, he would never have attained at all.[6]

2 As to the mode of *trial*. This is by interrogatories administered to the witnesses, upon which their depositions are taken in writing, wherever they happen to reside. If therefore the cause arises in a foreign country, and the witnesses reside upon the spot; if, in causes arising in England, the witnesses are abroad, or shortly to leave the kingdom; or if witnesses residing at home are aged or infirm; any of these cases lays a ground for a court of equity to grant a commission to examine them, and (in consequence)[7] to exercise the same jurisdiction, which might have been exercised at law, if the witnesses could probably attend.

3. With respect to the mode of *relief*. The want of a more specific remedy, than can be obtained in the courts of law, gives a concurrent jurisdiction to a court of equity in a great variety of cases. To instance in executory agreements. A court of equity will compel them to be carried into strict execution,(*b*) unless where it is improper or impossible: instead of giving damages for their non-performance. And hence a fiction is established, that what ought to be done shall be considered as being actually done,(*c*) and shall relate back to the time when it ought to have been done originally: and this fiction is so closely pursued through all its consequences, that it necessarily branches out into many rules of jurisprudence, which form a certain regular system. So of waste, and other similar injuries, a court of equity takes a concurrent cognizance, in order to prevent them by injunction.(*d*) Over questions that may be tried at law, in a great multiplicity of actions, a court of equity assumes a *jurisdiction, [*439 to prevent the expense and vexation of endless litigations and suits.(*e*)

(*u*) 2 Cha. Ca. 152.
(*w*) 1 Eq. Ca. Abr. 367.
(*x*) 2 Vern. 277.
(*y*) Ibid. 638.
(*z*) 2 Cha. Ca. 46.
(*a*) 3 P. Wms. 148. Year-Book, 22 Edw. IV. 37, pl. 21.
(*b*) Eq. Ca. Abr. 16.
(*c*) 3 P. Wms. 215.
(*d*) 1 Cha. Rep. 14. 2 Cha. Ca. 32.
(*e*) 1 Vern. 308. Prec. Cha. 261. 1 P. Wms. 672. Stra. 404.

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[6] One material difference between a court of equity and a court of law as to the mode of proof is thus described by lord chancellor Eldon:—"A defendant in a court of equity has the protection arising from his own conscience in a degree in which the law does not affect to give him protection. If he positively, plainly, and precisely denies the assertion, and one witness only proves it as positively, clearly, and precisely as it is denied, and there is no circumstance attaching credit to the assertion, overbalancing the credit due to the denial as a positive denial, a court of equity will not act upon the testimony of that witness. Not so at law. There the defendant is not heard. One witness proves the case; and, however strongly the defendant may be inclined to deny it upon oath, there must be a recovery against him." 6 Ves. Jr. 184.—CHRISTIAN.

[7] It is not correct that where a court of equity will grant a commission to examine witnesses, whose attendance cannot be procured to give testimony in a court of common law, it will in such case also grant relief. For though it is very usual to file a bill praying a discovery, and that a commission may be issued to examine witnesses who live abroad, no doubt can be entertained that if the bill proceeded to pray relief, and that relief was such as a court of law was fully competent to administer, a demurrer to the bill would hold, unless it was a case where the courts exercise a concurrent jurisdiction.—CHRISTIAN.

In various kinds of frauds it assumes a concurrent(*f*) jurisdiction, not only for the sake of a discovery, but of a more extensive and specific relief: as by setting aside fraudulent deeds,(*g*) decreeing reconveyances,(*h*) or directing an absolute conveyance merely to stand as a security.(*i*) And thus, lastly, for the sake of a more beneficial and complete relief by decreeing a sale of lands,(*k*) a court of equity holds plea of all debts, encumbrances, and charges that may affect it or issue thereout.

4. The true construction of *securities* for money lent is another fountain of jurisdiction in courts of equity. When they held the penalty of a bond to be the form, and that in substance it was only as a pledge to secure the repayment of the sum *bona fide* advanced, with a proper compensation for the use, they laid the foundation of a regular series of determinations, which have settled the doctrine of personal pledges or securities, and are equally applicable to mortgages of real property. The mortgagor continues owner of the land, the mortgagee of the money lent upon it; but this ownership is mutually transferred, and the mortgagor is barred from redemption if, when called upon by the mortgagee, he does not redeem within a time limited by the court; or he may when out of possession be barred by length of time, by analogy to the statute of limitations.

5. The form of a *trust*, or second use, gives the courts of equity an exclusive jurisdiction as to the subject-matter of all settlements and devises in that form, and of all the long terms created in the present complicated mode of conveyancing. This is a very ample source of jurisdiction: but the trust is governed by very nearly the same rules, as would govern the estate in a court of law,(*l*) if no trustee was interposed: and *by a regular positive system established in the courts of equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of the common law.

*440]

These are the principal (for I omit the minuter) grounds of the jurisdiction at present exercised in our courts of equity: which differ, we see, very considerably from the notions entertained by strangers, and even by those courts themselves before they arrived to maturity; as appears from the principles laid down, and the jealousies entertained of their abuse, by our early juridical writers cited in a former page;(*m*) and which have been implicitly received and handed down by subsequent compilers, without attending to those gradual accessions and derelictions, by which in the course of a century this mighty river hath imperceptibly shifted its channel. Lambard in particular, in the reign of queen Elizabeth, lays it down,(*n*) that "equity should not be appealed unto, but only in rare and extraordinary matters: and that a good chancellor will not arrogate authority in every complaint that shall be brought before him upon whatsoever suggestion: and thereby both overthrow the authority of the courts of common law, and bring upon men such a confusion and uncertainty, as hardly any man should know how or how long to hold his own assured to him." And certainly, if a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case, the inconvenience that would arise from this uncertainty would be a worse evil than any hardship that could follow from rules too strict and inflexible. Its powers would have become too arbitrary to have been endured in a country like this,(*o*) which boasts of being governed in all respects by law and not by will. But since the time when Lambard wrote, a set of great and eminent lawyers,(*p*) who have successively held the great seal, have by degrees erected the system of relief administered by a court of equity into a regular *science, which cannot be attained without study and experience, any more than the science of law: but from which, when understood, it may be known what remedy a suitor is entitled to expect, and by what mode of suit, as readily and with as much precision in a court of equity as in a court of law.

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(*f*) 2 P. Wms. 156.
(*g*) 1 Vern. 32. 1 P. Wms. 239.
(*h*) 1 Vern. 237.
(*i*) 2 Vern. 84.
(*k*) 1 Eq. Ca. Abr. 337.
(*l*) 2 P. Wms. 645, 668, 669.
(*m*) See page 433.
(*n*) *Archeion*. 71, 78.
(*o*) 2 P. Wms. 685, 688.
(*p*) See pages 54, 55, 56.

It were much to be wished, for the sake of certainty, peace, and justice, that each court would as far as possible follow the other, in the best and most effectual rules for attaining those desirable ends. It is a maxim that equity follows the law; and in former days the law had not scrupled to follow even that equity which was laid down by the clerical chancellors. Every one who is conversant in our antient books, knows that many valuable improvements in the state of our tenures (especially in leaseholds(*q*) and copyholds)(*r*) and the forms of administering justice,(*s*) have arisen from this single reason, that the same thing was constantly effected by means of a *subpœna* in the chancery. And sure there cannot be a greater solecism, than that in two sovereign independent courts established in the same country, exercising concurrent jurisdiction, and over the same subject-matter, there should exist in a single instance two different rules of property, clashing with or contradicting each other.

It would carry me beyond the bounds of my present purpose to go further into this matter. I have been tempted to go so far, because strangers are apt to be confounded by nominal distinctions, and the loose unguarded expressions to be met with in the best of our writers; and thence to form erroneous ideas of the separate jurisdictions now existing in England, but which never were separated in any other country in the universe. It hath also afforded me an opportunity to vindicate, on the one hand, the justice of our *courts of law from being that harsh and illiberal rule, which many are too ready [*442 to suppose it; and, on the other, the justice of our courts of equity from being the result of mere arbitrary opinion, or an exercise of dictatorial power, which rides over the law of the land, and corrects, amends, and controls it by the loose and fluctuating dictates of the conscience of a single judge. It is now high time to proceed to the practice of our courts of equity, thus explained, and thus understood.[8]

The first commencement of a suit in chancery is by preferring a bill to the lord chancellor, in the style of a petition; "humbly complaining showeth to your lordship your orator A B, that," &c. This is in the nature of a declaration at common law, or a libel and allegation in the spiritual courts: setting forth the circumstances of the case at length, as, some fraud, trust, or hardship; "in tender consideration whereof," (which is the usual language of the bill,) "and for that your orator is wholly without remedy at the common law," relief is therefore prayed at the chancellor's hands, and also process of *subpœna* against the defendant, to compel him to answer upon oath to all the matter charged in the bill. And, if it be to quiet the possession of lands, to stay waste, or to stop proceedings at law, an injunction is also prayed, in the nature of an *interdictum* by the civil law, commanding the defendant to cease.

This bill must call all necessary parties, however remotely concerned in interest, before the court; otherwise no decree can be made to bind them; and must be signed by counsel, as a certificate of its decency and propriety. For it must not contain matter either scandalous or impertinent: if it does, the defendant may refuse to answer it, till such scandal or impertinence is expunged, which is done upon an order to refer it to one of the officers of the court, called a master in chancery; of whom there are in number twelve, including the master of the rolls, all of whom, so late as the reign of queen Elizabeth, were commonly doctors of the civil *law.(*s*) The master is to examine the propriety of the bill: [*443 and if he reports it scandalous or impertinent, such matter must be struck out, and the defendant shall have his costs; which ought of right to be paid by the counsel who signed the bill.

When the bill is filed in the office of the six clerks, (who originally were all in orders; and therefore, when the constitution of the court began to alter, a law(*t*) was made to permit them to marry,) when, I say, the bill is thus filed,

(*q*) Gilb. of Ejectment, 2. 2 Bac. Abr. 160.
(*r*) Bro. Abr. tit. *tenant per copie.* 10 Litt. § 77.
(*s*) See page 200.
(*s*) Smith's Commonw. b. ii. c. 12.
(*t*) Stat. 14 & 15 Hen. VIII. c. 8.

[8] Very important alterations have been made in the whole process and proceedings in chancery by the statute 15 & 16 Vict. c. 86.—SHARSWOOD.

if an injunction be prayed therein, it may be had at various stages of the cause, according to the circumstances of the case.[9] If the bill be to stay execution upon an oppressive judgment, and the defendant does not put in his answer within the stated time allowed by the rules of the court, an injunction will issue of course; and, when the answer comes in, the injunction can only be continued upon a sufficient ground appearing from the answer itself. But if an injunction be wanted to stay waste, or other injuries of an equally urgent nature, then upon the filing of the bill, and a proper case supported by *affidavits*, the court will grant an injunction immediately, to continue till the defendant has put in his answer, and till the court shall make some further order concerning it: and when the answer comes in, whether it shall then be dissolved or continued till the hearing of the cause, is determined by the court upon argument, drawn from considering the answer and affidavit together.

But, upon common bills, as soon as they are filed, process of *subpœna* is taken out: which is a writ commanding the defendant to appear and answer to the bill, on pain of 100*l*. But this is not all; for if the defendant, on service of the *subpœna*, does not appear within the time limited by the rules of the court, and plead, demur, or answer to the bill, he is then said to be in *contempt;* and the respective processes of contempt are in successive order awarded against him. *444] The first of which is an *attachment*, which is a writ *in the nature of a *capias*, directed to the sheriff, and commanding him to attach, or take up, the defendant, and bring him into court. If the sheriff returns that the defendant is *non est inventus*, then an *attachment with proclamations* issues; which, besides the ordinary form of attachment, directs the sheriff, that he cause public proclamations to be made, throughout the county, to summon the defendant, upon his allegiance, personally to appear and answer. If this be also returned with a *non est inventus*, and he still stands out in contempt, a *commission of rebellion* is awarded against him, for not obeying the king's proclamations according to his allegiance; and four commissioners therein named, or any of them, are ordered to attach him wheresoever he may be found in Great Britain, as a rebel and contemner of the king's laws and government, by refusing to attend his sovereign when thereunto required: since, as was before observed,(*u*) matters of equity were originally determined by the king in person, assisted by his council; though that business is now devolved upon his chancellor. If upon this commission of rebellion a *non est inventus* is returned, the court then sends a *serjeant-at-arms* in quest of him; and if he eludes the search of the serjeant also, then a *sequestration* issues to seize all his personal estate, and the profits of his real, and to detain them, subject to the order of the court. Sequestrations were first introduced by Sir Nicholas Bacon, lord keeper in the reign of queen Elizabeth; before which the court found some difficulty in enforcing its process and decrees.(*v*) After an order for a sequestration issued, the plaintiff's bill is to be taken *pro confesso*, and a decree to be made accordingly. So that the sequestration does not seem to be in the nature of process to bring in the defendant, but only intended to enforce the performance of the decree. Thus much if the defendant absconds.

If the defendant is taken upon any of this process, he is to be committed to the Fleet or other prison till he puts in his appearance or answer, or per- *445] forms whatever else this *process is issued to enforce, and also clears his contempts by paying the costs which the plaintiff has incurred thereby. For the same kind of process (which was also the process of the court of star-chamber till its dissolution)(*w*) is issued out in all sorts of contempts during the progress of the cause if the parties in any point refuse or neglect to obey the order of the court.

(*) Page 50. (*) 1 Vern. 421. (*) 18 Rym. *Fœd.* 195.

[9] An injunction in the court of exchequer stays all further proceedings, in whatever stage the cause may be; but in chancery, if a declaration be delivered, the party may proceed to judgment notwithstanding an injunction, and execution is only stayed; but if no declaration has been delivered, all proceedings at law are restrained. 3 Woodd. 411. —Christian.

The process against a body corporate is by *distringas*, to distrain them by their goods and chattels, rents and profits, till they shall obey the summons or directions of the court. And if a peer is a defendant, the lord chancellor sends a *letter missive* to him to request his appearance, together with a copy of the bill; and if he neglects to appear, then he may be served with a *subpœna;* and if he continues still in contempt, a sequestration issues out immediately against his lands and goods, without any of the mesne process of attachments, &c., which are directed only against the person, and therefore cannot affect a lord of parliament. The same process issues against a member of the house of commons, except only that the lord chancellor sends him no letter missive.

The ordinary process before mentioned cannot be sued out till after the service of the *subpœna*, for then the contempt begins; otherwise he is not presumed to have notice of the bill; and therefore by absconding to avoid the *subpœna* a defendant might have eluded justice, till the statute 5 Geo. II. c. 25, which enacts that where the defendant cannot be found to be served with process of *subpœna*, and absconds (as is believed) to avoid being served therewith, a day shall be appointed him to appear to the bill of the plaintiff, which is to be inserted in the London gazette, read in the parish church where the defendant last lived, and fixed up at the royal exchange; and, if the defendant doth not appear upon that day, the bill shall be taken *pro confesso.*

But if the defendant appears regularly, and takes a copy of the bill, he is next to *demur, plead,* or *answer.*

*A demurrer in equity is nearly of the same nature as a demurrer in law, being an appeal to the judgment of the court, whether the defendant shall be bound to answer the plaintiff's bill; as for want of sufficient matter of equity therein contained; or where the plaintiff, upon his own showing, appears to have no right; or where the bill seeks a discovery of a thing which may cause a forfeiture of any kind, or may convict a man of any criminal misbehaviour. For any of these causes a defendant may demur to the bill. And if, on demurrer, the defendant prevails, the plaintiff's bill shall be dismissed: if the demurrer be overruled, the defendant is ordered to answer.[10] [*446

A plea may be either to the *jurisdiction*, showing that the court has no cognizance of the cause, or to the *person*, showing some disability in the plaintiff, as by outlawry, excommunication, and the like: or it is in *bar;* showing some matter wherefore the plaintiff can demand no relief, as an act of parliament, a fine, a release, or a former decree. And the truth of this plea the defendant is bound to prove, if put upon it by the plaintiff. But as bills are often of a complicated nature, and contain various matter, a man may plead as to part, demur as to part, and answer to the residue. But no exceptions to formal *minutiæ* in the pleadings will be here allowed; for the parties are at liberty, on the discovery of any errors in form, to amend them.(*x*)

An *answer* is the most usual defence that is made to a plaintiff's bill. It is given in upon oath, or the honour of a peer or peeress: but where there are amicable defendants, their answer is usually taken without oath, by consent of the plaintiff. This method of proceeding is taken from the ecclesiastical courts, like the rest of the practice in chancery; for there, in almost every case, the plaintiff may demand the *oath of his adversary in supply of proof. [*447 Formerly this was done in those courts with compurgators, in the manner of our waging of law; but this has been long disused; and instead of it the present kind of purgation, by the single oath of the party himself, was introduced. This oath was made use of in the spiritual courts, as well in criminal cases of ecclesiastical cognizance as in matters of civil right; and it was then usually denominated the oath *ex officio:* whereof the high commission court in

(*x*) *En cest court de chancerie, home ne serra prejudice par son mispleding ou par defaut de forme, mes solonque le verite del matter, car il doit agarder solonque consciens, et venit ex rigore juris. Diversité des courtes*, edit. 1534, fol. 296, 297. Bro. Abr. tit. *Jurisdiction*, 50.

[10] If a demurrer be overruled, the defendant may at the hearing demur *ore tenus*, though not where he pleads to the bill. 1 Sim. & Stu. 227; *et vid.* Mitf. Pl, 178, *et seq.*—

particular made a most extravagant and illegal use; forming a court of inquisition, in which all persons were obliged to answer in cases of bare suspicion, if the commissioners thought proper to proceed against them *ex officio* for any supposed ecclesiastical enormities. But when the high commission court was abolished by statute 16 Car. I. c. 11, this oath *ex officio* was abolished with it; and it is also enacted, by statute 13 Car. II. st. 1, c. 12, "that it shall not be lawful for any bishop or ecclesiastical judge to tender to any person the oath *ex officio*, or any other oath, whereby the party may be charged or compelled to confess, accuse, or purge himself of any criminal matter." But this does not extend to oaths in a civil suit; and therefore it is still the practice, both in the spiritual courts and in equity, to demand the personal answer of the party himself upon oath. Yet if in the bill any question be put that tends to the discovery of any crime, the defendant may thereupon demur, as was before observed, and may refuse to answer.

If the defendant lives within twenty miles of London, he must be sworn before one of the masters of the court: if farther off, there may be a *dedimus potestatem*, or commission to take his answer in the country, where the commissioners administer him the usual oath; and then, the answer being sealed up, either one of the commissioners carries it up to the court, or it is sent by a messenger, who swears he received it from one of the commissioners, and that the same has not been opened or altered since he received it. An answer must *448] be signed by counsel, and must either deny or confess all the *material parts of the bill; or it may confess and avoid, that is, justify or palliate the facts. If one of these is not done, the answer may be excepted to for insufficiency, and the defendant be compelled to put in a more sufficient answer. A defendant cannot pray any thing in this his answer but to be dismissed the court; if he has any relief to pray against the plaintiff, he must do it by an original bill of his own, which is called a *cross-bill*.

After answer put in, the plaintiff upon payment of costs may amend his bill, either by adding new parties, or new matter, or both, upon the new lights given him by the defendant; and the defendant is obliged to answer afresh to such amended bill. But this must be before the plaintiff has replied to the defendant's answer, whereby the cause is at issue; for afterwards, if new matter arises, which did not exist before, he must set it forth by a *supplemental-bill*. There may be also a bill of *revivor* when the suit is abated by the death of any of the parties; in order to set the proceedings again in motion, without which they remain at a stand. And there is likewise a bill of *interpleader;* where a person who owes a debt or rent to one of the parties in suit, but, till the determination of it, he knows not to which, desires that they may interplead, that he may be safe in the payment. In this last case it is usual to order the money to be paid into court for the benefit of such of the parties to whom upon hearing the court shall decree it to be due. But this depends upon circumstances; and the plaintiff must also annex an *affidavit* to his bill, swearing that he does not collude with either of the parties.[11]

If the plaintiff finds sufficient matter confessed in the defendant's answer to ground a decree upon, he may proceed to the hearing of the cause upon bill and answer only. But in that case he must take the defendant's answer to be true, in every point. Otherwise the course is for the plaintiff to reply generally to *449] the answer, averring his bill to be true, certain, and sufficient, and the defendant's answer to be *directly the reverse; which he is ready to prove as the court shall award; upon which the defendant rejoins, averring the like on his side; which is joining issue upon the facts in dispute. To prove which facts is the next concern.

This is done by examination of witnesses, and taking their *depositions* in writing, according to the manner of the civil law. And for that purpose *interrogatories* are framed, or questions in writing; which, and which only, are to be

[11] And must bring the money (if any is due) into court, or at least offer to do so by his bill. Prac. Reg. 39. Bunb. 303. Bargard. Ch 250. Mitf. Pl. 40.—Chitty.

proposed to, and asked of, the witnesses in the cause. These interrogatories must be short and pertinent: not leading ones; (as, "did not you see this? or, did not you hear that?") for if they be such, the depositions taken thereon will be suppressed and not suffered to be read. For the purpose of examining witnesses in or near London, there is an examiner's office appointed; but for such as live in the country, a commission to examine witnesses is usually granted to four commissioners, two named of each side, or any three or two of them, to take the depositions there. And if the witnesses reside beyond sea, a commission may be had to examine them there upon their own oaths, and (if foreigners) upon the oaths of skilful interpreters. And it hath been established(*y*) that the deposition of a heathen who believes in the Supreme Being, taken by commission in the most solemn manner according to the custom of his own country, may be read in evidence.

The commissioners are sworn to take the examinations truly and without partiality, and not to divulge them till published in the court of chancery; and their clerks are also sworn to secrecy. The witnesses are compellable by process of *subpœna*, as in the courts of common law, to appear and submit to examination. And when their depositions are taken, they are transmitted to the court with the same care that the answer of a defendant is sent.

*If witnesses to a disputable fact are old and infirm, it is very usual to file a bill to perpetuate the testimony of those witnesses, although no suit is depending; for, it may be, a man's antagonist only waits for the death of some of them to begin his suit. This is most frequent when lands are devised by will away from the heir at law, and the devisee, in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in chancery against the heir, and sets forth the will *verbatim* therein, suggesting that the heir is inclined to dispute its validity: and then, the defendant having answered, they proceed to issue as in other cases, and examine the witnesses to the will; after which the cause is at an end, without proceeding to any decree, no relief being prayed by the bill: but the heir is entitled to his costs, even though he contests the will. This is what is usually meant by proving a will in chancery. [*450

When all the witnesses are examined, then, and not before, the depositions may be published, by a rule to pass publication; after which they are open for the inspection of all the parties, and copies may be taken of them. The cause is then ripe to be set down for hearing, which may be done at the procurement of the plaintiff, or defendant, before either the lord chancellor or the master of the rolls, according to the discretion of the clerk in court, regulated by the nature and importance of the suit, and the arrear of causes depending before each of them respectively. Concerning the authority of the master of the rolls, to hear and determine causes, and his general power in the court of chancery, there were (not many years since) divers questions, and disputes very warmly agitated; to quiet which it was declared, by statute 3 Geo. II. c. 30, that all orders and decrees by him made, except such as by the course of the court were appropriated to the great seal alone, should be deemed to be valid; subject nevertheless to be discharged or altered by the lord chancellor, and so as they shall not be enrolled, till the same are signed by his lordship. Either party may be *subpœnaed* to hear judgment *on the day so fixed for the hearing; and then, if the plaintiff does not attend, his bill is dismissed with costs; or, if the defendant makes default, a decree will be made against him, which will be final, unless he pays the plaintiff's cost of attendance, and shows good cause to the contrary on a day appointed by the court. A plaintiff's bill may also at any time be dismissed for want of prosecution, which is in the nature of a non-suit at law, if he suffers three terms to elapse without moving forward in the cause. [*451

When there are cross-causes, on a cross-bill filled by the defendant against the plaintiff in the original cause, they are generally contrived to be brought on together, that the same hearing and the same decree may serve for both of them. The method of hearing causes in court is usually this. The parties on

(*y*) Omichund *vs.* Barker, 1 Atk. 21.

both sides appearing by their counsel, the plaintiff's bill is first opened, or briefly abridged, and the defendant's answer also, by the junior counsel on each side: after which the plaintiff's leading counsel states the case and the matters in issue, and the points of equity arising therefrom: and then such depositions as are called for by the plaintiff are read by one of the six clerks, and the plaintiff may also read such part of the defendant's answer as he thinks material or convenient:(z) and after this the rest of the counsel for the plaintiff make their observations and arguments. Then the defendant's counsel go through the same process for him, except that they may not read any part of his answer; and the counsel for the plaintiff are heard in reply. When all are heard, the court pronounces the *decree*, adjusting every point in debate according to equity and good conscience; which decree being usually very long, the minutes of it are taken down, and read openly in court by the registrar.[12] The matter of costs to be given to either party is not here held to be a point of right, but *452] merely discretionary (by the statute 17 Ric. II. c. 6) according to the circumstances of the case, as they *appear more or less favourable to the party vanquished. And yet the statute 15 Hen. VI. c. 4 seems expressly to direct, that as well damages as costs shall be given to the defendant, if wrongfully vexed in this court.

The chancellor's decree is either *interlocutory* or *final*. It very seldom happens that the first decree can be final, or conclude the cause; for, if any matter of fact is strongly controverted, this court is so sensible of the deficiency of trial by written depositions, that it will not bind the parties thereby, but usually directs the matter to be tried by jury; especially such important facts as the validity of a will, or whether A. is the heir at law to B., or the existence of a *modus decimandi*, or real and immemorial composition for tithes. But, as no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the court of king's bench, or at the assizes, upon a *feigned issue*. For (in order to bring it there, and have the point in dispute, and that only, put in issue) an action is brought, wherein the plaintiff by a fiction declares that he laid a wager of 5*l*. with the defendant that A. was heir at law to B.; and then avers that he is so; and therefore demands the 5*l*. The defendant admits the feigned wager, but avers that A. is not the heir to B.; and thereupon that issue is joined, which is directed out of chancery to be tried; and thus the verdict of the jurors at law determines the fact in the court of equity. These feigned issues seem borrowed from the *sponsio judicialis* of the Romans:(a) and are also frequently used in the courts of law, by consent of the parties, to determine some disputed rights without the formality of pleading, and thereby to save much time and expense in the decision of a cause.[13]

So, likewise, if a question of mere law arises in the course of a cause, as *453] whether by the words of a will an estate for life or *in tail is created, or whether a future interest devised by a testator shall operate as a remainder or an executory devise, it is the practice of this court to refer it to the opinion of the judges of the court of king's bench or common pleas, upon a case stated for that purpose,[14] wherein all the material facts are admitted, and the

(z) On a trial at law, if the plaintiff reads any part of the defendant's answer, he must read the whole of it; for by reading any of it he shows a reliance on the truth of the defendant's testimony, and makes the whole of his answer evidence.

(a) *Nota est sponsio judicialis: "spondesne quingentos si meus sit? spondeo si tuus sit. Et tu quoque spondesne quingentos si tuus sit? spondeo, si meus sit."* Vide Heinec. *Antiquitat. l.* 3, *t.* 16, § 3, and Sigon. *de judictis, l.* 21, p. 466, *citat.* ibid.

[12] It is not now the practice for the registrar to read the minutes of the decree openly in court; but any party to the suit may procure a copy of them, and, if there is any mistake, may move to have them amended. But after a decree has been drawn up and entered, no errors in it can be rectified on motion, or by any other proceeding than by rehearing the cause.—Christian.

[13] The consent of the court ought also to be previously obtained; for a trial of a feigned issue without such consent is a contempt, which will authorize the court to order the proceedings to be stayed. 4 T. R. 402.—Chitty.

[14] Formerly, when a case was heard before the master of the rolls sitting in his own court, on which he wished to have the opinion of a court of law, he directed an action to be commenced by the parties in a court of law, in such a form that the question on

point of law is submitted to their decision; who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the chancellor. And upon such certificate the decree is usually founded.

Another thing also retards the completion of decrees. Frequently long accounts are to be settled, encumbrances and debts to be inquired into, and a hundred little facts to be cleared up, before a decree can do full and sufficient justice. These matters are always, by the decree on the first hearing, referred to a master in chancery to examine, which examinations frequently last for years; and then he is to report the fact, as it appears to him, to the court. This report may be excepted to, disproved, and overruled; or otherwise is confirmed, and made absolute, by order of the court.

When all issues are tried and settled, and all references to the master ended, the cause is again brought to hearing upon the matters of equity reserved, and a final decree is made; the performance of which is enforced (if necessary) by commitment of the person, or sequestration of the party's estate. And if by this decree either party thinks himself aggrieved, he may petition the chancellor for a *rehearing;* whether it was heard before his lordship, or any of the judges sitting for him, or before the master of the rolls. For, whoever may have heard the cause, it is the chancellor's decree, and must be signed by him before it is enrolled;(*b*) which is done of course unless a rehearing be desired. Every petition for a rehearing must be signed by two counsel of character, usually such as have been concerned in the cause, certifying that they apprehend the cause is proper to be reheard. And upon the *rehearing, all the evidence taken in the cause, whether read before or not, is now admitted to be read; because it is the decree of the chancellor himself, who only now sits to hear reasons why it should not be enrolled and perfected; at which time all omissions of either evidence or argument may be supplied.(*c*) But, after the decree is once signed and enrolled, it cannot be reheard or rectified but by bill of review, or by appeal to the house of lords. [*454

A bill of *review*[15] may be had upon apparent error in judgment appearing on the face of the decree; or, by special leave of the court, upon oath made of the discovery of new matter or evidence, which could not possibly be had or used at the time when the decree passed. But no new evidence or matter then in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a bill of review.

An *appeal* to parliament, that is, to the house of lords, is the dernier resort of the subject who thinks himself aggrieved by an interlocutory order or final determination in this court; and it is effected by *petition* to the house of peers, and not by *writ of error*, as upon judgments at common law. This jurisdiction is said(*d*) to have began in 18 Jac. I., and it is certain that the first petition, which appears in the records of parliament, was preferred in that year;(*e*) and that the first which was heard and determined (though the name of appeal was then a novelty) was presented in a few months after;(*f*) both levelled against the lord chancellor Bacon for corruption and other misbehaviour. It was afterwards warmly controverted by the house of commons in the reign of Charles the Second.(*g*) But this dispute is now at rest:(*h*) it being obvious to the reason

(*b*) Stat. 3 Geo. III. c. 39. See p. 450.
(*c*) Gilb. Rep. 151, 152.
(*d*) Com. Jour. 13 Mar. 1704.
(*e*) Lords' Jour. 23 Mar. 1620.
(*f*) Ibid. 3, 11, 12 Dec. 1621.
(*g*) Com. Jour. 19 Nov. 1675, &c.
(*h*) Show. Parl. C. 81.

which he had a doubt might be decided in that suit, and he suspended his decree till the court of law had given its judgment. It appears that the first case sent from the rolls to the King's Bench is in 6 T. R. 313, where lord Kenyon says, "I believe that there is no instance in which this court ever certified their opinion on a case sent here from the master of the rolls. In Colson *vs.* Colson it was refused; but I think it was an idle formality, and I shall feel no reluctance in certifying in such cases, because I think it is convenient to the suitors of that court."—CHRISTIAN.

[15] A bill of review is only necessary where a decree is signed and enrolled. Mitf. Pl 71. It cannot be brought after twenty years. Id. 69. 1 Bro. P. C. 95. 5 Bro. P. C. 460. 6 Bro. P. C. 395.—CHITTY.

of all mankind, that, when the courts of equity became principal tribunals for deciding causes of property, a revision of their *decrees (by way of appeal) became equally necessary as a writ of error from the judgment of a court of law. And, upon the same principle, from decrees of the chancellor relating to the commissioners for the dissolution of chauntries, &c., under the statute 37 Hen. VIII. c. 4, (as well as for charitable uses under the statute 43 Eliz. c. 4,) an appeal to the king in parliament was always unquestionably allowed.(*i*) But no new evidence is admitted in the house of lords upon any account; this being a distinct jurisdiction :(*k*) which differs it very considerably from those instances, wherein the same jurisdiction revises and corrects its own acts, as in rehearings and bills of review. For it is a practice unknown to our law, (though constantly followed in the spiritual courts,) when a superior court is reviewing the sentence of an inferior, to examine the justice of the former decree by evidence that was never produced below. And thus much for the general method of proceeding in the courts of equity.

*455]

(*i*) Duke's Charitable Uses, 62.

(*k*) Gilb. Rep. 155, 156.

THE END OF THE THIRD BOOK.

APPENDIX.

No. I.

PROCEEDINGS ON A WRIT OF RIGHT PATENT.

No. I.

Sect. 1. Writ of Right Patent in the Court Baron.

George the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, to Willoughby, earl of Abingdon, greeting. We command you that without delay you hold full right to William Kent, Esquire, of one messuage and twenty acres of land, with the appurtenances, in Dorchester, which he claims to hold of you by the free service of one penny yearly in lieu of all services, of which Richard Allen deforces him. And unless you do so, let the sheriff of Oxfordshire do it, that we no longer hear complaint thereof for defect of right. Witness ourself at Westminster, the twentieth day of August, in the thirtieth year of our reign.

Pledges of prosecution. { John Doe. Richard Roe.

Sect. 2. Writ of Tolt, to remove it into the County Court.

Charles Morton, Esquire, sheriff of Oxfordshire, to John Long, bailiff-errant of our Lord the King and of myself, greeting. Because by the complaint of William Kent, Esquire, personally present at my county court, to wit, on Monday, the sixth day of September, in the thirtieth year of the reign of our Lord George the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, at Oxford, in the shirehouse there holden, I am informed, that although he himself the writ of our said Lord the King of right patent directed to Willoughby, earl of Abingdon, for this that *he should hold full right to the said William Kent, of one messuage and twenty acres of land, with the appurtenances, in Dorchester, within my said county, of which Richard Allen deforces him, hath brought to the said Willoughby, earl of Abingdon; yet for that the said Willoughby, earl of Abingdon, favoureth the said Richard Allen in this part, and hath hitherto delayed to do full right according to the exigence of the said writ, I command you on the part of our said Lord the King, firmly enjoining that in your proper person you go to the court-baron of the said Willoughby, earl of Abingdon, at Dorchester aforesaid, and take away the plaint which there is between the said William Kent and Richard Allen by the said writ into my county court to be next holden; and summon by good summoners the said Richard Allen that he be at my county court, on Monday, the fourth day of October next coming, at Oxford, in the shirehouse there to be holden, to answer to the said William Kent thereof. And have you there then the said plaint, the summoners, and this precept. Given in my county court, at Oxford, in the shirehouse, the sixth day of September, in the year aforesaid. [*ii

Sect. 3. Writ of Pone, to remove it into the Court of Common Pleas.

George the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, to the sheriff of Oxfordshire, greeting. Put at the request of William Kent, before our justices at Westminster, on the morrow of All Souls, the plaint which is in your county court by our writ of right, between the said William Kent, demandant, and Richard Allen, tenant, of one messuage and twenty acres of land, with the appurtenances, in Dorchester; and summon by good summoners

No. I.

the said Richard Allen, that he be then there to answer to the said William Kent thereof. And have you there the summoners and this writ. WITNESS ourself at Westminster, the tenth day of September, in the thirtieth year of our reign.

SEC. 4. WRIT OF RIGHT, *quia Dominus remisit Curiam.*

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, to the sheriff of Oxfordshire, greeting. COMMAND Richard Allen, that he justly and without delay render unto William Kent one messuage and twenty acres of land, with the appurtenances, in Dorchester, which he claims to be his right and inheritance, and whereupon he complains that the aforesaid Richard unjustly deforces him. And unless he shall do so, and *if the said William shall give you security of prosecuting his claim, then summon by good summoners the said Richard, that he appear before our justices at Westminster, on the morrow of All Souls, to show wherefore he hath not done it. And have you there the summoners and this writ. WITNESS ourself at Westminster, the twentieth day of August, in the thirtieth year of our reign. Because Willoughby, earl of Abingdon, the chief lord of that fee, hath thereupon remised unto us his court.

*iii.]

Sheriff's return. Pledges of prosecution. { JOHN DOE. RICHARD ROE. Summoners of the within-named Richard. { JOHN DEN. RICHARD FEN.

SECT. 5. THE RECORD, WITH THE AWARD OF BATTEL.[1]

PLEAS at Westminster before Sir John Willes, Knight, and his brethren, Justices of the Bench of the Lord the King at Westminster, of the term of Saint Michael, in the thirtieth year of the reign of the Lord GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, &c.

Writ. *Oxon, to wit.* } WILLIAM KENT, Esquire, by James Parker, his attorney, demands against Richard Allen, gentleman, one messuage and twenty acres of land, with the appurtenances, in Dorchester, as his right and inheritance, by writ of the Lord the King of right, because Willoughby, earl of Abingdon, the chief lord of that fee, hath now thereupon remised to the Lord the King his court. AND WHEREUPON he saith that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in the time of peace, in the time of the Lord GEORGE the First, late King of Great Britain, by taking the esplees thereof to the value[2] [of ten shillings, and more, in rents, corn, and grass.] And that such is his right he offers [suit and good proof.] AND the said Richard Allen, by Peter Jones his attorney, comes and defends the right of the said William Kent, and his seisin, when [and where it shall behoove him,] and all [that concerns it,] and whatsoever [he ought to defend] and chiefly the tenements aforesaid, with the appurtenances, as of fee and right, [namely, one messuage and twenty acres of land, with appurtenances in Dorchester.] AND this he is ready to defend by the body of his freeman, George Rumbold by name, who is present here in court, ready to defend the same by his body, or in what manner soever the court of the Lord the King shall consider that he ought to defend. *And if any mischance should befall the said George, (which God defend,) he is ready to defend the same by another man, who [is bounden and able to defend it.] AND the said William Kent saith, that the said Richard Allen unjustly defends the right of him the said William, and his seisin, &c., and all, &c., and whatsoever, &c., and chiefly of the tenements aforesaid, with the appurtenances, as of fee and right, &c.: because he saith that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in the time of peace, in the time of the said Lord GEORGE the First, late King of Great Britain, by taking the esplees thereof to the value, &c. AND that such is his right he is prepared to prove by the body of his freeman, Henry Broughton by name, who is present here in court ready to prove the same by his body, or in what manner soever the court of the Lord the King shall consider that he ought to prove; and if any mischance should befall the said Henry, (which God defend,) he is ready to prove the

Dominus remisit curiam.

Count.

Esplees.

Defence.

Wager of battel.

*iv.]

Replication.

Joinder of battel.

[1] As to battel, see page 337, n. 7.

[2] N.B.—The clauses between hooks in this and the subsequent numbers of the Appendix are usually no otherwise expressed in the records than by an "&c."

No. 1.

same by another man, who, &c. And hereupon it is demanded of the said George and Henry whether they are ready to make battel as they before have waged it; who say that they are. And the same George Rumbold giveth gage of defending, and the said Henry Broughton giveth gage of proving; and such engagement being given as the manner is, it is demanded of the said William Kent and Richard Allen if they can say any thing wherefore battel ought not to be awarded in this case; who say that they cannot. Therefore it is considered, that battel be made thereon, &c. And the said George Rumbold findeth pledges of battel, to wit, Paul Jenkins and Charles Carter; and the said Henry Broughton findeth also pledges of battel, to wit, Reginald Read and Simon Tayler. And thereupon day is here given as well to the said William Kent as to the said Richard Allen, to wit, on the morrow of Saint Martin next coming, by the assent as well of the said William Kent as of the said Richard Allen. And it is commanded that each of them then have here his champion, sufficiently furnished with competent armour as becomes him, and ready to make the battel aforesaid; and that the bodies of them in the mean time be safely kept, on peril that shall fall thereon. At which day here come as well the said William Kent as the said Richard Allen by their attorneys aforesaid, and the said George Rumbold and Henry Broughton in their proper persons likewise come, sufficiently furnished with competent armour as becomes them, ready to make the battel aforesaid as they had before waged it. And hereupon day is further given by the court here, as well to the said William Kent as to the said Richard Allen, at Tothill, near the city of Westminster, in the county of Middlesex, to wit, on the morrow of the Purification of the Blessed Virgin Mary next coming, by the assent as well of the said *William as of the aforesaid Richard. And it is commanded that each of them have then there his champion, armed in the form aforesaid, ready to make the battel aforesaid, and that their bodies in the mean time, &c. At which day here, to wit, at Tothill aforesaid, comes the said Richard Allen by his attorney aforesaid, and the said George Rumbold and Henry Broughton in their proper persons likewise come, sufficiently furnished with competent armour as becomes them, ready to make the battel aforesaid as they before had waged it. And the said William Kent being solemnly called doth not come, nor hath prosecuted his writ aforesaid. Therefore it is considered, that the same William, and his pledges of prosecuting, to wit, John Doe and Richard Roe, be in mercy for his false complaint, and that the same Richard go thereof without a day, &c., and also that the said Richard do hold the tenements aforesaid with the appurtenances to him and his heirs, quit of the said William and his heirs, forever, &c.

Gages given.

Award of battel.

Pledges.

Continuance.

Champions appear.

Adjournment to Tothill Fields.

[*v.

Demandant non-suit.

Final judgment for the tenant.

Sect. 6. Trial by the Grand Assize.

Defence.

—— And the said Richard Allen, by Peter Jones, his attorney, comes and defends the right of the said William Kent, and his seisin, when, &c., and all, &c., and whatsoever, &c., and chiefly of the tenements aforesaid with the appurtenances, as of fee and right, &c., and puts himself upon the grand assize of the Lord the King, and prays recognition to be made, whether he himself hath greater right to hold the tenements aforesaid, with the appurtenances, to him and his heirs as tenants thereof, as he now holdeth them, or the said William to have the said tenements with the appurtenances, as he above demandeth them. And he tenders here in court six shillings and eight-pence to the use of the Lord the now King, &c., for that, to wit, it may be inquired of the time [of the seisin alleged by the said William.] And he therefore prays that it may be inquired by the assize, whether the said William Kent was seised of the tenements aforesaid, with the appurtenances in his demesne, as of fee, in the time of the said Lord the King George the First, as the said William in his demand before hath alleged. Therefore it is commanded the sheriff, that he summon by good summoners four lawful knights of his county, girt with swords, that they be here on the octaves of Saint Hilary next coming, to make election of the assize aforesaid. The same day is given as well to the said William Kent as to the said Richard Allen, here, &c. At which day here come as well the said William Kent as the said Richard Allen; and the sheriff, to wit, Sir Adam Alstone, Knight, now returns, that he had caused to be summoned Charles Stephens, Randel Wheler, Toby Cox, and Thomas Munday, four lawful knights of *his county, girt with swords, by John Doe and Richard Roe, his bailiffs, to be here at the said octaves of Saint Hilary, to do as the said writ thereof com-

Mise.

Tender of demi-mark.

Summons of the knights.

Return.

[*vi.

No. II.

mands and requires; and that the said summoners, and each of them, are mainprized by John Day and James Fletcher. Whereupon the said Charles Stephens, Randel Wheler, Toby Cox, and Thomas Munday, four lawful knights of the county aforesaid, girt with swords, being called, in their proper persons come, and being sworn upon their oath in the presence of the parties aforesaid, chose of themselves and others twenty-four, to wit, Charles Stephens, Randel Wheler, Toby Cox, Thomas Munday, Oliver Greenway, John Boys, Charles Price, knights; Daniel Prince, William Day, Roger Lucas, Patrick Fleming, James Harris, John Richardson, Alexander Moore, Peter Payne, Robert Quin, Archibald Stuart, Bartholomew Norton, and Henry Davis, Esquires; John Porter, Christopher Ball, Benjamin Robinson, Lewis Long, William Kirby, gentlemen, good and lawful men of the county aforesaid, who neither are of kin to the said William Kent nor to the said Richard Allen, to make recognition of the grand assize aforesaid. THEREFORE it is commanded the sheriff, that he cause them to come here from the day of Easter in fifteen days, to make the recognition aforesaid. The same day is there given to the parties aforesaid. At which day here come as well the said William Kent as the said Richard Allen, by their attorneys aforesaid, and the recognitors of the assize, whereof mention is made above, being called, come, and certain of them, to wit, Charles Stephens, Randel Wheler, Toby Cox, Thomas Munday, Charles Price, knights; Daniel Prince, Roger Lucas, William Day, James Harris, Peter Payne, Robert Quin, Henry Davis, John Porter, Christopher Ball, Lewis Long, and William Kirby, being elected, tried, and sworn upon their oath, say that the said William Kent hath more right to have the tenements aforesaid, with the appurtenances, to him and his heirs, as he demandeth the same, than the said Richard Allen to hold the same as he now holdeth them, according as the said William Kent by his writ aforesaid hath supposed. THEREFORE IT IS CONSIDERED, that the said William Kent do recover his seisin against the said Richard Allen of the tenements aforesaid, with the appurtenances, to him and his heirs, quit of the said Richard Allen and his heirs forever: and the said Richard Allen in mercy, &c.

Election of the recognitors.

Venire facias.

Recognitors sworn.

Verdict for the demandant.

Judgment.

*vii.]

*No. II.

PROCEEDINGS ON AN ACTION OF TRESPASS IN EJECTMENT, BY ORIGINAL, IN THE KING'S BENCH.

SECT. 1. THE ORIGINAL WRIT.

Si fecerit te securum.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, to the sheriff of Berkshire, greeting. IF Richard Smith shall give you security of prosecuting his claim, then put by gage and safe pledges William Stiles, late of Newbury, gentleman, so that he be before us on the morrow of All Souls, wheresoever we shall then be in England, to show wherefore with force and arms he entered into one messuage, with the appurtenances, in Sutton, which John Rogers, Esquire, hath demised to the aforesaid Richard, for a term which is not yet expired, and ejected him from his said farm, and other enormities to him did, to the great damage of the said Richard, and against our peace. And have you there the names of the pledges and this writ. WITNESS ourself at Westminster, the twelfth day of October, in the twenty-ninth year of our reign.

Sheriff's return.

Pledges of prosecution.	JOHN DOE. RICHARD ROE.	The within-named William Stiles is attached by pledges.	JOHN DEN. RICHARD FEN.

SECT. 2. COPY OF THE DECLARATION AGAINST THE CASUAL EJECTOR, WHO GIVES NOTICE THEREUPON TO THE TENANT IN POSSESSION.

Michaelmas, the 29th of King George the Second.

Declaration.

Berks, to wit. WILLIAM STILES, late of Newbury in the said county, gentleman, was attached to answer Richard Smith, of a plea, wherefore with force and arms he entered into one messuage, with the appurtenances, in Sutton in the county aforesaid, which John Rogers, Esquire, demised to the said Richard Smith for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the Lord the King, &c. And whereupon the said Richard by *Robert Martin his attorney complains, that whereas

*viii.]

the said John Rogers, on the first day of October, in the twenty ninth year of the reign of the Lord the King that now is, at Sutton aforesaid, had demised to the same Richard the tenement aforesaid, with the appurtenances, to have and to hold the said tenement, with the appurtenances, to the said Richard and his assigns, from the Feast of Saint Michael the Archangel then last past, to the end and term of five years from thence next following and fully to be complete and ended, by virtue of which demise the said Richard entered into the said tenement, with the appurtenances, and was thereof possessed; and the said Richard being so possessed thereof, the said William afterwards, that is to say, on the said first day of October in the said twenty-ninth year, with force and arms, that is to say, with swords, staves, and knives, entered into the said tenement, with the appurtenances, which the said John Rogers demised to the said Richard in form aforesaid for the term aforesaid, which is not yet expired, and ejected the said Richard out of his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the said Lord the King; whereby the said Richard saith, that he is injured and damaged to the value of twenty pounds. And thereupon he brings suit, &c. No II.

MARTIN, for the plaintiff. } Pledges of } JOHN DOE.
PETERS, for the defendant. } prosecution. } RICHARD ROE.

MR. GEORGE SAUNDERS,

I am informed that you are in possession of, or claim title to, the premises mentioned in this declaration of ejectment, or to some part thereof; and I, being sued in this action as a casual ejector, and having no claim or title to the same, do advise you to appear next Hilary Term in his Majesty's court of King's Bench at Westminster, by some attorney of that court, and then and there, by a rule to be made of the same court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession. Notice.

Your loving friend,

WILLIAM STILES.

5th January, 1756.

*SECT. 3. THE RULE OF COURT. [*ix.

Hilary Term, in the twenty-ninth Year of King George the Second.

Berks, to wit. } IT IS ORDERED by the court, by the assent of both parties, and their attorneys, that George Saunders, gentleman, may be made defendant, in the place of the now defendant, William Stiles, and shall immediately appear to the plaintiff's action, and shall receive a declaration in a plea of trespass and ejectment of the tenements in question, and shall immediately plead thereto Not Guilty; and, upon the trial of the issue, shall confess lease, entry, and ouster, and insist upon his title only. And if upon the trial of the issue, the said George do not confess lease, entry, and ouster, and by reason thereof the plaintiff cannot prosecute his writ, then the taxation of costs upon such *non pros.* shall cease, and the said George shall pay such costs to the plaintiff, as by the court of our Lord the King here shall be taxed and adjudged, for such his default in non-performance of this rule; and judgment shall be entered against the said William Stiles, now the casual ejector, by default. And it is further ordered, that if upon the trial of the said issue a verdict shall be given for the defendant, or if the plaintiff shall not prosecute his writ upon any other cause than for the not confessing lease, entry, and ouster as aforesaid, then the lessor of the plaintiff shall pay costs, if the plaintiff himself doth not pay them. Smith against Stiles, for one messuage with the appurtenances in Sutton, on the demise of John Rogers.

By the Court.

MARTIN, for the plaintiff. }
NEWMAN, for the defendant. }

SECT. 4. THE RECORD.

PLEAS before the Lord the King at Westminster, of the Term of Saint Hilary, in the twenty-ninth Year of the Reign of the Lord GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, &c.

Berks, to wit. } GEORGE SAUNDERS, late of Sutton, in the county aforesaid, gentleman, was attached to answer Richard Smith, of a plea, wherefore with

No. II.

force and arms he entered into one messuage, with the appurtenances, in Sutton, which John Rogers, Esq. hath demised to the said Richard for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the Lord the King that *now is. And whereupon the said Richard by Robert Martin, his attorney, complains, that whereas the said John Rogers on the first day of October in the twenty-ninth year of the reign of the Lord the King that now is, at Sutton aforesaid, had demised to the same Richard the tenement aforesaid, with the appurtenances, to have and to hold the said tenement, with the appurtenances, to the said Richard and his assigns, from the feast of Saint Michael the Archangel then last past, to the end and term of five years from thence next following and fully to be complete and ended; by virtue of which demise the said Richard entered into the said tenement, with the appurtenances, and was thereof possessed: and, the said Richard being so possessed thereof, the said George afterwards, that is to say, on the first day of October in the said twenty-ninth year, with force and arms, that is to say, with swords, staves, and knives, entered into the said tenement, with the appurtenances, which the said John Rogers demised to the said Richard in form aforesaid for the term aforesaid, which is not yet expired, and ejected the said Richard out of his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the said Lord the King; whereby the said Richard saith that he is injured and endamaged to the value of twenty pounds: and thereupon he brings suit, [and good proof.] And the aforesaid George Saunders, by Charles Newman, his attorney, comes and defends the force and injury, when [and where it shall behoove him;] and saith that he is in no wise guilty of the trespass and ejectment aforesaid, as the said Richard above complains against him; and thereof he puts himself upon the country; and the said Richard doth likewise the same; Therefore let a jury come thereupon before the Lord the King, on the octave of the Purification of the Blessed Virgin Mary, wheresoever he shall then be in England, who neither [are of kin to the said Richard, nor to the said George,] to recognise [whether the said George be guilty of the trespass and ejectment aforesaid;] because as well [the said George as the said Richard, between whom the difference is, have put themselves on the said jury.] The same day is there given to the parties aforesaid. Afterwards the process therein, being continued between the said parties of the plea aforesaid by the jury, is put between them in respite, before the Lord the King, until the day of Easter in fifteen days, wheresoever the said Lord the King shall then be in England; unless the justices of the Lord the King assigned to take assizes in the county aforesaid, shall have come before that time, to wit, on Monday the eighth day of March, at Reading in the said county, by the form of the statute [in that case provided,] by reason of the default of the jurors, [summoned to appear as aforesaid.] At which day before the Lord the King, at Westminster, come the parties aforesaid by their attorneys aforesaid; and the aforesaid justices of *assize, before whom [the jury aforesaid came,] sent here their record before them, had in these words, to wit, Afterwards, at the day and place within contained, before Heneage Legger, Esquire, one of the Barons of the Exchequer of the Lord the King, and Sir John Eardley Wilmot, Knight, one of the justices of the said Lord the King, assigned to hold pleas before the King himself, justices of the said Lord the King, assigned to take assizes in the county of Berks by the form of the statute [in that case provided,] come as well the within-named Richard Smith, as the within-written George Saunders, by their attorneys within contained; and the jurors of the jury whereof mention is within made being called, certain of them, to wit, Charles Holloway, John Hooke, Peter Graham, Henry Cox, William Brown, and Francis Oakley, come, and are sworn upon that jury; and because the rest of the jurors of the same jury did not appear, therefore others of the bystanders being chosen by the sheriff, at the request of the said Richard Smith, and by the command of the justices aforesaid, are appointed anew, whose names are affixed to the panel within written, according to the form of the statute in such case made and provided; which said jurors so appointed anew, to wit, Roger Bacon, Thomas Small, Charles Pye, Edward Hawkins, Samuel Roberts, and Daniel Parker, being likewise called, come; and together with the other jurors aforesaid before impanelled and sworn, being elected, tried, and sworn, to speak the truth of the matter within contained, upon their oath say, that the aforesaid George Saunders is guilty of the trespass and ejectment within written, in manner and form as the

*x.]

Declaration, or count.

Defence.

Plea, not guilty. Issue.

Venire awarded.

Respite, for default of jurors.

Nisi prius.

*xi.]

Postea.

Tales de circumstantibus.

Verdict for the plaintiff.

aforesaid Richard Smith within complains against him; and assess the damages of the said Richard Smith, on occasion of that trespass and ejectment, besides his costs and charges which he hath been put unto about his suit in that behalf, to twelve pence; and, for those costs and charges, to forty shillings. WHEREUPON the said Richard Smith, by his attorney aforesaid, prayeth judgment against the said George Saunders, in and upon the verdict aforesaid by the jurors aforesaid given in the form aforesaid; and the said George Saunders, by his attorney aforesaid, saith, that the court here ought not to proceed to give judgment upon the said verdict, and prayeth that judgment against him the said George Saunders, in and upon the verdict aforesaid by the jurors aforesaid given in the form aforesaid, may be stayed, by reason that the said verdict is insufficient and erroneous, and that the same verdict may be quashed, and that the issue aforesaid may be tried anew by other jurors to be afresh impanelled. And, because the court of the Lord the King here is not yet advised of giving their judgment of and upon the premises, therefore day thereof is given as well to the said Richard Smith as the said George Saunders, before the Lord the King, until the morrow of the Ascension of our Lord, wheresoever the said Lord *the King shall then be in England, to hear their judgment of and upon the premises, for that the court of the Lord the King is not yet advised thereof. At which day before the Lord the King, at Westminster, come the parties aforesaid by their attorneys aforesaid; upon which, the record and matters aforesaid having been seen, and by the court of the Lord the King now here fully understood, and all and singular the premises having been examined, and mature deliberation being had thereupon, for that it seems to the court of the Lord the King now here that the verdict aforesaid is in no wise insufficient or erroneous, and that the same ought not to be quashed, and that no new trial ought to be had of the issue aforesaid, THEREFORE IT IS CONSIDERED, that the said Richard do recover against the said George his term yet to come, of and in the said tenements, with the appurtenances, and the said damages assessed by the said jury in form aforesaid, and also twenty-seven pounds six shillings and eight-pence for his costs and charges aforesaid, by the court of the Lord the King here awarded to the said Richard, with his assent, by way of increase; which said damages in the whole amount to twenty-nine pounds, seven shillings and eight-pence. "And let the said George be taken, [until he maketh fine to the Lord the King."][3] AND HEREUPON the said Richard, by his attorney aforesaid, prayeth a writ to the Lord the King, to be directed to the sheriff of the county aforesaid, to cause him to have possession of his term aforesaid yet to come, of and in the tenements aforesaid, with the appurtenances; and it is granted unto him, returnable before the Lord the King on the morrow of the Holy Trinity, wheresoever he shall then be in England. At which day before the Lord the King, at Westminster, cometh the said Richard, by his attorney aforesaid; and the sheriff, that is to say, Sir Thomas Reeve, Knight, now sendeth, that he by virtue of the writ aforesaid to him directed, on the ninth day of June last past, did cause the said Richard to have his possession of his term aforesaid yet to come, of and in the tenements aforesaid, with the appurtenances, as he was commanded.

No. III.

Motion in arrest of judgment.

Continuance.

[*xii.

Opinion of the court.

Judgment for the plaintiff.

Costs.

Capiatur pro fine.

Writ of possession and return.

*No. III. [*xiii

PROCEEDINGS ON AN ACTION OF DEBT IN THE COURT OF COMMON PLEAS; REMOVED INTO THE KING'S BENCH BY WRIT OF ERROR.

SECT. 1. ORIGINAL.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the sheriff of Oxfordshire, greeting. COMMAND Charles Long, late of Burford, gentleman, that justly and without delay he render to William Burton two hundred pounds, which he owes him and unjustly detains, as he saith. And unless he shall so do, and if the said William shall make you secure of prosecuting his claim, then summon by good summoners the aforesaid Charles, that he be before our justices, at Westminster, on the octave of Saint Hilary, to

Præcipe.

[3] Now omitted. See page 398.

No. III.

show wherefore he hath not done it. And have you there then the summoners, and this writ. WITNESS ourself at Westminster, the twenty-fourth day of December, in the twenty-eighth year of our reign.

Sheriff's return. Pledges of prosecution. { JOHN DOE. RICHARD DOE. Summoners of the within-named Charles Long. { ROGER MORRIS. HENRY JOHNSON

SECT. 2. PROCESS.

Attachment.

Pone.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the sheriff of Oxfordshire, greeting. PUT by gage and safe pledges Charles Long, late of Burford, gentleman, that he be before our justices, at Westminster, on the octave of the Purification of the Blessed Mary, to answer to William Burton of a plea, that he render to him two hundred pounds which he owes him and unjustly detains, as he saith; and to show wherefore he was not before our justices at Westminster on the octave of Saint Hilary, as he was summoned. And have there then the names of the pledges and this writ. WITNESS, Sir John Willes, Knight, at Westminster, the twenty-third day of January, in the twenty-eighth year of our reign.

Sheriff's return. The within-named Charles Long is attached by Pledges. { EDWARD LEIGH. ROBERT TANNER

Distringas.

*xiv.] *GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the sheriff of Oxfordshire, greeting. WE command you, that you distrein Charles Long, late of Burford, gentleman, by all his lands and chattels within your bailiwick, so that neither he nor any one through him may lay hands on the same, until you shall receive from us another command thereupon; and that you answer to us of the issues of the same; and that you have his body before our justices at Westminster, from the day of Easter, in fifteen days, to answer to William Burton of a plea that he render to him two hundred pounds which he owes him and unjustly detains, as he saith, and to hear his judgment of his many defaults. WITNESS, Sir John Willes, Knight, at Westminster, the twelfth day of February, in the twenty-eighth year of our reign.

Sheriff's return. *Nihil.* The within-named Charles Long hath nothing in my bailiwick whereby he may be distreined.

Capias ad respondendum.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the sheriff of Oxfordshire, greeting. WE command you that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, from the day of Easter, in five weeks, to answer to William Burton, gentleman, of a plea that he render to him two hundred pounds which he owes him and unjustly detains, as he saith; and whereupon you have returned to our justices at Westminster that the said Charles hath nothing in your bailiwick whereby he may be distreined. And have you there then this writ. WITNESS, Sir John Willes, Knight, at Westminster, the sixteenth day of April, in the twenty-eighth year of our reign.

Sheriff's return. *Non est inventus.* The within-named Charles Long is not found in my bailiwick.

Testatum capias.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the sheriff of Berkshire, greeting. WE command you that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, on the morrow of the Holy Trinity, to answer to William Burton, gentleman, of a plea that he render to him two hundred pounds which he owes him and unjustly detains, as he saith; and whereupon our sheriff of Oxfordshire hath made a return to our justices at Westminster at a certain day now past, that the *aforesaid Charles is not found in his bailiwick; and thereupon it is testified in our said court that the aforesaid Charles lurks, wanders, and runs about in your county. And have you there then this writ. WITNESS, Sir John Willes, Knight, at Westminster, the seventh day of May, in the twenty-eighth year of our reign.

*xv.]

By virtue of this writ to me directed, I have taken the body of the within-named Charles Long; which I have ready at the day and place within contained, according as by this writ it is commanded me. No. III. Sheriff's return *Cepi corpus.*

Or upon the Return of Non est inventus *upon the first* Capias, *the Plaintiff may sue out an* Alias *and a* Pluries, *and thence proceed to Outlawry; thus:*

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the sheriff of Oxfordshire, greeting. WE command you, as formerly we commanded you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, on the morrow of the Holy Trinity, to answer to William Burton, gentleman, of a plea that he render to him two hundred pounds which he owes him and unjustly detains, as he saith. And have you there then this writ. WITNESS, Sir John Willes, Knight, at Westminster, the seventh day of May, in the twenty-eighth year of our reign. *Alias capias.*

The within-named Charles Long is not found in my bailiwick. Sheriff's return *Non est inventus.*

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the sheriff of Oxfordshire, greeting. WE command you, as we have more than once commanded you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, from the day of the Holy Trinity, in three weeks, to answer to William Burton, gentleman, of a plea that he render to him two hundred pounds which he owes him and unjustly detains, as he saith. And have you there then this writ. WITNESS, Sir John Willes, Knight, at Westminster, the thirtieth day of May, in the twenty-eighth year of our reign. *Pluries capias.*

The within-named Charles Long is not found in my bailiwick. Sheriff's return. *Non est inventus.*

*GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the sheriff of Oxfordshire, greeting. WE command you that you cause Charles Long, late of Burford, gentleman, to be required from county court to county court, until, according to the law and custom of our realm of England, he be outlawed if he doth not appear; and if he doth appear, then take him and cause him to be safely kept, so that you may have his body before our justices at Westminster, on the morrow of All Souls, to answer to William Burton, gentleman, of a plea that he render to him two hundred pounds which he owes him and unjustly detains, as he saith; and whereupon you have returned to our justices at Westminster, from the day of the Holy Trinity, in three weeks, that he is not found in your bailiwick. And have you there then this writ. WITNESS, Sir John Willes, Knight, at Westminster, the eighteenth day of June, in the twenty-eighth year of our reign. [*xvi. *Exigi facias.*

By virtue of this writ to me directed at my county court, held at Oxford, in the county of Oxford, on Thursday the twenty-first day of June, in the twenty-ninth year of the reign of the Lord the King within written, the within-named Charles Long was required the first time and did not appear; and at my county court, held at Oxford aforesaid, on Thursday the twenty-fourth day of July, in the year aforesaid, the said Charles Long was required the second time and did not appear; and at my county court, held at Oxford aforesaid, on Thursday the twenty-first day of August, in the year aforesaid, the said Charles Long was required the third time and did not appear; and at my county court, held at Oxford aforesaid, on Thursday the eighteenth day of September, in the year aforesaid, the said Charles Long was required the fourth time and did not appear; and at my county court, held at Oxford aforesaid, on Thursday the sixteenth day of October, in the year aforesaid, the said Charles Long was required the fifth time and did not appear; therefore the said Charles Long, by the judgment of the coroners of the said Lord the King, of the county aforesaid, according to the law and custom of the kingdom of England, is outlawed. Sheriff's return. *Primo exactus. Secundo exactus. Tertio exactus. Quarto exactus. Quinto exactus. Ideo utlagatus.*

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the sheriff of Oxfordshire, greeting. WHEREAS, by our writ, we have lately commanded you that you should cause Charles Long, late of Burford, gentleman, to be required from county court to county court, until, according to *the law and [*xvii. Writ of proclamation.

No. III

custom of our realm of England, he should be outlawed if he did not appear; and if he did appear, then that you should take him and cause him to be safely kept, so that you might have his body before our justices at Westminster, on the morrow of All Souls, to answer to William Burton, gentleman, of a plea that he render to him two hundred pounds which he owes him and unjustly detains, as he saith: THEREFORE, we command you, by virtue of the statute in the thirty-first year of the Lady Elizabeth, late Queen of England, made and provided, that you cause the said Charles Long to be proclaimed, upon three several days, according to the form of that statute, (whereof one proclamation shall be made at or near the most usual door of the church of the parish wherein he inhabits,) that he render himself unto you; so that you may have his body before our justices at Westminster, at the day aforesaid, to answer the said William Burton of the plea aforesaid. And have you there then this writ. WITNESS, Sir John Willes, Knight, at Westminster, the eighteenth day of June, in the twenty-eighth year of our reign.

Sheriff's return. *Proclamari feci.* By virtue of this writ to me directed, at my county court held at Oxford, in the county of Oxford, on Thursday the twenty-sixth day of June, in the twenty-ninth year of the reign of the Lord the King within written, I caused to be proclaimed the first time; and at the general quarter sessions of the peace, held at Oxford aforesaid, on Tuesday the fifteenth day of July in the year aforesaid, I caused to be proclaimed the second time; and at the most usual door of the church of Burford within written, on Sunday the third day of August in the year aforesaid, immediately after divine service, one month at the least before the within-named Charles Long was required the fifth time, I caused to be proclaimed the third time, that the said Charles Long should render himself unto me, as within it is commanded me.

Capias utlagatum. GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, to the sheriff of Berkshire, greeting. WE command you, that you omit not by reason of any liberty of your county, but that you take Charles Long, late of Burford, in the county of Oxford, gentleman, (being outlawed in the said county of Oxford; on Thursday the sixteenth day of October last past, at the suit of William Burton, gentleman, of a plea of debt, as the sheriff of Oxfordshire aforesaid returned to our justices at Westminster on the morrow of All Souls then next ensuing,) if the said Charles Long may be found in your bailiwick; and him safely keep, so that you may *have his body before our justices at Westminster from the day of St. Martin in fifteen days, to do and receive what our court shall consider concerning him in this behalf. WITNESS, Sir John Willes, Knight, at Westminster, the sixth day of November, in the twenty-ninth year of our reign.

*xviii.]

Sheriff's return. *Cepi corpus.* By virtue of this writ to me directed, I have taken the body of the within-named Charles Long; which I have ready at the day and place within contained, according as by this writ it is commanded me.

SECT. 3. [4]BILL OF MIDDLESEX, AND LATITAT THEREUPON IN THE COURT OF KING'S BENCH.

Bill of Middlesex for trespass. *Middlesex, to wit.* } THE SHERIFF is commanded that he take Charles Long, late of Burford, in the county of Oxford, if he may be found in his bailiwick, and him safely keep, so that he may have his body before the Lord the King at Westminster, on Wednesday next after fifteen days of Easter, to answer William Burton, gentleman, of a plea of trespass; [AND ALSO to a bill of the said William against the aforesaid Charles, for two hundred pounds of debt, according to the custom of the court of the said Lord the King, before the King himself to be exhibited;] and that he have there then this precept.

Ac etiam in debt.

Sheriff's return. *Non est inventus. Latitat.* The within-named Charles Long is not found in my bailiwick.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the sheriff of Berkshire, greeting. WHEREAS we lately commanded our sheriff of Middlesex that he should take Charles Long, late of Burford, in the county of Oxford,

[4] Note, that sections 3 and 4 are the usual method of process to compel an appearance in the courts of King's Bench and Exchequer, in which the practice of those courts does principally differ from that of the court of Common Pleas, the subsequent stages of proceeding being nearly alike in them all.

if he might be found in his bailiwick, and him safely keep, so that he might be before us at Westminster, at a certain day now past, to answer unto William Burton, gentleman, of a plea of trespass; [AND ALSO to a bill of the said William against the aforesaid Charles, for two hundred pounds of debt, according to the custom of our court, before us to be exhibited;] and our said sheriff of Middlesex at that day returned to us that the aforesaid Charles was not found in his bailiwick; whereupon on the behalf of the aforesaid William, in our court before us, it is sufficiently attested that the aforesaid Charles lurks and runs about in your county: THEREFORE we command you that you take him, if he may be found in *your bailiwick, and him safely keep, so that you may have his body before us at Westminster on Tuesday next after five weeks of Easter, to answer the aforesaid William of the plea [and bill] aforesaid; and have you there then this writ. WITNESS, Sir Dudley Ryder, Knight, at Westminster, the eighteenth day of April, in the twenty-eighth year of our reign.

No. III.

Ac etiam.

[*xix.

By virtue of this writ to me directed, I have taken the body of the within-named Charles Long, which I have ready at the day and place within contained, according as by this writ it is commanded me.

Sheriff's return. *Cepi corpus.*

SECT. 4. WRIT OF QUO MINUS IN THE EXCHEQUER.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the sheriff of Berkshire, greeting. WE command you that you omit not by reason of any liberty of your county, but that you enter the same, and take Charles Long, late of Burford, in the county of Oxford, gentleman, wheresoever he shall be found in your bailiwick, and him safely keep, so that you may have his body before the Barons of our Exchequer at Westminster on the morrow of the Holy Trinity, to answer William Burton, our debtor of a plea, that he render to him two hundred pounds which he owes him and unjustly detains, whereby he is the less able to satisfy us the debts which he owes us at our said Exchequer, as he saith that he can reasonably show that the same he ought to render: and have you there this writ. WITNESS, Sir Thomas Parker, Knight, at Westminster, the sixth day of May, in the twenty-eighth year of our reign.

By virtue of this writ to me directed, I have taken the body of the within-named Charles Long, which I have ready before the barons within written, according as within it is commanded me.

Sheriff's return. *Cepi corpus.*

SECT. 5. SPECIAL BAIL, ON THE ARREST OF THE DEFENDANT, PURSUANT TO THE TESTATUM CAPIAS, in page xiv.

KNOW ALL MEN, by these presents, that we, Charles Long, of Burford, in the county of Oxford, gentleman, Peter Hamond, of Bix, in the said county, yeoman, and Edward Thomlinson, of Woodstock, in the said county, innholder, are held and firmly bound to Christopher Jones, esquire, sheriff of the county of Berks, in four hundred pounds of lawful money of Great Britain, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made we bind ourselves, and each of us by himself *for the whole and in gross, our and every of our heirs, executors, and administrators, firmly by these presents, sealed with our seals. Dated the fifteenth day of May, in the twenty-eighth year of the reign of our sovereign Lord GEORGE the Second, by the grace of God King of Great Britain, France, and Ireland, Defender of the Faith, and so forth, and in the year of our Lord one thousand seven hundred and fifty-five.

Bail-bond to the sheriff.

[*xx.

THE CONDITION of this obligation is such, that if the above-bounden Charles Long do appear before the justices of our sovereign Lord the King, at Westminster, on the morrow of the Holy Trinity, to answer William Burton, gentleman, of a plea of debt of two hundred pounds, then this obligation shall be void and of none effect, or else shall be and remain in full force and virtue.

Sealed and delivered, being first duly stamped, in the presence of
HENRY SHAW.
TIMOTHY GRIFFITH.

CHARLES LONG. (L.S.)
PETER HAMOND. (L.S.)
EDWARD THOMLINSON. (L.S.)

No. III.

Recognizance of bail before the commissioner.

You Charles Long do acknowledge to owe unto the plaintiff four hundred pounds, and you John Rose and Peter Hamond do severally acknowledge to owe unto the same person the sum of two hundred pounds apiece, to be levied upon your several goods and chattels, lands and tenements, UPON CONDITION that, if the defendant be condemned in the action, he shall pay the condemnation, or render himself a prisoner in the Fleet for the same; and, if he fail so to do, you John Rose and Peter Hamond do undertake to do it for him.

Trinity Term, 28 Geo. II.

Bail-piece.

Berks, to wit. } On a *Testatum Capias* from Oxfordshire against Charles Long, late of Burford, in the county of Oxford, gentleman, returnable on the morrow of the Holy Trinity, at the suit of William Burton, of a plea of debt of two hundred pounds:

The Bail are, John Rose, of Witney, in the county of Oxford, esquire, Peter Hamond, of Bix, in the said county, yeoman.

Richard Price, attorney for the defendant, }

The party himself in 400*l.*
Each of the bail in 200*l.*

Taken and acknowledged the twenty-eighth day of May, in the year of our Lord one thousand seven hundred and fifty-five, *de bene esse*, before me,

Robert Grove,
one of the commissioners.

*xxi.]

*Sect. 6. The Record as removed by Writ of Error.

Writ of error.

The Lord the King hath given in charge to his trusty and beloved Sir John Willes, Knight, his writ closed in these words:—GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth: to our trusty and beloved Sir John Willes, Knight, greeting. Because in the record and process, and also in the giving of judgment of the plaint, which was in our court before you and your fellows, our justices of the bench, by our writ between William Burton, gentleman, and Charles Long, late of Burford, in the county of Oxford, gentleman, of a certain debt of two hundred pounds, which the said William demands of the said Charles, manifest error hath intervened, to the great damage of him the said William, as we from his complaint are informed; we being willing that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, do command you, that if judgment thereof be given, then under your seal you do distinctly and openly send the record and process of the plaint aforesaid, with all things concerning them, and this writ; so that we may have them from the day of Easter in fifteen days, wheresoever we shall then be in England; that the record and process aforesaid being inspected, we may cause to be done thereupon, for correcting that error, what of right and according to the law and custom of our realm of England ought to be done. Witness ourself at Westminster, the twelfth day of February, in the twenty-ninth year of our reign.

Chief-justice's return.

The record and process whereof in the said writ mention above is made, follow in these words, to wit:—

The record.

Pleas at Westminster before Sir John Willes, Knight, and his brethren, justices of the bench of the Lord the King at Westminster, of the term of the Holy Trinity, in the twenty-eighth year of the reign of the Lord George the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, &c.

Writ.

Oxon, to wit. } Charles Long, late of Burford, in the county aforesaid, gentleman, was summoned to answer William Burton, of Yarnton in the said county, gentleman, of a plea that he render unto him two hundred pounds, which he owes him and unjustly detains, [as he saith.] And whereupon the said William, by Thomas Gough, his attorney, complains, that whereas on the first day of December, in the year of our Lord *one

Declaration, or count, on a bond.

*xxii.]

No. III.

thousand seven hundred and fifty-four, at Banbury in this county, the said Charles by his writing obligatory did acknowledge himself to be bound to the said William in the said sum of two hundred pounds of lawful money of Great Britain, to be paid to the said William whenever after the said Charles should be thereto required; nevertheless the said Charles (although often required) hath not paid to the said William the said sum of two hundred pounds, nor any part thereof, but hitherto altogether hath refused, and doth still refuse, to render the same; wherefore he saith that he is injured and hath damage to the value of ten pounds: and thereupon he brings suit, [and good proof.] And he brings here into court the writing obligatory aforesaid; which testifies the debt aforesaid in form aforesaid; the date whereof is the day and year before mentioned. And the aforesaid Charles, by Richard Price his attorney, comes and defends the force and injury when [and where it shall behoove him,] and craves oyer of the said writing obligatory, and it is read unto him [in the form aforesaid:] he likewise craves oyer of the condition of the said writing, and it is read unto him in these words: "The condition of this obligation is such, that if the above-bounden Charles Long, his heirs, executors, and administrators and every of them, shall and do from time to time, and at all times hereafter, well and truly stand to, obey, observe, fulfil, and keep the award, arbitrament, order, rule, judgment, final end, and determination of David Stiles, of Woodstock, in the said county, clerk, and Henry Bacon, of Woodstock aforesaid, gentleman, (arbitrators indifferently nominated and chosen by and between the said Charles Long and the above-named William Burton, to arbitrate, award, order, rule, judge, and determine of all and all manner of actions, cause or causes of action, suits, plaints, debts, duties, reckonings, accounts, controversies, trespasses, and demands whatsoever had, moved, or depending, or which might have been had, moved, or depending, by and between the said parties, for any matter, cause, or thing, from the beginning of the world until the day of the date hereof,) which the said arbitrators shall make and publish, of or in the premises, in writing under their hands and seals, or otherwise by word of mouth in the presence of two credible witnesses, on or before the first day of January next ensuing the date hereof; then this obligation to be void and of none effect, or else to be and remain in full force and virtue." Which being read and heard, the said Charles prays leave to imparl therein here until the octave of the Holy Trinity; and it is granted unto him. The same day is given to the said William Burton, here, &c. At which day, to wit, on the octave of the Holy Trinity, here come as well the said William Burton as the said Charles Long, by their attorneys aforesaid; and hereupon the said William *prays that the said Charles may answer to his writ and count aforesaid. And the aforesaid Charles defends the force and injury, when, &c., and saith that the said William ought not to have or maintain his said action against him: because he saith, that the said David Stiles and Henry Bacon, the arbitrators before named in the said condition, did not make any such award, arbitrament, order, rule, judgment, final end, or determination, of or in the premises above specified in the said condition, on or before the first day of January, in the condition aforesaid above mentioned, according to the form and effect of the said condition: and this he is ready to verify. Wherefore he prays judgment, whether the said William ought to have or maintain his said action thereof against him [and that he may go thereof without a day.] And the aforesaid William saith that for anything above alleged by the said Charles in pleadings he ought not to be precluded from having his said action thereof against him; because he saith, that after the making of the said writing obligatory, and before the said first day of January, to wit, on the twenty-sixth day of December, in the year aforesaid, at Banbury aforesaid, in the presence of two credible witnesses, namely, John Dew, of Chalbury, in the county aforesaid, and Richard Morris, of Wytham, in the county of Berks, the said arbitrators undertook the charge of the award, arbitrament, order, rule, judgment, final end, and determination aforesaid, of and in the premises specified in the condition aforesaid; and then and there made and published their award by word of mouth in manner and form following: that is to say, the said arbitrators did award, order, and adjudge that he the said Charles Long should forthwith pay to the said William Burton the sum of seventy-five pounds, and that thereupon all differences between them at the time of the making the said writing obligatory should finally cease and determine. And the said William further saith that although he afterwards, to

Profert in curia.

Defence.

Oyer prayed of the bond and condition,—viz., to perform an award.

Imparlance.

Continuance.

[*xxiii.

Plea: No such award.

Replication, setting forth an award.

No. III.

wit, on the sixth day of January, in the year of our Lord one thousand seven hundred and fifty-five, at Banbury aforesaid, requested the said Charles to pay to him the said William the said seventy-five pounds, yet (by protestation that the said Charles hath not stood to, obeyed, observed, fulfilled, or kept any part of the said award, which by him the said Charles ought to have been stood to, obeyed, observed, fulfilled, and kept) for further plea therein he saith, that the said Charles the said seventy-five pounds to the said William hath not hitherto paid; and this he is ready to verify. Wherefore he prays judgment, and his debt aforesaid, together with his damages occasioned by the detention of the said debt, to be adjudged unto him, &c. And the aforesaid Charles saith, that the plea aforesaid by him the said William in manner and form aforesaid above in his replication pleaded, and the matter in the same contained, are in no wise sufficient in *law for the said William to have or maintain his action aforesaid thereupon against him the said Charles; to which the said Charles hath no necessity, neither is he obliged, by the law of the land, in any manner to answer; and this he is ready to verify. Wherefore, for want of a sufficient replication in this behalf, the said Charles, as aforesaid, prays judgment, and that the aforesaid William may be precluded from having his action aforesaid thereupon against him, &c. And the said Charles, according to the form of the statute in that case made and provided, shows to the court here the causes of demurrer following, to wit: that it doth not appear, by the replication aforesaid, that the said arbitrators made the same award in the presence of two credible witnesses on or before the said first day of January, as they ought to have done, according to the form and effect of the condition aforesaid; and that the replication aforesaid is uncertain, insufficient, and wants form. And the aforesaid William saith, that the plea aforesaid by him the said William in manner and form aforesaid above in his replication pleaded, and the matter in the same contained, are good and sufficient in law for the said William to have and maintain the said action of him the said William thereupon against the said Charles; which said plea, and the matter therein contained, the said William is ready to verify and prove as the court shall award: and because the aforesaid Charles hath not answered to that plea, nor hath he hitherto in any manner denied the same, the said William as before prays judgment, and his debt aforesaid, together with his damages occasioned by the detention of that debt, to be adjudged unto him, &c. And because the justices here will advise themselves of and upon the premises before they give judgment thereupon, a day is thereupon given to the parties aforesaid here, until the morrow of All Souls, to hear their judgment thereupon, for that the said justices here are not yet advised thereof. At which day here come as well the said Charles as the said William, by their said attorneys; and because the said justices here will farther advise themselves of and upon the premises before they give judgment thereupon, a day is farther given to the parties aforesaid here until the octave of Saint Hilary, to hear their judgment thereupon, for that the said justices here are not yet advised thereof. At which day here come as well the said William Burton as the said Charles Long, by their said attorneys. Wherefore, the record and matters aforesaid having been seen, and by the justices here fully understood, and all and singular the premises being examined, and mature deliberation being had thereupon; for that it seems to the said justices here that the said plea of the said William Burton before in his replication pleaded, and the matter therein contained, are not sufficient in law to have and maintain the action of the aforesaid William against the aforesaid Charles: Therefore it is considered, that the aforesaid William *take nothing by his writ aforesaid, but that he and his pledges of prosecuting, to wit, John Doe and Richard Roe, be in mercy for his false complaint; and that the aforesaid Charles go thereof without a day, &c. And it is farther considered, that the aforesaid Charles do recover against the aforesaid William eleven pounds and seven shillings, for his costs and charges by him about his defence in this behalf sustained, adjudged by the court here to the said Charles with his consent, according to the form of the statute in that case made and provided: and that the aforesaid Charles may have execution thereof, &c.

Protestando.

Demurrer.

*xxiv.]

Causes of demurrer.

Joinder in demurrer.

Continuances.

Opinion of the court.

Replication insufficient.

*xxv.]

Judgment for the defendant.

Quærens nihil capiat per breve.

Amercement.

Costs.

xecution.

General error assigned.

Afterwards, to wit, on Wednesday next after fifteen days of Easter in this same term, before the Lord the King, at Westminster, comes the aforesaid William Burton, by Peter Manwaring, his attorney, and saith, that in the record and process aforesaid, and also in the giving of the judgment in the plaint aforesaid, it is manifestly erred in this, to wit, that the judgment

aforesaid was given in form aforesaid for the said Charles Long against the aforesaid William Burton, where, by the law of the land, judgment should have been given for the said William Burton against the said Charles Long; and this he is ready to verify. AND the said William prays the writ of the said Lord the King, to warn the said Charles Long to be before the said Lord the King, to hear the record and process aforesaid; and it is granted unto him; by which the sheriff aforesaid is commanded that by good [and lawful men of his bailiwick] he cause the aforesaid Charles Long to know that he be before the Lord the King from the day of Easter in five weeks, wheresoever [he shall then be in England,] to hear the record and process aforesaid, if [it shall have happened that in the same any error shall have intervened;] and further [to do and receive what the court of the Lord the King shall consider in this behalf.] The same day is given to the aforesaid William Burton. AT WHICH DAY before the Lord the King, at Westminster, comes the aforesaid William Burton, by his attorney aforesaid; and the sheriff returns, that by virtue of the writ aforesaid to him directed he had caused the said Charles Long to know that he be before the Lord the King at the time aforesaid in the said writ contained, by John Den and Richard Fen, good, &c., as by the same writ was commanded him; which said Charles Long, according to the warning given him in this behalf, here cometh by Thomas Webb, his attorney. WHEREUPON the said William saith, that in the record and process aforesaid, and also in the giving of the judgment aforesaid, it is manifestly erred, alleging the error aforesaid by him in the form aforesaid alleged, and prays that the judgment aforesaid for the error aforesaid, and others, in the record and process aforesaid being may be reversed, annulled, and entirely for nothing esteemed, and that the said Charles *may rejoin to the errors aforesaid, and that the court of the said Lord the King here may proceed to the examination as well of the record and process aforesaid as of the matter aforesaid above for error assigned. AND the said Charles saith, that neither in the record and process aforesaid, nor in the giving of the judgment aforesaid, in any thing is there erred; and he prays in like manner that the court of the said Lord the King here may proceed to the examination as well of the record and process aforesaid as of the matters aforesaid above for error assigned. AND BECAUSE the court of the Lord the King here is not yet advised what judgment to give of and upon the premises, a day is thereof given to the parties aforesaid until the morrow of the Holy Trinity, before the Lord the King, wheresoever he shall then be in England, to hear their judgment of and upon the premises, for that the court of the Lord the King here is not yet advised thereof. At which day before the Lord the King, at Westminster, come the parties aforesaid by their attorneys aforesaid. WHEREUPON, as well the record and process aforesaid, and the judgment thereupon given, as the matters aforesaid by the said William above for error assigned, being seen, and by the court of the Lord the King here being fully understood, and mature deliberation being thereupon had, for that it appears to the court of the Lord the King here, that in the record and process aforesaid, and also in the giving of the judgment aforesaid, it is manifestly erred, THEREFORE IT IS CONSIDERED that the judgment aforesaid, for the error aforesaid, and others, in the record and process aforesaid, be reversed, annulled, and entirely for nothing esteemed; and that the aforesaid William recover against the aforesaid Charles his debt aforesaid, and also fifty pounds for his damages which he hath sustained, as well on occasion of the detention of the said debt, as for his costs and charges unto which he hath been put about his suit in this behalf, to the said William with his consent by the court of the Lord the King here adjudged. And the said Charles in mercy.

No. III.

Writ of *scire facias*, to hear errors.

Sheriff's return. *Scire feci.*

Error as signed afresh.

[*xxvi.

Rejoinder. *In nullo est erratum.*

Continuance.

Opinion of the court.

Judgment of the Common Pleas reversed.

Judgment for the plaintiff.

Costs.

Defendant amerced.

SECT. 7. PROCESS OF EXECUTION.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, to the sheriff of Oxfordshire, greeting. WE command you that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before us in three weeks from the day of the Holy Trinity, wheresoever we shall then be in England, to satisfy William Burton for two hundred pounds debt, which the said William Burton hath lately recovered against him in our court before us, and also fifty pounds, which were *adjudged in our said court before us to the said William Burton for his damages which he hath sustained, as well by occasion of the

Writ of *capias ad satisfaciendum.*

[*xxvii

No. III.

detention of the said debt as for his costs and charges to which he hath been put about his suit in this behalf, whereof the said Charles Long is convicted, as it appears to us of record; and have you there then this writ. WITNESS Sir Thomas Denison,[5] Knight, at Westminster, the nineteenth day of June, in the twenty-ninth year of our reign.

Sheriff's return. *Capi corpus.*

By virtue of this writ to me directed, I have taken the body of the within-named Charles Long, which I have ready before the Lord the King at Westminster, at the day within written, as within it is commanded me.

Writ of *fieri facias.*

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, to the sheriff of Oxfordshire, greeting. WE command you that of the goods and chattels within your bailiwick of Charles Long, late of Burford, gentleman, you cause to be made two hundred pounds debt, which William Burton lately in our court before us at Westminster hath recovered against him, and also fifty pounds, which were adjudged in our court before us to the said William for his damages which he hath sustained, as well by occasion of the detention of his said debt as for his costs and charges to which he hath been put about his suit in this behalf, whereof the said Charles Long is convicted, as it appears to us of record; and have that money before us in three weeks from the day of the Holy Trinity, wheresoever we shall then be in England, to render to the said William of his debt and damages aforesaid; and have there then this writ. WITNESS Sir Thomas Denison, Knight, at Westminster, the nineteenth day of June, in the twenty-ninth year of our reign.

Sheriff's return. *Fieri feci.*

By virtue of this writ to me directed, I have caused to be made of the goods and chattels of the within-written Charles Long two hundred and fifty pounds, which I have ready before the Lord the King at Westminster, at the day within written, as it is within commanded me.

[5] The senior puisné justice, there being no chief-justice that term.

COMMENTARIES

ON

THE LAWS OF ENGLAND.

BOOK THE FOURTH.

Of Public Wrongs.

CHAPTER I.

OF THE NATURE OF CRIMES, AND THEIR PUNISHMENT.

We are now arrived at the fourth and last branch of these commentaries; which treats of *public wrongs*, or *crimes* and *misdemesnours*. For we may remember that, in the beginning of the preceding book,(*a*) wrongs were divided into two species: the one *private*, and the other *public*. Private wrongs, which are frequently termed civil injuries, were the subject of that entire book: we are now therefore, lastly, to proceed to the consideration of public wrongs, or crimes and misdemesnours; with the means of their prevention and punishment. In the pursuit of which subject I shall consider, in the *first* place, the general nature of crimes and punishments; *secondly*, the persons capable of committing crimes; *thirdly*, their several degrees of guilt as principals, or accessaries; **fourthly*, the several species of crimes, with the punishment annexed to each by the laws of England; *fifthly*, the means of preventing their perpetration; and, *sixthly*, the method of inflicting those punishments which the law has annexed to each several crime and misdemesnour. [*2

First, as to the general nature of crimes, and their punishment; the discussion and admeasurement of which forms in every country the code of criminal law; or, as it is more usually denominated with us in England, the doctrine of the *pleas of the crown*; so called because the king, in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the proper prosecutor for every public offence.(*b*)

The knowledge of this branch of jurisprudence, which teaches the nature, extent, and degrees of every crime, and adjusts to it its adequate and necessary penalty, is of the utmost importance to every individual in the state. For (as a very great master of the crown-law(*c*) has observed upon a similar occasion) no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude that he may not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vices and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events which the compass of a day may bring forth, will teach us (upon a moment's reflection) that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern.

(*a*) Book iii. ch. 1. (*b*) See book i. p. 268. (*c*) Sir Michael Foster, pref. to rep.

In proportion to the importance of the criminal law ought also to be the care and attention of the legislature in properly forming and enforcing it. It should *3] be founded upon principles that are permanent, uniform, *and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind: though it sometimes (provided there be no transgression of these external boundaries) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the state which it is meant to govern. And yet, either from a want of attention to these principles in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition, and revenge; from retaining the discordant political regulations, which successive conquerors or factions have established in the various revolutions of government; from giving a lasting efficacy to sanctions that were intended to be temporary, and made (as lord Bacon expresses it) merely upon the spur of the occasion; or from, lastly, too hastily employing such means as are greatly disproportionate to their end, in order to check the progress of some very prevalent offence: from some, or from all, of these causes, it hath happened that the criminal law is in every country of Europe more rude and imperfect than the civil. I shall not here enter into any minute inquiries concerning the local constitutions of other nations; the inhumanity and mistaken policy of which have been sufficiently pointed out by ingenious writers of their own.(*d*) But even with us in England, where our crown law is with justice supposed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties less uncertain and ar- *4] bitrary; where all our accusations are public, and our *trials in the face of the world; where torture is unknown, and every delinquent is judged by such of his equals against whom he can form no exception nor even a personal dislike;—even here we shall occasionally find room to remark some particulars that seem to want revision and amendment. These have chiefly arisen from too scrupulous an adherence to some rules of the antient common law, when the reasons have ceased upon which those rules were founded; from not repealing such of the old penal laws as are either obsolete or absurd; and from too little care and attention in framing and passing new ones. The enacting of penalties, to which a whole nation should be subject, ought not to be left as a matter of indifference to the passions or interests of a few, who upon temporary motives may prefer or support such a bill; but be calmly and maturely considered by persons who know what provisions the laws have already made to remedy the mischief complained of, who can from experience foresee the probable consequences of those which are now proposed, and who will judge without passion or prejudice how adequate they are to the evil. It is never usual in the house of peers even to read a private bill, which may affect the property of an individual, without first referring it to some of the learned judges and hearing their report thereon.(*e*) And surely equal precaution is necessary when laws are to be established which may affect the property, the liberty, and perhaps even the lives of thousands. Had such a reference taken place, it is impossible that in the eighteenth century it could ever have been made a capital crime to break down (however maliciously) the mound of a fish-pond, whereby any fish shall escape; or to cut down a cherry-tree in an orchard.(*f*)[1] Were even a committee appointed but once in a hundred years to revise the criminal law, it could not have continued to this hour a felony, without benefit of clergy, to be seen for one month in the company of persons who call themselves, or are called, Egyptians.(*g*)[2]

(*d*) Baron Montesquieu. marquis Beccaria, &c.
(*e*) See book ii. page 335.
(*f*) Stat. 9 Geo. I. c. 22. 31 Geo. II. c. 42.
(*g*) Stat. 5 Eliz. c. 20.

[1] The two acts inflicting this severe punishment are repealed, as far as regards the benefit of clergy, by 4 Geo. IV. c. 54, §§ 1 & 2: and the offender or offenders, together with their accessaries, are liable, at the discretion of the court, to be transported or imprisoned. And see still more recent enactments with respect to these offences. in 7 & 8 Geo. IV. c. 30, §§ 15, 19, 20.—Chitty.

[2] The 5 Eliz. c. 20, which introduced this crime and its severe punishment, is repealed

It is true that these outrageous penalties, being seldom or never inflicted, are hardly known to be law by the public; *but that rather aggravates the mischief, by laying a snare for the unwary. Yet they cannot but occur [*5 to the observation of any one who hath undertaken the task of examining the great outlines of the English law, and tracing them up to their principles; and it is the duty of such a one to hint them with decency to those whose abilities and stations enable them to apply the remedy.[3] Having therefore premised this apology for some of the ensuing remarks, which might otherwise seem to savour of arrogance, I proceed now to consider (in the first place) the general nature of *crimes*.

I. A crime or misdemeanour is an act committed or omitted, in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanours, which, properly speaking, are mere synonymous terms; though, in common usage, the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler names of "misdemeanours" only.[4]

The distinction of public wrongs from private, of crimes and misdemeanours from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanours, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity. As, if I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public which of us is in possession of the land: but treason, murder, and robbery are properly ranked among crimes; since, besides the injury done to individuals, they strike at the very being of society, which cannot possibly subsist where actions of this sort are suffered to escape with impunity.[5]

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by the 23 Geo. III. c. 51. Also the 1 & 2 Ph. & M. c. 4, as far as it made it a capital felony for gypsies to remain one month in England, is repealed by 1 Geo. IV. c. 116.—CHITTY.

[3] This hint was, however, taken but tardily, and the duty of reforming our criminal code was left unperformed until very recently. In spite of the striking expostulation of our commentator, and the repeated exposure by other great and good men of the injustice, the inconsistency and inefficiency of this branch of our law, one-fourth of the present century was suffered to expire without any important or uniform amelioration of its enactments. The subject has, however, recently received the attention which it so seriously demanded: and it is only due to a late eminent statesman to say that, although others had previously pointed out the defects of the criminal code, to him the merit is to be given of first bringing the power and advantages of office to remedy them. The work thus commenced has been carried on by others.—STEWART.

[4] In the English law *misdemeanour* is generally used in contradistinction to *felony*, and misdemeanours comprehend all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies, attempts and solicitations to commit felonies, &c.—CHRISTIAN.

[5] The distinction between public crimes and private injuries seems entirely to be created by positive laws, and is referable only to civil institutions. Every violation of a moral law or natural obligation is an injury for which the offender ought to make retribution to the individuals who immediately suffer from it; and it is also a crime for which he ought to be punished to that extent which would deter both him and others from a repetition of the offence. In positive laws those acts are denominated injuries for which the legislature has provided only retribution or a compensation in damages; but when, from experience, it is discovered that this is not sufficient to restrain within moderate bounds certain classes of injuries, it then becomes necessary for the legislative power to raise them into crimes and to endeavour to repress them by the terror of punishment, or the sword of the public magistrate. The word "crime" has no technical meaning in the law of England. It seems, when it has a reference to positive law, to comprehend those acts which subject the offender to punishment. When the words *high crimes and misdemeanours* are used in prosecutions by impeachment, the words *high crimes* have no definite signification, but are used merely to give greater solemnity to the charge. When the word *crime* is used with a reference to moral law, it implies every deviation from moral

In all cases the crime includes an injury: every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community. *Thus, treason in imagining the king's death involves in it conspiracy against an individual, which is also a civil injury; but, as this species of treason, in its consequences, principally tends to the dissolution of government, and the destruction thereby of the order and peace of society, this denominates it a crime of the highest magnitude. Murder is an injury to the life of an individual; but the law of society considers principally the loss which the state sustains by being deprived of a member, and the pernicious example thereby set for others to do the like. Robbery may be considered in the same view: it is an injury to *private* property; but, were that all, a civil satisfaction in damages might atone for it; the *public* mischief is the thing for the prevention of which our laws have made it a capital offence. In these gross and atrocious injuries the private wrong is swallowed up in the public: we seldom hear any mention made of satisfaction to the individual, the satisfaction to the community being so very great. And, indeed, as the public crime is not otherwise avenged than by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrong, which can only be had from the body or goods of the aggressor.[6] But there are crimes of an inferior nature, in which the public punishment is not so severe but it affords room for a private compensation also; and herein the distinction of crimes from civil injuries is very apparent. For instance: in the case of battery, or beating another, the aggressor may be indicted for this at the suit of the king, for disturbing the public peace, and be punished criminally by fine and imprisonment; and the party beaten may also have his private remedy by action of trespass for the injury which he in particular sustains, and recover a civil satisfaction in damages.[7] So, also, in case of a public nuisance, as digging a ditch across a

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rectitude. Hence we say it is a *crime* to refuse the payment of a just debt; it is a *crime* wilfully to do an injury to another's person or property without making him a satisfaction. To destroy another's property wilfully, without making the owner a compensation, is in all cases a worse crime in reason than theft; because the individual deprived of his property suffers precisely the same injury, and the public loses the benefit of that property, which contributes to the support of no one; and he who does the injury has not the temptation of him who steals to supply his wants. In the case of those actions which are only civil injuries, and to which no legal punishment is annexed, the law was supposed that retribution will be sufficient to deter the commission of them. But the wilful and malicious destruction of another's property by fire in many cases is punished with death; so also is the malicious killing and maiming of another's cattle: yet these detestable and diabolical acts were not crimes by the common law of England; but experience discovered the necessity of rendering them subject to public and severe punishment. Yet to set fire to a field of ripe standing corn is still only a private injury though this is an act *which strikes at the very being of society*, but the legislature have not yet found it necessary to repress it by the terror of penal laws.—Christian.

The 9 Geo. I. c. 22, relating to killing and maiming cattle, is repealed by 4 Geo. IV. c. 54, by which the punishment of that offence is altered to transportation or imprisonment, and the necessity of proving malice against the owner is removed.—Chitty.

[6] The civil right to sue for the injury the party has received in a case of felony is not in general merged or destroyed, but only *suspended* until he has performed his duty to society by an endeavour to bring the offender to justice: and after the party on whom suspicion was fixed has been convicted or acquitted, without collusion, the prosecutor may support an action for the same cause as that on which the criminal prosecution was founded. Styles, 346. 12 East, 409. Rep. T. Hardw. 350. 17 Ves. 329. No action can be brought, or bill in equity filed, in relation to a felony, until the offender has been duly tried for the offence, (id. ibid.,) or that every exertion has been made to bring him to justice.—Chitty.

[7] The court of Common Pleas will not compel a party who has proceeded both by indictment and action for the same assault to make his election upon which he will rely, (Jones *vs.* Clay, 1 Bos. & Pul. 191;) and, though it was formerly held that, in general, if the party moved for a criminal information he must abandon any action, that doctrine seems to have been broken in upon by a very recent case in the court of King's Bench, (Caddy *vs.* Barlow, 1 Man. & Ryl. 275,) where it was held, in an action by A. for the malicious prosecution by C. of an indictment against A. and B., that a rule for a

highway: this is punishable by indictment as a common offence to the whole kingdom and all his majesty's subjects; but if any individual sustains any special *damage thereby, as laming his horse, breaking his carriage, or the like, the offender may be compelled to make ample satisfaction, as well for the [*7 private injury as for the public wrong.

Upon the whole, we may observe that, in taking cognizance of all wrongs or unlawful acts, the law has a double view, viz.: not only to redress the party injured by either restoring to him his right, if possible, or by giving him an equivalent, the manner of doing which was the object of our inquiries in the preceding book of these commentaries, but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws which the sovereign power has thought proper to establish for the government and tranquillity of the whole. What those breaches are, and how prevented or punished, are to be considered in the present book.

II. The nature of *crimes and misdemeanours* in general being thus ascertained and distinguished, I proceed, in the next place, to consider the general nature of *punishments*, which are evils or inconveniences consequent upon crimes and misdemeanours; being devised, denounced, and inflicted, by human laws, in consequence of disobedience or misbehaviour in those to regulate whose conduct such laws were respectively made. And herein we will briefly consider the *power*, the *end*, and the *measure*, of human punishment.

1. As to the *power* of human punishment, or the right of the temporal legislator to inflict discretionary penalties for crimes and misdemeanours.(*h*) It is clear that the right of punishing crimes against the law of nature, as murder, and the like, is, in a state of mere nature, vested in every individual. For it must be vested in somebody; otherwise the laws of nature would be vain and fruitless, if none were empowered to put them in execution: and, if that power is vested in any *one*, it must also be vested in *all* mankind, *since all are [*8 by nature equal. Whereof the first murderer, Cain, was so sensible, that we find him(*i*) expressing his apprehensions that *whoever* should find him would slay him. In a state of society this right is transferred from individuals to the sovereign power; whereby men are prevented from being judges in their own causes, which is one of the evils that civil government was intended to remedy. Whatever power, therefore, individuals had of punishing offences against the law of nature, that is now vested in the magistrate alone, who bears the sword of justice by the consent of the whole community. And to this precedent natural power of individuals must be referred that right, which some have argued to belong to every state, (though, in fact, never exercised by any,) of punishing not only their own subjects, but also foreign ambassadors, even with death itself, in case they have offended, not indeed against the municipal laws of the country, but against the divine laws of nature, and become liable thereby to forfeit their lives for their guilt.(*k*)

As to offences merely against the laws of society, which are only *mala prohibita*, and not *mala in se*, the temporal magistrate is also empowered to inflict coercive penalties for such transgressions, and this by the consent of individuals who, in forming societies, did either tacitly or expressly invest the sovereign power with the right of making laws, and of enforcing obedience to them when made by exercising, upon their non-observance, severities adequate to the evil. The lawfulness, therefore, of punishing such criminals, is founded upon this principle, that the law by which they suffer was made by their own consent: it is a part of the original contract into which they entered when first they engaged in society; it was calculated for, and has long contributed to, their own security.

This right, therefore, being thus conferred by universal consent, gives to the state exactly the same power, and no more, over all its members, as each indi-

(h) See Grotius, *de j. b. & p. l.* 2, c. 20. Puffendorf, L. of Nat. & N. b. 8, c. 3.

(i) Gen. iv. 14.

(k) See book i. p. 254.

criminal information obtained by A., and made absolute, was no bar to the action. See also the note to that case, id. 278.—CHITTY.

*9] vidual member had naturally over himself or others: which has *occasioned some to doubt how far a human legislature ought to inflict capital punishments for *positive* offences,—offences against the municipal law only, and not against the law of nature,—since no individual has, naturally, a power of inflicting death upon himself or others for actions in themselves indifferent. With regard to offences *mala in se*, capital punishments are in some instances inflicted by the immediate *command* of God himself to all mankind; as in the case of murder, by the precept delivered to Noah, their common ancestor and representative, "whoso sheddeth man's blood, by man shall his blood be shed."(*l*) In other instances they are inflicted after the *example* of the Creator in his positive code of laws for the regulation of the Jewish republic; as in the case of the crime against nature. But they are sometimes inflicted without such express warrant or example, at the will and discretion of the human legislature; as for forgery, for theft, and sometimes for offences of a lighter kind. Of these we are principally to speak, as these crimes are none of them offences against natural, but only against social rights, not even theft itself, unless it be accompanied with violence to one's house or person; all others being an infringement of that right of property which, as we have formerly seen,(*m*) owes its origin not to the law of nature, but merely to civil society.[8]

The practice of inflicting capital punishments, for offences of human institution, is thus justified by that great and good man, Sir Matthew Hale:(*n*) "When offences grow enormous, frequent, and dangerous to a kingdom or state, destructive or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom or its inhabitants, severe punishment, and even death itself, is necessary to be annexed to laws in many cases by the prudence of lawgivers." It is therefore the enormity or dangerous tendency of the crime that alone can warrant any earthly legislature in putting him to death

*10] that commits it. *It is not its frequency only, or the difficulty of otherwise preventing it, that will excuse our attempting to prevent it by a wanton effusion of human blood. For though the end of punishment is to deter men from offending, it never can follow from thence that it is lawful to deter them at any rate and by any means; since there may be unlawful methods of enforcing obedience even to the justest laws. Every humane legislator will be therefore extremely cautious of establishing laws that inflict the penalty of death, especially for slight offences or such as are merely positive. He will expect a better reason for his so doing than that loose one which generally is given,—that it is found by former experience that no lighter penalty will be effectual. For is it found upon further experience that capital punishments are more effectual? Was the vast territory of all the Russias worse regulated under the late empress Elizabeth than under her more sanguinary predecessors? Is it now, under Catherine III., less civilized, less social, less secure? And yet we are assured, that neither of these illustrious princesses have, throughout their whole administration, inflicted the penalty of death; and the latter has, upon full persuasion of its being useless, nay, even pernicious, given orders for abolishing it entirely throughout her extensive dominions.(*o*) But, indeed, were capital punishments proved by experience to be a sure and effectual remedy, that would not prove the necessity (upon which the justice and propriety depend) of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far. For instance, the

(*l*) Gen. ix. 6.
(*m*) Book ii. c. 1.
(*n*) 1 Hal. P. C. 13.
(*o*) Grand instructions for framing a new code of laws for the Russian empire, § 210.

[8] It is strange that the learned judge's conclusion—viz., that *theft itself is not an offence against natural rights*—did not lead him to suspect the fallacy of the position that *the right of property owes its origin not to the law of nature, but merely to civil society*, which he has also advanced in a former book, (2 book, p. 11,) and which I have there presumed to controvert. If theft be not a violation of the law of nature and reason, it would follow that there is no moral turpitude in dishonesty. "*Non igitur magis est contra naturam morbus aut egestas aut quid hujusmodi quam detractio aut appetitio alieni.*"—Cic. *Thou shalt not steal* is certainly one of the first precepts both of nature and religion.—Christian.

damage done to our public roads by loaded wagons is universally allowed, and many laws have been made to prevent it; none of which have hitherto proved effectual. But it does not therefore follow that it would be just for the legislature to inflict death upon every obstinate carrier who defeats or eludes the provision of former statutes. Where the evil to be prevented is not adequate to the violence of the preventive, a sovereign that thinks seriously can never justify such a law to the dictates of *conscience and humanity. To shed the blood of our fellow-creature is a matter that requires the greatest deliberation and the fullest conviction of our own authority: for life is the immediate gift of God to man; which neither he can resign, nor can it be taken from him, unless by the command or permission of Him who gave it; either expressly revealed, or collected from the laws of nature or society by clear and indisputable demonstration. [*11.

I would not be understood to *deny* the right of the legislature in any country to enforce its own laws by the death of the transgressor, though persons of some abilities have *doubted* it; but only to suggest a few hints for the consideration of such as are, or may hereafter become, legislators. When a question arises, whether death may be lawfully inflicted for this or that transgression, the wisdom of the laws must decide it; and to this public judgment or decision all private judgments must submit; else there is an end of the first principle of all society and government. The guilt of blood, if any, must lie at their doors who misinterpret the extent of their warrant, and not at the doors of the subject, who is bound to receive the interpretations that are given by the sovereign power.

2. As to the *end* or final cause of human punishments. This is not by way of atonement or expiation for the crime committed; for that must be left to the just determination of the Supreme Being; but as a precaution against future offences of the same kind. This is effected three ways: either by the amendment of the offender himself; for which purpose all corporal punishments, fines, and temporary exile or imprisonment are inflicted; or by deterring others by the dread of his example from offending in the like way, "*ut pœna* (as Tully(*p*) expresses it) *ad paucos, metus ad omnes perveniat;*" which gives rise to all ignominious punishments, and to such executions of justice as are open and public: *or, lastly, by depriving the party injuring of the power to do future mischief; which is effected by either putting him to death, or condemning him to perpetual confinement, slavery, or exile. The same one end of preventing future crimes is endeavoured to be answered by each of these three species of punishment. The public gains equal security, whether the offender himself be amended by wholesome correction, or whether he be disabled from doing any further harm; and if the penalty fails of both these effects, as it may do, still, the terror of his example remains as a warning to other citizens. The method, however, of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it: therefore the pains of death, and perpetual disability by exile, slavery, or imprisonment, ought never to be inflicted but when the offender appears incorrigible: which may be collected either from a repetition of minuter offences, or from the perpetration of some one crime of deep malignity which of itself demonstrates a disposition without hope or probability of amendment: and in such cases it would be cruelty to the public to defer the punishment of such a criminal till he had an opportunity of repeating perhaps the worst of villanies. [*12

3. As to the *measure* of human punishments. From what has been observed in the former articles, we may collect, that the quantity of punishment can never be absolutely determined by any standing invariable rule; but it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear to be the best calculated to answer the end of precaution against future offences.

Hence it will be evident that what some have so highly extolled for its

(p) *Pro Cluentio*, 46.

equity, the *lex talionis*, or law of retaliation, can never be in all cases an adequate or permanent rule of punishment. In some cases indeed it seems to be dictated by natural reason; as in the case of conspiracies to do an injury, or false accusations of the innocent; to which we may add that law of the Jews *13] and Egyptians, mentioned by *Josephus and Diodorus Siculus, that whoever without sufficient cause was found with any mortal poison in his custody should himself be obliged to take it. But, in general, the difference of persons, place, time, provocation, or other circumstances may enhance or mitigate the offence; and in such cases retaliation can never be a proper measure of justice. If a nobleman strikes a peasant, all mankind will see that if a court of justice awards a return of the blow it is more than a just compensation. On the other hand, retaliation may sometimes be too easy a sentence; as, if a man maliciously should put out the remaining eye of him who had lost one before, it is too slight a punishment for the maimer to lose only one of his: and therefore the law of the Locrians, which demanded an eye for an eye, was in this instance judiciously altered by decreeing, in imitation of Solon's laws,(*q*) that he who struck out the eye of a one-eyed man should lose both his own in return. Besides, there are very many crimes that will in no shape admit of these penalties without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like. And we may add, that those instances, wherein retaliation appears to be used, even by the divine authority, do not really proceed upon the rule of exact retribution, by doing to the criminal the same hurt he has done to his neighbour, and no more; but this correspondence between the crime and punishment is barely a consequence from some other principle. Death is ordered to be punished with death; not because one is equivalent to the other, for that would be expiation, and not punishment. Nor is death always an equivalent for death: the execution of a needy decrepit assassin is a poor satisfaction for the murder of a nobleman in the bloom of his youth and full enjoyment of his friends, his honours, and his fortune. But the reason upon which this sentence is grounded seems to be that this is the highest *14] penalty that man can inflict, *and tends most to the security of mankind, by removing one murderer from the earth and setting a dreadful example to deter others; so that even this grand instance proceeds upon other principles than those of retaliation. And truly, if any measure of punishment is to be taken from the damage sustained by the sufferer, the punishment ought rather to exceed than equal the injury: since it seems contrary to reason and equity that the guilty (if convicted) should suffer no more than the innocent has done before him; especially as the suffering of the innocent is past and irrevocable, that of the guilty is future, contingent, and liable to be escaped or evaded. With regard indeed to crimes that are incomplete, which consist merely in the intention, and are not yet carried into act, as conspiracies and the like, the innocent has a chance to frustrate or avoid the villany, as the conspirator has also a chance to escape his punishment; and this may be one reason why the *lex talionis* is more proper to be inflicted, if at all, for crimes that consist in intention, than for such as are carried into act. It seems, indeed, consonant to natural reason, and has therefore been adopted as a maxim by several theoretical writers,(*r*) that the punishment due to the crime of which one falsely accuses another should be inflicted on the perjured informer. Accordingly, when it was once attemped to introduce into England the law of retaliation, it was intended as a punishment for such only as preferred malicious accusations against others; it being enacted, by statute 37 Edw. III. ch. 18, that such as preferred any suggestions to the king's great council should put in sureties of taliation; that is, to incur the same pain that the other should have had in case the suggestion were found untrue. But after one year's experience, this punishment of taliation was rejected, and imprisonment adopted in its stead.(*s*)

But though from what has been said it appears that there cannot be any

(q) Pott. Antiq. b. i. c. 26. (r) Beccar. c. 15. (s) Stat. 38 Edw. III. c. 9.

regular or determinate method of rating the *quantity of punishments for crimes by any one uniform rule, but they must be referred to the will and discretion of the legislative power: yet there are some general principles, drawn from the nature and circumstances of the crime, that may be of some assistance in allotting it an adequate punishment. [*15

As, first, with regard to the *object* of it; for the greater and more exalted the object of an injury is, the more care should be taken to prevent that injury, and, of course, under this aggravation the punishment should be more severe. Therefore treason in conspring the *king's* death is by the English law punished with greater rigour than even actually killing any private subject. And yet, generally, a design to transgress is not so flagrant an enormity as the actual completion of that design. For evil, the nearer we approach it, is the more disagreeable and shocking; so that it requires more obstinacy in wickedness to perpetrate an unlawful action, than barely to entertain the thought of it: and it is an encouragement to repentance and remorse, even till the last stage of any crime, that it never is too late to retract; and that if a man stops even here, it is better for him than if he proceeds: for which reason, an attempt to rob, to ravish, or to kill, is far less penal than the actual robbery, rape, or murder. But in the case of a treasonable conspiracy, the object whereof is the king's majesty, the bare intention will deserve the highest degree of severity; not because the intention is equivalent to the act itself, but because the greatest rigour is no more than adequate to a treasonable purpose of the heart, and there is no greater left to inflict upon the actual execution itself.

Again: the violence of passion, or temptation, may sometimes alleviate a crime; as theft, in case of hunger, is far more worthy of compassion than when committed through avarice, or to supply one in luxurious excesses. To kill a man upon sudden and violent resentment is less penal than upon cool, deliberate malice. The age, education, and character of the offender: the repetition (or otherwise) *of the offence; the time, the place, the company, wherein it was committed; all these, and a thousand other incidents, may aggravate or extenuate the crime.(*t*) [*16

Further: as punishments are chiefly intended for the prevention of future crimes, it is but reasonable that among crimes of different natures those should be most severely punished which are the most destructive of the public safety and happiness;(*u*) and, among crimes of an equal malignity, those which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others, and which therefore the offender has the strongest inducement to commit; according to what Cicero observes,(*v*) "*ea sunt animadvertenda peccata maxime, quæ difficillime præcaventur.*" Hence it is, that for a servant to rob his master is in more cases capital than for a stranger; if a servant kills his master, it is a species of treason;[9] in another it is only murder; to steal a handkerchief, or other trifle of above the value of twelve pence, privately from one's person, is made capital;[10] but to carry off a load of

(*t*) Thus. Demosthenes (in his oration against Midias) finely works up the aggravations of the insults he had received:—"I was abused," says he, "by my enemy, in cold blood, out of malice, not by heat of wine, in the morning, publicly, before strangers as well as citizens; and that in the temple, whither the duty of my office called me."

(*u*) Beccar. c. 6.

(*v*) *Pro Sexto Roscio*, 40.

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[9] This is no longer law. By 9 Geo. IV. c. 31, s. 2, repealing 25 Edw. III. st. 5, c. 2, respecting petit treason, it is enacted "that every offence which before the commencement of that act would have amounted to petit treason shall be deemed to be murder only, and no greater offence; and that all persons guilty in respect thereof, whether as principals or accessaries, shall be dealt with, indicted, tried, and punished as principals and accessaries in murder." See 1 Hawk. P. C. 6th ed. 105. 5 Burn's J. last ed. 551.—CHITTY.

[10] This is altered by 7 & 8 Geo. IV. c. 29, s. 6, which enacts "that if any person shall steal any chattel, money, or valuable security from the person of another, or shall assault any other person with intent to rob him, or shall with menaces or by force demand any such property of any other person with intent to steal the same, he shall be guilty of felony, and liable to be transported for life, or for not less than seven years, or to be

corn from an open field, though of fifty times greater value, is punished with transportation only. And in the island of Man this rule was formerly carried so far that to take away a horse or an ox was there no felony, but a trespass, because of the difficulty in that little territory to conceal them or carry them off; but to steal a pig or a fowl, which is easily done, was a capital misdemeanour, and the offender was punished with death.(*w*)

Lastly: as a conclusion to the whole, we may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes and amending the manners of a people than such as are more merciful in general, yet properly intermixed with due *distinctions *17] of severity. It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action,(*x*) that crimes are more effectually prevented by the *certainty* than by the *severity* of punishment. For the excessive severity of law (says Montesquieu)(*y*) hinders their execution: when the punishment surpasses all measure the public will frequently, out of humanity, prefer impunity to it. Thus also the statute 1 Mar. st. 1, c. 1 recites in its preamble "that the state of every king consists more assuredly in the love of the subjects towards their prince than in the dread of laws made with rigorous pains; and that laws made for the preservation of the commonwealth without great penalties are more often obeyed and kept than laws made with extreme punishments." Happy had it been for the nation if the subsequent practice of that deluded princess, in matters of religion, had been correspondent to these sentiments of herself and parliament in matters of state and government! We may further observe that sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution. The laws of the Roman kings, and the twelve tables of the *decemviri*, were full of cruel punishments: the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished; under the emperors severe punishments were revived; and then the empire fell.[11]

It is moreover absurd and impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them) do likewise prove a manifest defect either in the wisdom of the legislative or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty. It is, it must be owned, much *easier* to extirpate than

(*w*) 4 Inst. 285. (*x*) Beccar. c. 7. (*y*) Sp. L. b. 6, c. 13.

imprisoned for not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped."—Chitty.

[11] The most admirable and excellent statute ever passed by the English legislature is the 1 Edw. VI. c. 12. In the preamble it states, in a beautiful and simple strain of eloquence, that "Nothing is more godly, more sure, more to be wished and desired betwixt a prince, the supreme head and ruler, and the subjects whose governor and head he is, than on the prince's part great clemency and indulgency, and rather too much forgiveness and remission of his royal power and just punishment, than exact severity and justice to be showed; and, on the subjects' behalf, that they should obey rather for love, and for the necessity and love of a king and prince, than for fear of his strait and severe laws. But as in tempest or winter one course and garment is convenient, in calm or warm weather a more liberal case or lighter garment both may and ought to be followed and used, so we have seen divers strait and sore laws made in one parliament (the time so requiring) in a more calm and quiet reign of another prince by the like authority and parliament taken away," &c. It therefore repeals every statute which has created any treason since the 25 Edw. III. st. 5, c. 2. It repeals "all and every act of parliament concerning doctrine or matters of religion." It repeals every felony created by the legislature during the preceding long and cruel reign of Henry VIII. It repeals the statute 31 Hen. VIII., "that proclamations made by the king's highness, by the advice of his honourable council, should be made and kept as though they were made by authority of parliament." It repeals also the extraordinary statute *de bigamis*, (4 Edw. I. st. 3, c. 5,) which enacted that if any man married a widow, or married a second wife after the death of the first, he should be deprived of the benefit of clergy if he was convicted of any clergyable felony whatever.—Christian.

to amend mankind; yet *that magistrate must be esteemed both a weak and a cruel surgeon who cuts off every limb which, through ignorance or [*18 indolence, he will not attempt to cure. It has been therefore ingeniously proposed,(z) that in every state a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least; but, if that be too romantic an idea, yet at least a wise legislator will mark the principal divisions and not assign penalties of the first degree to offences of an inferior rank. Where men see no distinction made in the nature and gradations of punishment, the generality will be led to conclude there is no distinction in the guilt. Thus in France the punishment of robbery, either with or without murder, is the same;(a) hence it is that though perhaps they are therefore subject to fewer robberies, yet they never rob but they also murder.[12] In China murderers are cut to pieces, and robbers not; hence in that country they never murder on the highway, though they often rob. And in England, besides the additional terrors of a speedy execution and a subsequent exposure or dissection, robbers have a hope of transportation, which seldom is extended to murderers. This has the same effect here as in China; in preventing frequent assassination and slaughter.

Yet, though in this instance we may glory in the wisdom of the English law, we shall find it more difficult to justify the frequency of capital punishment to be found therein, inflicted (perhaps inattentively) by a multitude of successive independent statutes upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than a hundred and sixty have been declared by act of parliament(b) to be felonies without benefit of clergy; or, in other words, to be worthy of instant death. So dreadful a list, instead of diminishing, increases the number of offenders. *The injured, through compassion, will often forbear [*19 to prosecute; juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence; and judges, through compassion, will respite one-half of the convicts, and recommend them to the royal mercy. Among so many chances of escaping, the needy and hardened offender overlooks the multitude that suffer: he boldly engages in some desperate attempt to relieve his wants or supply his vices, and if, unexpectedly, the hand of justice overtakes him, he deems himself peculiarly unfortunate in falling at last a sacrifice to those laws which long impunity has taught him to contemn.

CHAPTER II.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

HAVING in the preceding chapter considered in general the nature of crimes and punishments, we are led next, in the order of our distribution, to inquire what persons are or are not *capable* of committing crimes; or, which is all one, who are exempted from the censures of the law upon the commission of those acts which, in other persons, would be severely punished. In the process of which inquiry, we must have recourse to particular and special exceptions; for the general rule is, that no person shall be excused from punishment for disobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves.

(z) Beccar. c. 6.
(a) Sp. L. b. 6, c. 16.
(b) See Ruffhead's index to the statutes (tit. Felony) and the acts which have since been made.

[12] This is not now the law of France. By the present Criminal Code, founded on the Code Napoleon, robbery without murder has ceased to be a capital offence. And the result mentioned by the learned judge has ceased also: nothing is more common now than instances of robberies without murder in France.—CHITTY.

All the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto may be reduced to this single consideration, the want or defect of *will*. An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, *21] being the only thing *that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act. For, though, *in foro conscientiæ*, a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason, in all temporal jurisdictions, an *overt* act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment. And, as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that, to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.

Now, there are three cases in which the will does not join with the act: 1. Where there is a defect of understanding. For where there is no discernment there is no choice, and where there is no choice there can be no act of the will, which is nothing else but a determination of one's choice to do or to abstain from a particular action: he, therefore, that has no understanding can have no will to guide his conduct. 2. Where there is understanding and will sufficient residing in the party, but not called forth or exerted at the time of the action done; which is the case of all offences committed by chance or ignorance. Here the will sits neuter, and neither concurs with the act nor disagrees to it. 3. Where the action is constrained by some outward force and violence. Here the will counteracts the deed, and is so far from concurring with, that it loathes and disagrees to, what the man is obliged to perform. It will be the business of the present chapter briefly to consider all the several species of defect in will, as they fall under some one or other of these general heads: as infancy, idiocy, *22] lunacy, and intoxication, which fall under the first class; misfortune and ignorance, which *may be referred to the second; and compulsion or necessity, which may properly rank in the third.

I. First we will consider the case of *infancy*, or nonage, which is a defect of the understanding. Infants under the age of discretion ought not to be punished by any criminal prosecution whatever.(*a*) What the age of discretion is, in various nations, is matter of some variety. The civil law distinguished the age of minors, or those under twenty-five years old, into three stages: *infantia*, from the birth till seven years of age; *pueritia*, from seven to fourteen; and *pubertas*, from fourteen upwards. The period of *pueritia*, or childhood, was again subdivided into two equal parts: from seven to ten and a half was *ætas infantiæ proxima;* from ten and a half to fourteen was *ætas pubertati proxima*. During the first stage of infancy and the next half-stage of childhood, *infantiæ proxima*, they were not punishable for any crime.(*b*) During the other half-stage of childhood, approaching to puberty, from ten and a half to fourteen, they were indeed punishable, if found to be *doli capaces*, or capable of mischief, but with many mitigations, and not with the utmost rigour of the law.(*c*) During the last stage, (at the age of puberty, and afterwards,) minors were liable to be punished, as well capitally as otherwise.

The law of England does in some cases privilege an infant under the age of twenty-one, as to common misdemeanours, so as to escape fine, imprisonment, and the like: and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offences;(*d*) for, not having the command of his fortune till twenty-one, he wants the capacity to do those things which the

(a) 1 Hawk. P. C. 2.
(b) Inst. 3, 20, 10.
(c) *Ff.* 29, 5, 14, 50. 17, 111, 47, 2, 23.
(d) 1 Hal. P. C. 20, 21, 22.

law requires. But where there is any notorious breach of the peace, a riot, battery, or the like, (which infants, when full grown, are at least as liable as others to commit,) for these an infant, above *the age of fourteen, is equally liable to suffer as a person of the full age of twenty-one. [*23

With regard to capital crimes, the law is still more minute and circumspect; distinguishing with greater nicety the several degrees of age and discretion By the antient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open;(e) and from thence till the offender was fourteen it was *ætas pubertati proxima*, in which he might or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion: but under twelve it was held that he could not be guilty in will, neither after fourteen could he be supposed innocent, of any capital crime which he in fact committed. But by the law, as it now stands, and has stood at least ever since the time of Edward the Third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is, that "*malitia supplet ætatem.*" Under seven years of age, indeed, an infant cannot be guilty of felony,(f) for then a felonious discretion is almost an impossibility in nature; but at eight years old he may be guilty of felony.(g) Also, under fourteen, though an infant shall be *prima facie* adjudged to be *doli incapax*, yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. Thus a girl of thirteen has been burned for killing her mistress: and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged; because it appeared, upon their trials, that the one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion *to discern between good and evil.(h) And there was an instance in the last century where a boy of eight years old was tried at Abingdon for firing two barns; and, it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly.(i) Thus, also, in very modern times, a boy of ten years old was convicted on his own confession of murdering his bedfellow, there appearing in his whole behaviour plain tokens of a mischievous discretion; and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment.(j) But, in all such cases, the evidence of that malice which is to supply age ought to be strong and clear beyond all doubt and contradiction.[1] [*24

II. The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, viz., in an *idiot* or a *lunatic*. For the rule of law as to the latter, which may easily be adapted also to the former, is, that "*furiosus furore solum punitur.*" In criminal cases,

(e) *LL. Athelstan.* Wilk. 65.
(f) Mirr. c. 4, § 16. 1 Hal. P. C. 27.
(g) Dalt. Just. c. 147.
(h) 1 Hal. P. C. 26, 27.
(i) Emlyn on 1 Hal. P. C. 25.
(j) Foster, 72.

[1] Where an act is made felony or treason, it extends as well to infants, if above the age of fourteen, as to others, (see Co. Litt. 247. Hal. Hist. P. C. 21, 22;) and this appears by several acts of parliament, as by 1 Jac. I. ch. 11, of felony for marrying two wives, where there is a special exception of marriages below the age of consent,—which in females is twelve and males fourteen; so that if the marriage were above the age of consent, though within the age of twenty-one years, it is not exempted from the penalty. See Bing. on Inf. 99, 199. So, by the 21 Hen. VIII. c. 7, concerning felony, by servants that embezzle their masters' goods delivered to them, there is a special proviso that it shall not extend to servants under the age of eighteen, who certainly would have been within the penalty if above the age of fourteen, though under eighteen years, unless thus excluded by a special proviso. Hale, Hist. P. C. 22. So the 12 Anne, c. 7, for punishing robberies in dwelling-houses, excepts apprentices under the age of fifteen who shall rob their masters from the act.—CHITTY.

therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself.(*k*)[2] Also, if a man in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if after judgment he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he *25] might have alleged *something in stay of judgment or execution.(*l*) Indeed, in the bloody reign of Henry the Eighth a statute was made,(*m*) which enacted that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute 1 & 2 Ph. & M. c. 10. For, as is observed by Sir Edward Coke,(*n*) "the execution of an offender is for example, *ut pœna ad paucos, metus ad omnes perveniat:* but so it is not when a madman is executed; but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others." But if there be any doubt whether the party be *compos* or not, this shall be tried by a jury.[3] And if he be so found, a total

(*k*) 3 Inst. 6.
(*l*) 1 Hal. P. C. 34.
(*m*) 33 Hen. VIII. c. 20.
(*n*) 3 Inst. 6.

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[2] It is not every frantic and idle humour of a man that will exempt him from justice and the punishment of the law. When a man is guilty of a great offence, it must be very plain and clear before he is allowed such an exemption on the ground of lunacy: therefore it is not something unaccountable in a man's actions that points him out to be such a madman as is to be exempted from punishment. It must be a man that is totally deprived of his understanding and memory; one who doth not know what he is doing any more than an infant or a wild beast: it is only such a one who is never the object of punishment. 16 How. St. Tr. 764. If there be a total want of reason, it will acquit the prisoner; if there be an absolute temporary want of it when the offence was committed, it will acquit the prisoner; but if there be only a partial degree of insanity, mixed with a partial degree of reason, not a full and complete use of reason, (as lord Hale carefully and emphatically expresses himself,) but a *competent* use of it, sufficient to have restrained those passions which produce the crime,—if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil, —then, upon the fact of the offence proved, the judgment of the law must take place. *Per* Yorke, Solicitor-General in Lord Ferrer's case, 19 How. St. Tr. 947, 948; *et per* Lawrence, J., 3 Burn, J. 24th ed. 312, 313.—Chitty.

[3] The most of the previous acts are now repealed, by 9 Geo. IV. c. 40, which enacts, in section 36, that justices at their petty sessions, held next after the 15th day of August in every year, shall call upon the overseers to make returns of insane persons, under a penalty of 16*l.* for neglect.

Section 38 authorizes the justices of the peace to call upon the overseers to bring any poor person deemed to be insane before two justices, who, upon due examination, may cause the party to be sent to the lunatic-asylum or licensed house, and make an order for his allowance,—no person to be removed unless under a justice's order, or, when cured, overseers are to deliver to the keeper a certificate of examination.

By section 44, persons wandering about, deemed to be insane, though not chargeable, two justices may make an order for maintenance, as in cases of persons actually chargeable. If the estate of the party shall be sufficient, overseers may recover their expenses by levy.

By section 55, persons convicted of any offence becoming insane whilst under imprisonment may be removed by an order of the secretary of state to any county asylum; and, if they should recover before the time of their imprisonment shall have expired, they may be remanded to prison: so, if their imprisonment shall have expired, they are to be discharged.

By section 56, the visitors of county asylums are directed to prepare annual reports of the patients confined therein, and to furnish the secretary of state and the clerk to the commissioners, under 9 Geo. IV. c. 41, with a copy.

Vide also 9 Geo. IV. c. 41, entitled "An Act to regulate the Care and Treatment of Insane Persons in England," which, by section 21, makes it a misdemeanour in the

idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses: but, if a lunatic hath lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency.(o)[4] Yet, in the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting, unless under proper control; and, in particular, they ought not to be suffered to go loose, to the terror of the king's subjects. It was the doctrine of our antient law, that persons deprived of their reason might be confined till they recovered their senses,(p) without waiting for the forms of a commission or other special authority from the crown: and now, by the vagrant acts,(q) a method is chalked out for imprisoning, chaining, and sending them to their proper homes.

III. Thirdly: as to artificial, voluntarily contracted madness, by *drunkenness* or intoxication, which, depriving men of their reason, puts them in a temporary frenzy: our law looks upon this as an aggravation of the offence, rather *than as an excuse for any criminal misbehaviour. A drunkard, says Sir [*26 Edward Coke,(r) who is *voluntarius dæmon*, hath no privilege thereby; but what hurt or ill soever he doth, his drunkenness doth aggravate it: *nam omne crimen ebrietas, et incendit, et detegit*. It hath been observed that the real use of strong liquors, and the abuse of them by drinking to excess, depend much upon the temperature of the climate in which we live. The same indulgence which may be necessary to make the blood move in Norway would make an Italian mad. A German, therefore, says the president Montesquieu,(s) drinks through custom, founded upon constitutional necessity; a Spaniard drinks through choice, or out of the mere wantonness of luxury: and drunkenness, he adds, ought to be more severely punished where it makes men mischievous and mad, as in Spain and Italy, than where it only renders them stupid and heavy, as in Germany and more northern countries. And, accordingly, in the warm climate of Greece, a law of Pittacus enacted "that he who committed a crime when drunk should receive a double punishment;" one for the crime itself, and the other for the

(o) 1 Hal. P. C. 31.
(p) Bro. Abr. tit. *Corone*, 101.
(q) 17 Geo. II. c. 5.
(r) 1 Inst. 247.
(s) Sp. L. b. 14, c. 10.

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keeper or other superintendent of any licensed house concealing any insane person from the inspection of the commissioners or visitors.

An idiot, or person born deaf and dumb, or any one who is *non compos* at the time, cannot be an approver, (H. P. C. 282, § 5, vol. 2;) but if he who wants discretion commit a trespass against the person or possession of another, he shall be compelled in a civil action to give satisfaction for the damage. Id. vols. 1 and 3, s. 5. 3 Bac. Abr. 131. So he who invites a madman to commit murder or other crime is a principal offender, and as much punishable as if he had done it himself. Id. 4, s. 7. 1 Hale, 647.

See also 10 Geo. IV. c. 18.—CHITTY.

[4] And if to a charge of treason (or, it is presumed, any other crime) the defence set up be insanity, the question for the jury will be, Whether the prisoner was labouring under that species of insanity which satisfies them that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious, at the time he was committing the act, that it was a crime. Reg. *vs.* Oxford, 9 C. & P. 525; and see the case of Reg. *vs.* McNaughton, tried at the Central Criminal Court, in March, 1843, and the opinions of the judges arising out of that case, delivered in the house of lords on the 19th of June, 1843.—STEWART.

See the opinions of the judges referred to in the above note given at large in Wharton's American Criminal Law, 86. In Com. *vs.* Rogers, 7 Metcalf, 500, it was held that a person is not responsible for any criminal act he may commit, if by reason of mental infirmity he is incapable of distinguishing between right and wrong in regard to the particular act and of knowing the act itself will subject him to punishment; or has no will, no conscience, or controlling mental power; or has not sufficient power of memory to recollect the relations in which he stands to others and in which they stand to him; or has his reason, conscience, and judgment so overwhelmed by the violence of his disease as to act from an irresistible and uncontrollable impulse. See Freeman *vs.* People, 4 Denio, 10. State *vs.* Spencer, 1 Zabriskie, 196. Com. *vs.* Masters, 4 Barr. 267. State *vs.* Gardiner, Wright's Ohio Rep.—SHARSWOOD.

ebriety which prompted him to commit it.(*t*) The Roman law, indeed, made great allowances for this vice: "*per vinum delapsis capitalis pœna remittitur.*"(*u*) But the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, (though real,) will not suffer any man thus to privilege one crime by another.(*w*)[5]

IV. A fourth deficiency of will is where a man commits an unlawful act by *misfortune* or *chance*, and not by design. Here the will observes a total neutrality, and does not co-operate with the deed; which therefore wants one main ingredient of a crime. Of this, when it affects the life of another, we shall find more occasion to speak hereafter, at present only observing that, if any accidental mischief *happens to follow from the performance of a *lawful* act, the party stands excused from all guilt; but if a man be doing any thing *unlawful*, and a consequence ensues which he did not foresee or intend, as the death of a man, or the like, his want of foresight shall be no excuse; for, being guilty of one offence in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour.(*x*)[6]

*27]

V. Fifthly: *ignorance* or *mistake* is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here, the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error, in point of law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this is no criminal action;(*y*) but if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him, and does so, this is wilful murder. For a mistake in point of law, which every person of discretion not only may but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is as well the maxim of our own law,(*z*) as it was of the Roman.(*a*)[7]

VI. A sixth species of defect of will is that arising from *compulsion* and inevitable *necessity*. These are a constraint upon the will whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted

(*t*) Puff. L. of N. b. 8, c. 3.
(*u*) *Ff.* 49, 16, 6.
(*w*) Plowd. 19.
(*x*) 1 Hal. P. C. 39.
(*y*) Cro. Car. 538.
(*z*) Plowd. 343.
(*a*) *Ff.* 22, 6, 9.

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[5] As drunkenness clouds the understanding and excites passion, it may be evidence of passion only and of want of malice and design, (Pennsylvania *vs.* McFall, Addison, 257;) and, if it be satisfactorily established, it may lower the grade of homicide from murder in the first to murder in the second degree. Haile *vs.* State, 11 Humph. 154. It may also be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation; and that passion is more easily excitable in a person when in a state of intoxication than when he is sober. R. *vs.* Thomas, 7 C. & P. 817. R. *vs.* Pearson, 2 Lewin, 144. If indeed there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was ought not to be regarded. And see R. *vs.* Marshall, 1 Lewin, 76. State *vs.* McCauts, 1 Spear, 384. Wharton's Amer. Crim. Law, 93.—Sharswood.

[6] But a very important distinction is made in such cases,—viz., whether the unlawful act is also in its original nature wrong and mischievous; for a person is not answerable for the accidental consequences, though fatal, of an act which is merely a *malum prohibitum;* as, where any unfortunate accident happens from an unqualified person being in pursuit of game, he is amenable only to the same extent as a man duly qualified. Fost. 259. 2 Hal. P. C. 475.—Christian.

[7] "Ignorance of the law, which every man is bound to know, excuses no man." It may be a ground for pardon. Rex *vs.* Bailey, R. & R. C. C. 1. The rule is borrowed from the civil law, (D. lib. 22, tit. 6,) without, however, adopting with it those equitable modifications by which the rule was originally accompanied, some of which it may be proper to state. "*Juris ignorantia non prodest adquirere volentibus, suum vero petentibus non nocet,*" (D. 22, 6, 7;) or, as it is expressed by the commentators, "*Juris error, ubi de damno evitando agitur, non nocet: ubi de lucro captando, nocet: error facti neutro casu nocet.*" "*Minoribus* 25 *annis*

for the abuse of that free will which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.

*1. Of this nature, in the first place, is the obligation of *civil subjection*, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest; as when a legislator establishes iniquity by a law and commands the subject to do an act contrary to religion or sound morality. How far this excuse will be admitted *in foro conscientiæ*, or whether the inferior in this case is not bound to obey the divine rather than the human law, it is not my business to decide; though the question, I believe, among the casuists, will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The sheriff who burned Latimer and Ridley, in the bigoted days of queen Mary, was not liable to punishment from Elizabeth for executing so horrid an office; being justified by the commands of that magistracy, which endeavoured to restore superstition under the holy auspices of its merciless sister, persecution. [*28

As to persons in private relations: the principal case, where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband; for neither a son nor a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master;(*b*) though in some cases the command or authority of the husband, either expressed or implied, will privilege the wife from punishment even for capital offences. And therefore if a woman commit theft, burglary, or other civil offences against the laws of society by the coercion of her husband; or even in his company, which the law construes a coercion; she is not guilty of any crime; being considered as acting by compulsion and not of her own will.(*c*)[8] Which doctrine is at least a thousand years old in this kingdom, being to be found among the laws of king *Ina, the West Saxon.(*d*) And it appears that among the northern nations on the continent this privilege extended to any woman transgressing in concert with a man, and to any servant that committed a joint offence with a freeman; the male or freeman only was punished, the female or slave dismissed: "*procul dubio quod alterum libertas, alterum necessitas impelleret.*"(*e*) But (besides that in our law, which is a stranger to slavery, no impunity is given to servants, who are as much free agents as their masters) even with regard to wives, this rule admits of an exception in crimes that are *mala in se*, and prohibited by the law of nature, as murder and the like:[9] not only because these are of a deeper dye, but also, since in a state of nature no one is in subjection [*29

(*b*) 1 Hawk. P. C. 3.
(*c*) 1 Hal. P. C. 45.
(*d*) Cap. 57.
(*e*) Stiern. *de jure Sueon.* l. 2, c. 4.

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jus ignorare permissum est: quod et in fœminis in quibusdam causis propter sexus infirmitatem dicitur; et ideo, sicubi non est delictum, sed juris ignorantia, non læduntur." D. 22, 6, 9. And see Pothier, *Traité de l'Action, Condictio indebiti*, part 2, sect. 2, art. 3. In Vernon's case (Mich. 20 Hen. VII. fol. 2, pl. 4) the defendants justified taking away the plaintiff's wife, on the ground that they were accompanying her to Westminster, to sue for a divorce in ease of her conscience. It was objected to the plea that the defendants ought to have taken her to the ordinary or the metropolitan: but the plea was held good, "*for perhaps they had not knowledge of the law* as to where the divorce should be sued." And see Manser's case, 2 Co. Rep. 4. Doctor and Student, book 2, cap. 46, 47. Eichhorn *vs.* Le Maitre, 2 Wils. 368.—CHITTY.

[8] The husband, however, must be present when the offence is committed, or the presumption of coercion by him does not arise. Rex *vs.* Morris, R. & R. C. C. 270. The wife is not treated as an accessory to a felony for receiving her husband who has been guilty of it, though, on the contrary, it appears the husband would be for receiving his wife. H. P. C. vol. 1, s. 10. 1 Hale, 44. And if an offence be committed by the wife alone, without the husband's concurrence, she may be punished by way of indictment without him. Id.; and see Moor, 813.—CHITTY.

[9] The law seems to protect the wife in all *felonies* committed by her in company with her husband, except murder and manslaughter. Hal. P. C. 47.—CHRISTIAN.

to another, it would be unreasonable to screen an offender from the punishment due to natural crimes by the refinements and subordinations of civil society. In treason, also, (the highest crime which a member of society can as such be guilty of,) no plea of coverture shall excuse the wife; no presumption of the husband's coercion shall extenuate her guilt:(*f*) as well because of the odiousness and dangerous consequences of the crime itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the state, has no right to that obedience from a wife, which he himself as a subject has forgotten to pay. In inferior misdemeanours also we may remark another exception: that a wife may be indicted, and set in the pillory *with* her husband, for keeping a brothel;[10] for this is an offence touching the domestic economy or government of the house, in which the wife has a principal share; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex.(*g*)[11] And in all cases where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence as much as any feme-sole.

*30] *2. Another species of compulsion or necessity is what our law calls *duress per minas*;(*h*) or threats and menaces which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemeanours; at least, before the human tribunal. But then that fear which compels a man to do an unwarrantable action ought to be just and well grounded, such "*qui cadere possit in virum constantem, non timidum, et meticulosum*," as Bracton expresses it(*i*) in the words of the civil law.(*k*) Therefore, in time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels which would admit of no excuse in time of peace.(*l*)[12] This, however, seems only, or at least principally, to hold as to positive crimes, so created by the laws of society, and which therefore society may excuse; but not as to natural offences so declared by the law of God, wherein human magistrates are only the executioners of divine punishment. And therefore, though a man be violently assaulted, and hath no other possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder; for he ought rather to die himself than escape by the murder of an innocent.(*m*) But, in such a case, he is permitted to kill the assailant; for there the law of nature, and self-defence, its primary canon, have made him his own protector.

3. There is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection which act upon and constrain a man's will, and oblige him to do an action which, without such obligation, would be criminal. And that is, when a man has his choice of two evils set before him, and being under a necessity of

(*f*) 1 Hal. P. C. 47.
(*g*) 1 Hawk. P. C. 2, 3.
(*h*) See book i. p. 131.
(*i*) *L.* 2, *f.* 16.
(*k*) *Ff.* 4, 2, 5, and 6.
(*l*) 1 Hal. P. C. 50.
(*m*) Ibid. 51.

[10] The punishment of the pillory was abolished, by 56 Geo. III. c. 138.—Stewart.

[11] In all *misdemeanours* it appears that the wife may be found guilty with the husband. It is said the reason why she was excused in burglary, larceny, &c. was because she could not tell what property the husband might claim in the goods. 10 Mod. 63 and 335. But the better reason seems to be that by the ancient law the husband had the benefit of the clergy, if he could read, but in no case could women have that benefit. It would therefore have been an odious proceeding to have executed the wife and to have dismissed the husband with a slight punishment. To avoid this, it was thought better that in such cases she should be altogether acquitted; but this reason did not apply to misdemeanours.—Christian.

[12] The fear of having houses burned, or goods spoiled, is no excuse in the eye of the law for joining and marching with rebels. The only force that doth excuse is a force upon the *person* and present fear of death; and this force and fear must continue all the time the party remains with the rebels. It is incumbent upon men who make force their defence to show an actual force, and that they joined *pro timore mortis, et recesserunt quam cito potuerunt.* Fost. 14, 216.—Christian

choosing one, he chooses the *least pernicious of the two. Here the will cannot be said freely to exert itself, being rather passive than active; or, if active, it is rather in rejecting the greater evil than in choosing the less. Of this sort is that necessity where a man by the commandment of the law is bound to arrest another for any capital offence, or to disperse a riot, and resistance is made to his authority: it is here justifiable, and even necessary, to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to escape, or the riot to continue. For the preservation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost consequence to the public; and therefore excuse the felony which the killing would otherwise amount to.(n) [*31

4. There is yet another case of necessity, which has occasioned great speculation among the writers upon general law; viz., whether a man in extreme want of food or clothing may justify stealing either, to relieve his present necessities? And this both Grotius(o) and Puffendorf,(p) together with many other of the foreign jurists, hold in the affirmative; maintaining, by many ingenious, humane, and plausible reasons, that in such cases the community of goods, by a kind of tacit confession of society, is revived. And some even of our own lawyers have held the same,(q) though it seems to be an unwarranted doctrine, borrowed from the notions of some civilians; at least it is now antiquated, the law of England admitting no such excuse at present.(r) And this its doctrine is agreeable not only to the sentiments of many of the wisest antients, particularly Cicero,(s) who holds that "*suum cuique incommodum ferendum est, potius quam de alterius commodis detrahendum,*" but also to the Jewish law, as certified by king Solomon himself:(t) "If a thief steal to satisfy his soul when he is hungry, he shall restore *sevenfold, and shall give all the substance of his house:" which was the ordinary punishment for theft in that kingdom. [*32 And this is founded upon the highest reason: for men's properties would be under a strange insecurity if liable to be invaded according to the wants of others, of which wants no man can possibly be an adequate judge but the party himself who pleads them. In this country especially there would be a peculiar impropriety in admitting so dubious an excuse; for by our laws such sufficient provision is made for the poor by the power of the civil magistrate, that it is impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature. This case of a stranger is, by the way, the strongest instance put by baron Puffendorf, and whereon he builds his principal arguments: which, however they may hold upon the continent, where the parsimonious industry of the natives orders every one to work or starve, yet must lose all their weight and efficacy in England, where charity is reduced to a system and interwoven in our very constitution. Therefore our laws ought by no means to be taxed with being unmerciful for denying this privilege to the necessitous; especially when we consider that the king, on the representation of his ministers of justice, hath a power to soften the law and to extend mercy in cases of peculiar hardship. An advantage which is wanting in many states, particularly those which are democratical; and these have, in its stead, introduced and adopted in the body of the law itself a multitude of circumstances tending to alleviate its rigour. But the founders of our constitution thought it better to vest in the crown the power of pardoning particular objects of compassion than to countenance and establish theft by one general undistinguishing law.

VII. To these several cases, in which the incapacity of committing crimes arises from a deficiency of the will, we may add one more, in which the law supposes an incapacity of doing wrong, from the excellence and perfection of the *person; which extend as well to the will as to the other qualities of his mind. I mean the case of the king; who, by virtue of his royal prerogative, is not under the coercive power of the law;(u) which will not suppose [*33

(n) 1 Hal. P. C. 52.
(o) *De jure, b. & p. l.* 2, c. 2.
(p) L. of Nat. and N. 1, 2, c. 6.
(q) Britton, c. 10. Mirr. c. 4, § 16.
(r) 1 Hal. P. C. 54.
(s) *De off. l.* 3, c. 5.
(t) Prov. vi. 30.
(u) 1 Hal. P. C. 44.

him capable of committing a folly, much less a crime. We are therefore, out of reverence and decency, to forbear any idle inquiries of what would be the consequence if the king were to act thus and thus: since the law deems so highly of his wisdom and virtue as not even to presume it possible for him to do any thing inconsistent with his station and dignity; and therefore has made no provision to remedy such a grievance. But of this sufficient was said in a former volume,(*v*) to which I must refer the reader.

CHAPTER III.

OF PRINCIPALS AND ACCESSORIES.

*34] *It having been shown in the preceding chapter what persons are, or are not, upon account of their situation and circumstances, capable of committing crimes, we are next to make a few remarks on the different degrees of guilt among persons that are capable of offending, viz.: as *principal*, and as *accessory*.

I. A man may be *principal* in an offence in two degrees. A principal in the first degree is he that is the actor or absolute perpetrator of the crime; and in the second degree he is who is present, aiding and abetting the fact to be done.(*a*) Which *presence* need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder and another keeps watch or guard at some convenient distance.(*b*)[1] And this rule hath also other exceptions: for, in case of murder by poisoning, a man may be a principal felon by preparing and laying the poison, or persuading another to drink it(*c*) who is

(*v*) Book i. ch. 7, page 244.
(*a*) 1 Hal. P. C. 615.
(*b*) Foster, 350.
(*c*) Kel. 52.

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[1] Where a person stood outside a house to receive goods which a confederate was stealing within it, he was held a principal, (1 Ry. & M. C. C. 96;) and in the case of privately stealing in a shop, if several are acting together, some in the shop and some out of it, and the property is stolen by the hands of one of those who are in the shop, those who are outside are equally guilty as principals. (Russ. & R. C. C. 343;) and if several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals. Russ. & R. C. C. 446. But where a man incites a guilty agent to commit murder, and he is neither actually nor constructively present, the perpetrator is the principal felon, and the former *only an accessory* before the fact. 1 Hale, 435. 3 Inst. 49. Persons not present, nor sufficiently near to give assistance, are not principals. Russ. & R. C. C. 363, 421.

Mere *presence* is not sufficient to constitute the party a principal, without he *aids, assists, and abets*. Thus, if two are fighting, and a third comes by and looks on, but assists neither, he is not guilty if homicide ensue, (1 Hale, 439. 2 Hawk. c. 29, s. 10;) but if several come with intent to do mischief, though only one does it, all the rest are principals in the second degree. 1 Hale, 440. 2 Hawk. c. 29, s. 8. So, if one present command another to kill a third, both the agent and contriver are guilty. Id.: and see 1 Hale, 442, 443, 444. 2 Hawk. c. 29, s. 8. In a late singular case it was held that if a man encourage a woman to murder herself, and is present abetting her while she does so, such person is guilty of murder as a principal; and that if two encourage each other to murder themselves together, and one does so, but the other fails in the attempt upon himself, he is a principal in the murder of the other; but if it be uncertain whether the deceased really killed herself, or whether she came to her death by accident before the moment when she meant to destroy herself, it will not be murder in either. Russ. & R. C. C. 523.

Besides presence and aiding and abetting the principal, there must be a *participation in the felonious design*, or at least the offence must be within the compass of the original intention, to constitute a principal in the second degree. Thus, if a master assaults another with malice prepense, and the servant, being ignorant of his master's malignant design, takes part with him, the servant is not an abettor of murder, but manslaughter only. See 1 Hale, 446. Russ. & R. C. C. 99. And in order to render persons liable as

ignorant of its poisonous quality,(*d*) or giving it to him for that purpose, and yet not administer it himself, nor be present when the very deed of poisoning is committed.(*e*) And the same reasoning will hold with regard to other murders committed in the absence *of the murderer by means which he had prepared beforehand, and which probably could not fail of their mischievous effect. As by laying a trap or pitfall for another, whereby he is killed, letting out a wild beast, with an intent to do mischief, or inciting a madman to commit murder, so that death thereupon ensues; in every of these cases the party offending is guilty of murder as a principal, in the first degree. For he cannot be called an accessory, that necessarily presupposing a principal; and the poison, the pitfall, the beast, or the madman cannot be held principals, being only the instruments of death. As therefore he must be certainly guilty either as principal or accessory, and cannot be so as accessory, it follows that he must be guilty as principal, and, if principal, then in the first degree; for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist.(*f*) [*35

II. An *accessory* is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either *before* or *after* the fact committed. In considering the nature of which degree of guilt, we will first examine what offences admit of accessories, and what not; secondly, who may be an accessory *before* the fact; thirdly, who may be an accessory *after* it; and lastly, how accessories, considered merely as such, and distinct from principals, are to be treated.

1. And, first, as to what offences admit of accessories, and what not. In high treason there are no accessories, but all are principals: the same acts that make a man accessory in felony making him a principal in high treason, upon account of the heinousness of the crime.(*g*) Besides, it is to be considered, that the bare intent to commit treason is many times actual treason; as imagining the death of the king, or conspiring to take away his crown. And, as no one can advise and abet such a crime without an intention to have it done, there can be no accessories before the fact; since the *very advice and abetment amount to principal treason. But this will not hold in the inferior species of high treason, which do not amount to the legal idea of compassing the death of the king, queen, or prince. For in those no advice to commit them, unless the thing be actually performed, will make a man a principal traitor.(*h*) In petit treason, murder, and felonies with or without benefit of clergy,[2] there may be accessories; except only in those offences which by judgment of law are sudden and unpremeditated, as manslaughter and the like, which therefore cannot have any accessories *before* the fact.(*i*) So too in petit larceny, and in all crimes under the degree of felony, there are no accessories either *before* or *after* the fact, but all persons concerned therein, if guilty at all, are principals:(*k*) the same rule holding with regard to the highest and lowest offences, [*36

(*d*) Foster, 349.
(*e*) 3 Inst. 138.
(*f*) 1 Hal. P. C. 617. 2 Hawk. P. C. 315.
(*g*) 3 Inst. 138. 1 Hal. P. C. 613.
(*h*) Foster, 342.
(*i*) 1 Hal. P. C. 615.
(*k*) 1 Hal. P. C. 613.

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principals in the second degree, the killing or other act must be in pursuance of some original unlawful purpose, and not collateral to it. 1 East, P. C. 358.

The *punishment* of principals in the second degree is in general the same as principals in the first degree. 1 Leach, 64. 4 Burr. 2076. But where the act is necessarily personal, as in stealing privately from the person, he whose hand took the property can alone be guilty, under the statute, and aiders and abettors are only principals in a simple larceny. 1 Hale, 529. So, on an indictment on the statute against stabbing, only the party who actually stabs is ousted of clergy. 1 Jac. I. c. 8. 1 East, P. C. 348, 350. 1 Hale, 468.

Principals in the second degree may be arraigned and *tried* before the principal in the first degree has been outlawed or found guilty. 1 Hale, 437. 4 Burr. 2076. 2 Hale, 223. 9 Co. 67.—CHITTY.

[2] This seems to apply merely to felonies, where, by the law, judgment of death ought regularly to ensue. 1 Hale, 618. 1 Burn, 5. The crime of petit treason is now abolished.—CHITTY.

though upon different reasons. In treason all are principals *propter odium delicti;* in trespass all are principals because the law, *quæ de minimis non curat*, does not descend to distinguish the different shades of guilt in petty misdemeanours. It is a maxim that *accessorius sequitur naturam sui principalis:*(*l*) and therefore an accessory cannot be guilty of a higher crime than his principal: being only punished as a partaker of his guilt. So that if a servant instigates a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder; though, had he been present and assisting, he would have been guilty as principal of petit treason, and the stranger of murder.(*m*)

2. As to the second point, who may be an accessory *before* the fact; Sir Matthew Hale(*n*) defines him to be one who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessory; for if such procurer, or the like, be present, he is guilty of the crime as principal. If A. then advises B. to kill another, and *B. does it in the absence of A., now B. is principal and A. is accessory in the murder. And this holds even though the party killed be not *in rerum naturâ* at the time of the advice given. As if A., the reputed father, advises B., the mother of a bastard child unborn, to strangle it when born, and she does so; A. is accessory to this murder.(*o*) And it is also settled(*p*) that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact. It is likewise a rule, that he who in any wise commands or counsels another to commit an unlawful act is accessory to all that ensues upon that unlawful act; but is not accessory to any act distinct from the other. As if A. commands B. to beat C., and B. beats him so that he dies: B. is guilty of murder as principal, and A. as accessory.[3] But if A. commands B. to burn C.'s house, and he, in so doing, commits a robbery; now A., though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and unconsequential nature.(*q*)[4] But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison Titius, he is stabbed or shot, and dies; the commander is still accessory to the murder, for the substance of the thing commanded was the death of Titius, and the manner of its execution is a mere collateral circumstance.(*r*)

*37]

3. An accessory *after* the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon.(*s*) Therefore to make an accessory *ex post facto*, it is in the first place requisite that he knows of the felony committed.(*t*)[5] In the next place, he must receive, relieve, comfort, or assist him. And, generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assistor an accessory. As furnishing him with a horse to escape his *pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him.(*u*) So

*38]

(*l*) 3 Inst. 139.
(*m*) 2 Hawk. P. C. 315.
(*n*) 1 Hal. P. C. 616.
(*o*) Dyer, 186.
(*p*) Foster, 125.
(*q*) 1 Hal. P. C. 617.
(*r*) 2 Hawk. P. C. 316.
(*s*) 1 Hal. P. C. 618.
(*t*) 2 Hawk. P. C. 319.
(*u*) 2 Hawk. P. C. 317, 318.

[3] This must be understood to have reference to a case where the command is to beat violently. 1 Hale, 442, 443, 444. 1 East, P. C. 257, 258, 259. Kel. 109, 117.—Chitty.

[4] The crime must be of the same complexion, and not on a different object than that to which the agent was instigated. Thus, if A. commands B. to burn a certain house with which he is well acquainted, and he burns another, or to steal a certain horse, and he steals a different one, A. will not be liable to be indicted as accessory to the crimes committed, because, B. acting in contradiction to the commands of A., and that knowingly, it is on his part a mere ineffectual temptation, and the specific crime he planned was never completed. Plowd. 475. Hawk. b. 2, c. 29, s. 18. 1 Hale, 617. Com. Dig. Justices, T. 1 Fost. 360.—Chitty.

[5] He must know that the felon is guilty; and it seems to be the better opinion that an implied notice is not sufficient. 1 Hale, 323, 622.—Chitty.

likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony. But to relieve a felon in gaol with clothes or other necessaries is no offence; for the crime imputable to this species of accessory is the hinderance of public justice, by assisting the felon to escape the vengeance of the law.(*v*) To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions; it was therefore at common law a mere misdemeanour, and made not the receiver accessory to the theft; because he received the *goods* only and not the *felon*:(*w*) but now, by the statutes 5 Anne, c. 31, and 4 Geo. I. c. 11,[6] all such receivers are made accessories, (where the principal felony admits of accessories.)(*x*) and may be transported for fourteen years;[7] and, in the case of receiving linen goods stolen from the bleaching-grounds, are, by statute 18 Geo. II. c. 27, declared felons without benefit of clergy.[8] In France such receivers are punished with death; and the Gothic constitutions distinguished also three sorts of thieves, "*unum qui consilium daret, alterum qui contrectaret, tertium qui receptaret et occuleret; pari pœnæ singulos obnoxios.*"(*y*)

The felony must be complete at the time of the assistance given; else it makes not the assistant an accessory. As, if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent: this does not make him accessory to the homicide; for, till death ensues, there is no felony committed.(*z*) But so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If the parent assists his child, or the child the parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who have any of them committed a *felony, the receivers become accessories *ex post facto*.(*z*) But a feme-covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her lord.(*a*) [*39

4. The last point of inquiry is how accessories are to be treated, considered distinct from principals. And the general rule of the antient law (borrowed from the Gothic constitutions,(*b*) is this, that accessories shall suffer the same punishment as their principals: if one be liable to death the other is also liable;(*c*) as, by the laws of Athens, delinquents and their abettors were to receive the same punishment.(*d*) Why then, it may be asked, are such elaborate distinctions made between accessories and principals, if both are to suffer the same punishment? For these reasons: 1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted; the commission of an actual robbery being quite a different accusation from that of harbouring the robber. 2. Because, though by the antient common law the rule is as before laid down, that both shall be punished alike, yet now by the statutes relating to the benefit of clergy a distinction is made be-

(*v*) 1 Hal. P. C. 620, 621.
(*w*) Ibid. 620.
(*x*) Foster, 73.
(*y*) Stiernhook, *de jure Goth. l.* 3, c. 5.
(*z*) 2 Hawk. P. C. 320.
(*a*) 3 Inst. 108. 2 Hawk. P. C. 320.
(*b*) 1 Hal. P. C. 621.
(*c*) See Stiernhook, ibid.
(*d*) 3 Inst. 188.

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[6] 5 Anne, c. 31 is repealed by 7 Geo. IV. c. 31, as relating to this subject: and 4 Geo. IV. c. 11, as to this offence, is repealed by 7 & 8 Geo. IV. c. 27; and now, by 7 & 8 Geo. IV. c. 29, such receivers may be indicted as accessories after the fact, or for a substantive felony; and, in the latter case, whether the principal shall or shall not have been previously convicted, or shall not be amenable to justice, and are liable to transportation or imprisonment.—CHITTY.

[7] But now, by stat. 7 & 8 Geo. IV. c. 29, s. 54, the receiver of stolen goods may be indicted either as accessory after the fact or for a substantive felony, and is liable to penal servitude (16 & 17 Vict. c. 99) or imprisonment.—STEWART.

[8] By 7 & 8 Geo. IV. c. 29, s. 16, this offence is punishable by transportation for life, or for any term not less than seven years, or by imprisonment not exceeding four years, with public or private whippings for male offenders.—CHITTY.

tween them: accessories *after* the fact being still allowed the benefit of clergy in all cases, except horse-stealing,(*e*) and stealing of linen from bleaching-grounds:(*f*)[9] which is denied to the principals and accessories *before* the fact in many cases; as, among others, in petit treason, murder, robbery, and wilful burning.(*g*) And perhaps if a distinction were constantly to be made between the punishment of principals and accessories, even *before* the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes by increasing the difficulty of finding a person to execute the deed itself; as his danger would be greater *than that of his accomplices by reason of the difference of his punishment.(*h*) 3. Because formerly no man could be tried as accessory till after the principal was convicted, or at least he must have been tried at the same time with him; though that law is now much altered, as will be shown more fully in its proper place. 4. Because, though a man be indicted as accessory and acquitted, he may afterwards be indicted as principal; for an acquittal of receiving or counselling a felon is no acquittal of the felony itself; but it is matter of some doubt whether, if a man be acquitted as principal, he can be afterwards indicted as accessory before the fact; since those offences are frequently very nearly allied, and therefore an acquittal of the guilt of one may be an acquittal of the other also.(*i*) But it is clearly held that one acquitted as principal may be indicted as an accessory *after* the fact; since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other. Upon these reasons the distinction of principal and accessory will appear to be highly necessary; though the punishment is still much the same with regard to principals, and such accessories as offend *before* the fact is committed.[10]

*40]

CHAPTER IV.

OF OFFENCES AGAINST GOD AND RELIGION.

*41] *In the present chapter we are to enter upon the detail of the several species of crimes and misdemeanours, with the punishments annexed to each by the law of England. It was observed in the beginning of this book(*a*) that crimes and misdemeanours are a breach and violation of the public rights and duties owing to the whole community, considered as a community, in its social

(*e*) Pott. Antiq. b. i. c. 26.
(*f*) Stat. 31 Eliz. c. 12.
(*g*) Stat. 18 Geo. II. c. 27.
(*h*) 1 Hal. P. C. 615.
(*i*) Beccar. c. 37.
(*k*) 1 Hal. P. C. 625, 626. 2 Hawk. P. C. 373. Foster, 361.
(*a*) See page 5.

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[9] By stat. 9 Geo. IV. c. 31, accessories before the fact in cases of murder are rendered equally guilty with the principal.

By stat. 7 & 8 Geo. IV. c. 29, it is enacted, in the 61st section, "That in every case of felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death, or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act (except only a receiver of stolen property) shall on conviction be liable to be imprisoned for any term not exceeding two years; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanour punishable under this act, shall be liable to be indicted and punished as a principal offender."

And, by 7 & 8 Geo. IV. c. 30, a similar enactment is made in section 26 to the above.

These three acts incorporate nearly every offence of murder, felony, and misdemeanour mentioned and adverted to by the learned commentator.—Chitty.

[10] But if the principal felony is committed on the high seas, then the accessory shall be tried like the principal, under the 28 Hen. VIII. c. 15, which provides for the trial of felonies upon the high seas; but no one tried for an offence by one jurisdiction shall afterwards be tried for the same offence under the other jurisdiction.—Chitty

aggregate capacity. And in the very entrance of these commentaries(*b*) it was shown that human laws can have no concern with any but social and relative duties, being intended only to regulate the conduct of man, considered under various relations, as a member of civil society. All crimes ought therefore to be estimated merely according to the mischiefs which they produce in civil society;(*c*) and of consequence private vices or breach of mere absolute duties, which man is bound to perform considered only as an individual, are not, cannot be, the object of any municipal law any further than as by their evil example, or other pernicious effects, they may prejudice the community and thereby become a species of public crimes. Thus the vice of drunkenness, if committed privately and alone, is beyond the knowledge and of course beyond the reach of human tribunals; but if committed publicly, in the face of the world, its evil example makes it liable to temporal censures. The vice of lying, which consists (abstractedly taken) in a criminal violation of truth, and therefore, in any *shape, is derogatory from sound morality, is not, however, taken notice of by our law unless it carries with it some public inconvenience, as [*42 spreading false news; or some social injury, as slander and malicious prosecution, for which a private recompense is given. And yet drunkenness and malevolent lying are *in foro conscientiæ* as thoroughly criminal when they are not, as when they are, attended with public inconvenience. The only difference is that both public and private vices are subject to the vengeance of eternal justice; and public vices are besides liable to the temporal punishment of human tribunals.

On the other hand: there are some misdemeanours which are punished by the municipal law that have in themselves nothing criminal, but are made unlawful by the positive constitutions of the state for public convenience; such as poaching, exportation of wool, and the like. These are naturally no offences at all; but their whole criminality consists in their disobedience to the supreme power, which has an undoubted right, for the well-being and peace of the community, to make some things unlawful which are in themselves indifferent. Upon the whole, therefore, though part of the offences to be enumerated in the following sheets are offences against the revealed law of God, others against the law of nature, and some are offences against neither; yet in a treatise of municipal law we must consider them all as deriving their particular guilt here punishable from the law of man.

Having premised this caution, I shall next proceed to distribute the several offences, which are either directly or by consequence injurious to civil society, and therefore punishable by the laws of England, under the following general heads: first, those which are more immediately injurious to God and his holy religion; secondly, such as violate and transgress the law of nations; thirdly, such as more especially affect the sovereign executive power of the state, or the king and his government; fourthly, such as more directly *infringe the rights of the public or commonwealth; and lastly, such as derogate from [*43 those rights and duties, which are owing to particular individuals, and in the preservation and vindication of which the community is deeply interested.

First, then, of such crimes and misdemeanours as more immediately offend Almighty God, by openly transgressing the precepts of religion, either natural or revealed; and mediately by their bad example and consequence the law of society also; which constitutes that guilt in the action which human tribunals are to censure.

1. Of this species the first is that of *apostasy*, or a total renunciation of Christianity, by embracing either a false religion or no religion at all. This offence can only take place in such as have once professed the true religion. The perversion of a Christian to Judaism, paganism, or other false religion, was punished by the emperors Constantine and Julian with confiscation of goods;(*d*) to which the emperors Theodosius and Valentinian added capital punishment, in case the apostate endeavoured to pervert others to the same iniquity;(*e*) a punishment

(*b*) See book i. pages 123, 124.
(*c*) Beccar. ch. 8.
(*d*) Cod. 1, 7, 1.
(*e*) Ibid. 6.

too severe for any temporal laws to inflict upon any spiritual offence; and yet the zeal of our ancestors imported it into this country; for we find by Bracton(*f*) that in his time apostates were to be burnt to death. Doubtless the preservation of Christianity, as a national religion, is, abstracted from its own intrinsic truth, of the utmost consequence to the civil state: which a single instance will sufficiently demonstrate. The belief of a future state of rewards and punishments, the entertaining just ideas of the moral attributes of the Supreme Being, and a firm persuasion that he superintends and will finally compensate every action in human life, (all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our Saviour Christ,) these are the grand foundation of all judicial oaths; which call God to witness the truth of those facts, which perhaps may be only known to him and the party attesting; all moral evidence, *therefore, all confidence in human veracity, *44] must be weakened by apostasy and overthrown by total infidelity.(*g*) Wherefore all affronts to Christianity, or endeavours to depreciate its efficacy, in those who have once professed it, are highly deserving of censure. But yet the loss of life is a heavier penalty than the offence, taken in a civil light, deserves; and taken in a spiritual light, our laws have no jurisdiction over it. This punishment therefore has long ago become obsolete; and the offence of apostasy was for a long time the object only of the ecclesiastical courts, which corrected the offender *pro salute animæ*. But about the close of the last century the civil liberties to which we were then restored being used as a cloak of maliciousness, and the most horrid doctrines, subversive of all religion, being publicly avowed both in discourse and writings, it was thought necessary again for the civil power to interpose by not admitting those miscreants(*h*) to the privileges of society who maintained such principles as destroyed all moral obligation. To this end it was enacted, by statute 9 & 10 W. III. c. 32, that if any person educated in, or having made profession of, the Christian religion, shall, by writing, printing, teaching, or advised speaking, deny the Christian religion to be true, or the holy scriptures to be of divine authority, he shall upon the first offence be rendered incapable to hold any office or place of trust; and for the second be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer three years' imprisonment without bail. To give room, however, for repentance, if, within four months after the first conviction, the delinquent will in open court publicly renounce his error, he is discharged for that once from all disabilities.

II. A second offence is that of *heresy*, which consists not in a total denial of Christianity, but of some of its essential *doctrines publicly and obsti- *45] nately avowed; being defined by Sir Matthew Hale, "*sententia rerum divinarum humano sensu excogitata, palam docta et pertinaciter defensa.*"(*i*) And here it must also be acknowledged that particular modes of belief or unbelief, not tending to overturn Christianity itself, or to sap the foundations of morality, are by no means the object of coercion by the civil magistrate. What doctrines shall therefore be adjudged heresy was left by our old constitution to the determination of the ecclesiastical judge; who had herein a most arbitrary latitude allowed him. For the general definition of a heretic given by Lyndewode,(*k*) extends to the smallest deviation from the doctrines of holy church; "*hæreticus est qui dubitat de fide catholica, et qui negligit servare ea, quæ Romana ecclesia statuit, seu servare decreverat.*" Or, as the statute 2 Hen. IV. c. 15 expresses it in English, "teachers of erroneous opinions, contrary to the faith and blessed determinations of the holy church." Very contrary this to the usage of the first general councils, which defined all heretical doctrines with the utmost precision and exactness. And what ought to have alleviated the punishment, the uncertainty of the crime, seems to have enhanced it in those days of blind zeal and pious cruelty. It is true that the sanctimonious hypocrisy of the canonists went at

(*f*) *T.* 3, c. 9.

(*g*) *Utiles esse opiniones has, quis negat, cum intelligat, quam multa firmentur jurejurando; quantæ salutis sint fœderum religiones; quam multos divini supplicii metus a scelere revocavit: quamque sancta sit societas civium inter ipsos, Diis immortalibus interpositis tum judicibus, tum testibus?* Cic. de LL. ii. 7.

(*h*) *Mescroyantz* in our ancient law-books is the name of unbelievers.

(*i*) 1 Hal. P. C. 384.

(*k*) *Cap. de hæreticis.*

first no further than enjoining penance, excommunication, and ecclesiastical deprivation for heresy; though afterwards they proceeded boldly to imprisonment by the ordinary, and confiscation of goods *in pios uses*. But in the meantime they had prevailed upon the weakness of bigoted princes to make the civil power subservient to their purposes, by making heresy not only a temporal but even a capital offence: the Romish ecclesiastics determining, without appeal, whatever they pleased to be heresy, and shifting off to the secular arm the odium and drudgery of executions; with which they themselves were too tender and delicate to intermeddle. Nay, they pretended to intercede and pray on behalf of the convicted heretic, *ut citra mortis periculum sententia circa eum moderatur;*(*l*) well *knowing at the same time that they were delivering the unhappy victim to certain death. [*46 Hence the capital punishments inflicted on the antient Donatists and Manichæans by the emperors Theodosius and Justinian:(*m*) hence also the constitution of the emperor Frederic, mentioned by Lyndewode,(*n*) adjudging all persons, without distinction, to be burned with fire who were convicted of heresy by the ecclesiastical judge. The same emperor, in another constitution,(*o*) ordained that if any temporal lord, when admonished by the church, should neglect to clear his territories of heretics within a year, it should be lawful for good catholics to seize and occupy the lands and utterly to exterminate the heretical possessors. And upon this foundation was built that arbitrary power, so long claimed and so fatally exerted by the pope, of disposing even of the kingdoms of refractory princes to more dutiful sons of the church. The immediate event of this constitution was something singular, and may serve to illustrate at once the gratitude of the holy see and the just punishment of the royal bigot: for upon the authority of this very constitution the pope afterwards expelled this very emperor Frederic from his kingdom of Sicily and gave it to Charles of Anjou.(*p*)

Christianity being thus deformed by the demon of persecution upon the continent, we cannot expect that our own island should be entirely free from the same scourge. And therefore we find among our antient precedents(*q*) a writ *de hæretico comburendo*, which is thought by some to be as antient as the common law itself. However, it appears from thence that the conviction of heresy by the common law was not in any petty ecclesiastical court, but before the archbishop himself in a provincial synod; and that the delinquent was delivered over to the king to do as he should please with him; so that the crown had a control over the spiritual power, and might pardon the convict by issuing no process against him; the writ *de hæretico comburendo* being not a writ of course, but issuing only by the special direction of the king in council.(*r*)

*But in the reign of Henry the Fourth, when the eyes of the Christian [*47 world began to open, and the seeds of the Protestant religion (though under the opprobrious name of lollardy)(*s*) took root in this kingdom; the clergy, taking advantage from the king's dubious title to demand an increase of their own power, obtained an act of parliament(*t*) which sharpened the edge of persecution to its utmost keenness. For by that statute the diocesan alone, without the intervention of a synod, might convict of heretical tenets; and unless the convict abjured his opinions, or if after abjuration he relapsed, the sheriff was bound *ex officio*, if required by the bishop, to commit the unhappy victim to the flames, without waiting for the consent of the crown. By the statute 2 Hen. V. c. 7, lollardy was also made a temporal offence and indictable in the king's courts; which did not thereby gain an exclusive, but only a concurrent, jurisdiction with the bishop's consistory.

Afterwards, when the final reformation of religion began to advance, the power of the ecclesiastics was somewhat moderated; for though what heresy *is* was not then precisely defined, yet we were told in some points what it is *not*:

(*l*) *Decretal. l.* 5, *t.* 40, c. 27.
(*m*) *Cod. l.* 1, tit. 5.
(*n*) *C. de hæreticis.*
(*o*) *Cod.* 1, 5, 4.
(*p*) Baldus in *Cod.* 1, 5, 4.
(*q*) F. N. B. 269.
(*r*) 1 Hal. P. C. 395.

(*s*) So called, not from *lolium*, or tares, (an etymology which was afterwards devised in order to justify the *burning* of them, Matt. xiii. 30,) but from one Walter Lollhard, a German reformer, A.D. 1315. Mod. Un. Hist. xxvi. 13. Spelm. Gloss. 371.
(*t*) 2 Hen. IV. c. 15.

the statute 25 Hen. VIII. c. 14 declaring that offences against the see of Rome are not heresy, and the ordinary being thereby restrained from proceeding in any case upon mere suspicion; that is, unless the party be accused by two credible witnesses, or an indictment of heresy be first previously found in the king's courts of common law. And yet the spirit of persecution was not then abated, but only diverted into a lay channel. For in six years afterwards, by statute 31 Hen. VIII. c. 14, the bloody law of the six articles was made, which established the six most contested points of popery, transubstantiation, communion in one kind, the celibacy of the clergy, monastic vows, the sacrifice of the mass, and auricular confession; which points were "determined and resolved *48] by the most *godly study, pain, and travail of his majesty: for which his most humble and obedient subjects, the lords *spiritual* and temporal, and the commons in parliament assembled, did not only render and give unto his highness their most high and hearty thanks," but did also enact and declare all oppugners of the first to be heretics, and to be burned with fire; and of the five last to be felons, and to suffer death. The same statute established a new and mixed jurisdiction of clergy and laity for the trial and conviction of heretics; the reigning prince being then equally intent on destroying the supremacy of the bishops of Rome and establishing all other their corruptions of the Christian religion.

I shall not perplex this detail with the various repeals and revivals of these sanguinary laws in the two succeeding reigns; but shall proceed directly to the reign of queen Elizabeth; when the reformation was finally established with temper and decency, unsullied with party rancour or personal caprice and resentment. By statute 1 Eliz. c. 1, all former statutes relating to heresy are repealed, which leaves the jurisdiction of heresy as it stood at common law; viz., as to the infliction of common censures in the ecclesiastical courts; and, in case of burning the heretic, in the provincial senate only.(*u*) Sir Matthew Hale is indeed of a different opinion, and holds that such power resided in the diocesan also, though he agrees that in either case the writ *de hæretico comburendo* was not demandable of common right, but grantable or otherwise merely at the king's discretion.(*v*) But the principal point now gained was that by this statute a boundary is for the first time set to what shall be accounted heresy; nothing for the future being to be so determined but only such tenets which have been heretofore so declared, 1. By the words of the canonical scriptures; 2. By the first four general councils, or such others as have only used the words of the holy scriptures; or, 3. Which shall hereafter be so declared by the parliament with the assent of the clergy in convocation. Thus was heresy reduced to a greater certainty than before; though it might not have been the worse to have defined it in terms still more precise and particular: as a man *49] continued still *liable to be burned for what perhaps he did not understand to be heresy till the ecclesiastical judge so interpreted the words of the canonical scriptures.

For the writ *de hæretico comburendo* remained still in force; and we have instances of its being put in execution upon two anabaptists in the seventeenth of Elizabeth, and two Arians in the ninth of James the First. But it was totally abolished, and heresy again subjected only to ecclesiastical correction *pro salute animæ*, by virtue of the statute 29 Car. II. c. 9. For in one and the same reign our lands were delivered from the slavery of military tenures, our bodies from arbitrary imprisonment by the *habeas corpus* act, and our minds from the tyranny of superstitious bigotry by demolishing this last badge of persecution in the English law.

In what I have now said, I would not be understood to derogate from the just rights of the national church, or to favour a loose latitude of propagating any rude undigested sentiments in religious matters. Of propagating, I say; for the bare entertaining them, without an endeavour to diffuse them, seems hardly cognizable by any human authority. I only mean to illustrate the excellence of our present establishment, by looking back to former times. Every

(*u*) 5 Rep. 23. 12 Rep. 56, 92.

(*v*) 1 Hal. P. C. 405.

thing is now as it should be, with respect to the spiritual cognizance and spiritual punishment of heresy: unless, perhaps, that the crime ought to be more strictly defined, and no prosecution permitted, even in the ecclesiastical courts, till the tenets in question are by proper authority previously declared to be heretical. Under these restrictions, it seems necessary for the support of the national religion that the officers of the church should have power to censure heretics, yet not to harass them with temporal penalties, much less to exterminate or destroy them. The legislature hath indeed thought it proper that the civil magistrate should again interpose with regard to one species of heresy very prevalent in modern times; for, by statute 9 & 10 W. III. c. 32, if any person educated in the Christian religion, or professing the same, shall, by writing, printing, teaching, or advised speaking, deny any one of the persons of the Holy Trinity to be God, or maintain that there are *more Gods than one, he shall undergo the same penalties and incapacities which were just now mentioned to be inflicted on apostasy by the same statute.[1] And thus much for the crime of heresy. [*50

III. Another species of offences against religion are those which affect the *established church*. And these are either positive or negative: positive, by reviling its ordinances; or negative, by non-conformity to its worship. Of both of these in their order.

1. And, first, of the offence of *reviling the ordinances* of the church. This is a crime of a much grosser nature than the other of mere non-conformity, since it carries with it the utmost indecency, arrogance, and ingratitude: indecency, by setting up private judgment in virulent and factious opposition to public authority; arrogance, by treating with contempt and rudeness what has at least a better chance to be right than the singular notions of any particular man; and ingratitude, by denying that indulgence and undisturbed liberty of conscience to the members of the national church which the retainers to every petty conventicle enjoy. However, it is provided, by statutes 1 Edw. VI. c. 1, and 1 Eliz. c. 1, that whoever reviles the sacrament of the Lord's supper shall be punished by fine and imprisonment; and, by the statute 1 Eliz. c. 2, if any minister shall speak any thing in derogation from the book of common prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second; and if he be beneficed, he shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice; for the second offence he shall be deprived, and suffer one year's imprisonment; and for the third shall in like manner be deprived, and suffer imprisonment for life. And if *any person* whatsoever shall, in plays, songs, or other open words, speak any thing in derogation, depraving, or despising of said book, or shall forcibly prevent the reading of it, or cause any other service to be used in its stead, he shall forfeit for the first offence a hundred marks; for the second, four hundred; and for the third shall forfeit all his goods and chattels, and suffer imprisonment for life.[2] *These penalties were framed in the infancy of our present establishment, when the disciples of Rome and of Geneva united in inveighing with the utmost bitterness against the English liturgy; and the terror of these laws (for they seldom, if ever, were fully executed) proved a principal means, under Providence, of preserving the purity as well as decency of our national worship. Nor can their continuance to this time (of the milder penalties at least) be thought too severe and intolerant; so far as they are [*51

[1] This statute has been repealed, as far as it affects Unitarians only, by the 53 Geo. III. c. 160. Prosecutions for reviling the Trinity seem to have been generally framed on the construction of the common law. The 9 & 10 W. III. has not altered the common law as to the offence of blasphemy, but only given a cumulative punishment. And it seems also the 53 Geo. III. c. 160 does not alter the common law, but only removes the penalties imposed upon persons denying the Trinity by 9 & 10 W. III. c. 32, and extends to such persons the benefits conferred upon all other Protestant dissenters, by 1 W. and M. s. 1, c. 18. 1 Bar. & Cres. 26.—CHITTY.

[2] This statute of 1 Eliz. c. 2 was repealed, as far as relates to Protestant dissenters, by the 31 Geo. III. c. 32, s. 3.—CHITTY.

levelled at the offence, not of *thinking* differently from the national church, but of *railing* at that church and *obstructing* its ordinances for not submitting its public judgment to the private opinion of others. For, though it is clear that no restraint should be laid upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship, yet contumely and contempt are what no establishment can tolerate.(*w*) A rigid attachment to trifles, and an intemperate zeal for reforming them, are equally ridiculous and absurd; but the latter is at present the less excusable, because from political reasons, sufficiently hinted at in a former volume,(*x*) it would now be extremely unadvisable to make any alterations in the service of the church; unless by its own consent, or unless it can be shown that some manifest impiety or shocking absurdity will follow from continuing the present forms.

2. Non-conformity to the worship of the church is the other or negative branch of this offence. And for this there is much more to be pleaded than for the former; being a matter of private conscience, to the scruples of which our present laws have shown a very just and Christian indulgence. For undoubtedly all persecution and oppression of weak consciences, on the score of religious persuasions, are highly unjustifiable upon every principle of natural reason, civil liberty, or sound religion. But care must be taken not to carry this indul-
*52] gence into such extremes as may endanger *the national church: there is always a difference to be made between toleration and establishment.

Non-conformists are of two sorts: first, such as absent themselves from divine worship in the established church, through total irreligion, and attend the service of no other persuasion. These, by the statutes of 1 Eliz. c. 2, 23 Eliz. c. 1, and 3 Jac. I. c. 4, forfeit one shilling to the poor every Lord's day they so absent themselves, and 20*l.* to the king if they continue such default for a month together. And if they keep any inmate, thus irreligiously disposed, in their houses, they forfeit 10*l.* per month.

The second species of non-conformists are those who offend through a mistaken or perverse zeal. Such were esteemed by our laws, enacted since the time of the reformation, to be papists and Protestant dissenters; both of which were supposed to be equally schismatics in not communicating with the national church; with this difference, that the papists divided from it upon material, though erroneous, reasons; but many of the dissenters upon matters of indifference, or, in other words, upon no reason at all. Yet certainly our ancestors were mistaken in their plans of compulsion and intolerance. The sin of schism, as such, is by no means the object of temporal coercion and punishment. If, through weakness of intellect, through misdirected piety, through perverseness and acerbity of temper, or (which is often the case) through a prospect of secular advantage in herding with a party, men quarrel with the ecclesiastical establishment, the civil magistrate has nothing to do with it, unless their tenets and practice are such as threaten ruin or disturbance to the state. He is bound indeed to protect the established church; and, if this can be better effected by admitting none but its genuine members to offices of trust and emolument, he is certainly at liberty so to do: the disposal of offices being matter of favour and discretion. But, this point being once secured, all persecution for diversity of opinions, however ridiculous or absurd they may be, is contrary to every principle of sound policy and civil freedom. The names and subordination of
*53] the clergy, the posture of devotion, the materials and *colour of the minister's garment, the joining in a known or unknown form of prayer, and other matters of the same kind, must be left to the option of every man's private judgment.

With regard, therefore, to *Protestant dissenters*, although the experience of their turbulent disposition in former times occasioned several disabilities and restrictions (which I shall not undertake to justify) to be laid upon them by

(*w*) By an ordinance, (Aug. 23, 1645.) which continued till the restoration, to preach, write, or print any thing in derogation or depraving of the *directory* for the then established Presbyterian worship, subjected the offender, upon indictment, to a discretionary fine, not exceeding fifty pounds. Scobell, 98.

(*x*) Book i. page 8.

abundance of statutes,(y) yet at length the legislature, with a spirit of true magnanimity, extended that indulgence to these sectaries which they themselves, when in power, had held to be countenancing schism and denied to the church of England.(z) The penalties are conditionally suspended by the statute 1 W. and M. st. 1, c. 18, "for exempting their majesties' Protestant subjects, dissenting from the church of England, from the penalties of certain laws," commonly called the toleration act; which is confirmed by the statute 10 Anne, c. 2, and declares that neither the laws above mentioned, nor the statutes 1 Eliz. c. 2, § 14, 3 Jac. I. c. 4 & 5, nor any other penal laws made against popish recusants, (except the test acts,) shall extend to any dissenters other than papists and such as deny the Trinity: provided, 1. that they take the oaths of allegiance and supremacy (or make a similar affirmation, being Quakers)(a) and subscribe the declaration against popery; 2. that they repair to some congregation certified to and registered in the court of the bishop or archdeacon, or at the county sessions; 3. that the doors of such meeting-house shall be unlocked, unbarred, and unbolted; in default of which the persons meeting there are still liable to all the penalties of the former acts. Dissenting teachers, in order to be exempted from the penalties of the statutes 13 & 14 Car. II. c. 4, 15 Car. II. c. 6, 17 Car. II. c. 2, and 22 Car. II. c. 1, are also to subscribe the articles of religion mentioned in the statute 13 Eliz. c. 12, (which only concern the confession of the true Christian faith and the doctrine of the sacraments,) with an express exception *of those relating to the government and powers of the church [*54 and to infant baptism; or, if they scruple subscribing the same, shall make and subscribe the declaration prescribed by statute 19 Geo. III. c. 44, professing themselves to be Christians and Protestants, and that they believe the scriptures to contain the revealed will of God, and to be the rule of doctrine and practice. Thus, though the crime of non-conformity is by no means universally abrogated, it is suspended and ceases to exist with regard to those Protestant dissenters during their compliance with the conditions imposed by these acts; and, under these conditions, all persons, who will approve themselves no papists or oppugners of the Trinity, are left at full liberty to act as their consciences shall direct them in the matter of religious worship. And if any person shall wilfully, maliciously, or contemptuously disturb any congregation assembled in any church or permitted meeting-house, or shall misuse any preacher or teacher there, he shall (by virtue of the same statute, 1 W. & M.) be bound over to the sessions of the peace and forfeit twenty pounds.[3] But, by statute 5 Geo. I. c. 4, no mayor or principal magistrate must appear at any dissenting meeting with the ensigns of his office,(b) on pain of disability to hold that or any other office: the legislature judging it a matter of propriety that a mode of worship set up in opposition to the national, when allowed to be exercised in peace, should be exercised also with decency, gratitude, and humility. Dissenters also, who subscribe the declaration of the act 19 Geo. III., are exempted (unless in the case of endowed schools and colleges) from the penalties of the statutes 13 & 14 Car. II. c. 4, and 17 Car. II. c. 2, which prohibit (upon pain of fine and imprisonment) all persons from teaching school, unless they be

(y) 23 Eliz. c. 1. 29 Eliz. c. 6. 35 Eliz. c. 1. 22 Car. II. c. 1.

(z) The ordinance of 1645 (before cited) inflicted imprisonment for a year on the third offence, and pecuniary penalties on the former two, in case of using the Book of Common Prayer not only in a place of public worship, but also in any private family.

(a) See stat. 8 Geo I. c. 6.

(b) Sir Humphrey Edwin, a lord mayor of London, had the imprudence, soon after the toleration act, to go to a Presbyterian meeting-house in his formalities; which is alluded to by Dean Swift, in his *Tale of a Tub*, under the allegory of *Jack* getting on a great horse and eating custard.

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[3] To constitute an offence within this act, the party *must come into* the place of worship. See 5 T. R. 542. The enactment is repeated, without the words "*come into*," in the 52 Geo. III. c. 155, s. 12, which imposes the heavier penalty of 40*l*. The act applies only where the thing is done wilfully and of purpose maliciously to disturb the congregation or misuse the preacher. *Per* Abbott, C. J. 2 B. & C. 699; *sed vid.* Peake, R. 132. 5 T. R. 542. Each defendant is liable to the penalty. 5 T. R. 542. An indictment found at sessions may be removed into King's Bench by prosecutor before verdict. 5 T. R. 542. 4 M. & S. 508.—CHITTY.

licensed by the ordinary, and subscribe a declaration of conformity to the liturgy of the church, and reverently frequent divine service, *established* by the laws of this kingdom.[4]

As to *papists*, what has been said of the Protestant dissenters would hold equally strong for a general toleration of them; *provided their separation was founded only upon difference of opinion in religion, and their principles did not also extend to a subversion of the civil government. If once they could be brought to renounce the supremacy of the pope, they might quietly enjoy their seven sacraments, their purgatory and auricular confession, their worship of relics and images, nay, even their transubstantiation. But while they acknowledge a foreign power superior to the sovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects.

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Let us therefore now take a view of the laws in force against the papists; who may be divided into three classes, persons professing popery, popish recusants convict, and popish priests. 1. *Persons professing the popish religion,* besides the former penalties for not frequenting their parish church, are disabled from taking their lands, either by descent or purchase, after eighteen years of age, until they renounce their errors; they must at the age of twenty-one register their estates before acquired, and all future conveyances and wills relating to them; they are incapable of presenting to any advowson, or granting to any other person any avoidance of the same; they may not keep or teach any school, under pain of perpetual imprisonment; and if they willingly say or hear mass, they forfeit the one two hundred, the other one hundred marks, and each shall suffer a year's imprisonment. Thus much for persons who, from the misfortune of family prejudices or otherwise, have conceived an unhappy attachment to the Romish church from their infancy and publicly profess its errors. But if any evil industry is used to rivet these errors upon them, if any person sends another abroad to be educated in the popish religion or to reside in any religious house abroad for that purpose, or contributes to their

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[4] The 13 & 14 Car. II. c. 1. 17 Car. II. c. 2, and 22 Car. II. c. 1, are repealed by the 52 Geo. III. c. 155, s. 1, by which all places of religious worship of Protestants must be certified to the bishop of the diocese, or the archdeacon of the archdeaconry, or to the justices at the general or quarter sessions, and shall be also registered; and a penalty to the amount of 20*l.* and not less than 20*s.* may be inflicted for permitting meetings in places not so certified or registered; and, by sect. 4, every person teaching or preaching at, or being in, such place so certified, is exempted from penalties, as a person who has taken the oath and made the declaration prescribed by the 1 W. & M. st. 1, c. 18, or any act amending the same. By sect. 5, every one preaching or teaching at such place so certified shall, when required by a magistrate, take and subscribe the oath and declaration specified in the 19 Geo. III. c. 44; and, if he refuse to take it, he must not teach or preach, under a penalty of not exceeding 10*l.* nor less than 10*s.*; but he need not go more than five miles from his place of residence to take such oath; and, by sect. 6, such person may compel a justice to administer such oath to him, and to attest his subscription to such declaration and give him a certificate thereof. By sect. 11, no place of public meeting for religious worship must have the doors fastened, so as to prevent persons entering therein during the time of such meeting, under a penalty to the teacher of not exceeding 20*l.* nor less than 10*s.* By sect. 13, the act is not to affect the celebration of divine service, according to the rights of the Church of England and Ireland, by ministers of such church, in places before then used for that purpose, or licensed or consecrated by any person so to do, nor affect the jurisdiction of bishops or others exercising lawful authority in the church over the said church, according to the rules and discipline of the same and to the laws of the realm. And, by sect. 14, the act is not to extend to Quakers, nor to meetings convened by them, or in any manner to affect any act relating to them, except those expressly above repealed.—Chitty.

By a still more important statute, (9 Geo. IV. c. 17,) the former acts which imposed the necessity of receiving the sacrament as a test or qualification for holding corporation offices and employments were repealed, and a declaration to be made within six months after admittance in lieu of the sacramental test is substituted; but the not making the declaration which is intended for the protection of the Protestant Church renders the appointment void.—Stewart.

maintenance when there; *both the sender, the sent, and the contributor are disabled to sue in law or equity, to be executor or administrator to [*56 any person, to take any legacy or deed of gift, and to bear any office in the realm, and shall forfeit all their goods and chattels, and likewise all their real estate for life. And where these errors are also aggravated by apostasy or perversion, where a person is reconciled to the see of Rome, or procures others to be reconciled, the offence amounts to high treason. 2. *Popish recusants*, convicted in a court of law of not attending the service of the church of England, are subject to the following disabilities, penalties, and forfeitures, over and above those before mentioned. They are considered as persons excommunicated; they can hold no office or employment; they must not keep arms in their houses, but the same may be seized by the justices of the peace; they may not come within ten miles of London, on pain of 100*l.*; they can bring no action at law, or suit in equity: they are not permitted to travel above five miles from home, unless by license, upon pain of forfeiting all their goods; and they may not come to court under pain of 100*l.* No marriage or burial of such recusant, or baptism of his child, shall be had otherwise than by the ministers of the church of England, under other severe penalties. A married woman, when recusant, shall forfeit two-thirds of her dower or jointure; may not be executrix or administratrix to her husband, nor have any part of his goods; and during the coverture may be kept in prison, unless her husband redeems her at the rate of 10*l.* a month, or the third part of all his lands. And, lastly, as a feme-covert recusant may be imprisoned, so all others must, within three months after conviction, either submit and renounce their errors, or, if required so to do by four justices, must abjure and renounce the realm: and if they do not depart, or if they return without the king's license, they shall be guilty of felony, and suffer death as felons without the benefit of clergy. There is also an inferior species of recusancy, (refusing to make the declaration against popery enjoined by statute 30 Car. II. st. 2, when tendered by the proper magistrate,) which, if the party resides within ten miles of London, makes him an absolute recusant convict; or, if at a greater distance, suspends him from having any seat in *parliament, keeping arms in his house, or [*57 any horse above the value of five pounds. This is the state, by the laws now in being,(*c*) of a lay papist. But, 3. The remaining species or degree, viz., *popish priests*, are in a still more dangerous condition. For by statute 11 & 12 W. III. c. 4, popish priests or bishops celebrating mass or exercising any part of their functions in England, except in the houses of ambassadors, are liable to perpetual imprisonment. And, by the statute 27 Eliz. c. 2, any popish priest, born in the dominions of the crown of England, who shall come over hither from beyond sea, (unless driven by stress of weather, and tarrying only a reasonable time,)(*d*) or shall be in England three days without conforming and taking the oaths, is guilty of high treason: and all persons harbouring him are guilty of felony without the benefit of clergy.

This is a short summary of the laws against the papists, under their three several classes of persons professing the popish religion, popish recusants convict, and popish priests. Of which the president Montesquieu observes,(*e*) that they are so rigorous, though not professedly of the sanguinary kind, that they do all the hurt that can possibly be done in cold blood. But in answer to this it may be observed (what foreigners who only judge from our statute-book are not fully apprized of) that these laws are seldom exerted to their utmost rigour: and, indeed, if they were, it would be very difficult to excuse them. For they are rather to be accounted for from their history, and the urgency of the times which produced them, than to be approved (upon a cool review) as a standing system of law. The restless machinations of the Jesuits during the reign of Elizabeth, the turbulence and uneasiness of the papists under the new religious establishment, and the boldness of their hopes and wishes for the

(*c*) Stat. 23 Eliz. c. 1. 27 Eliz. c. 2. 29 Eliz. c. 6. 35 Eliz. c. 2. 1 Jac. II. c. 4. 3 Jac. I. c. 4 and 5. 7 Jac. I. c. 6. 3 Car. I. c. 3. 25 Car. II. c. 2. 30 Car. II. st. 2. 1 W. & M. c. 9, 15, and 26. 11 & 12 W. III. c. 4. 12 Anne, st. 2, c. 14. 1 Geo. I. st. 2, c. 55. 3 Geo. I. c. 18. 11 Geo. II. c. 17.

(*d*) Raym. 377. Latch. 1.

(*e*) Sp. L. b. xix. c. 27.

succession of the queen of Scots, obliged the parliament to counteract so dangerous a spirit by laws of a great, and then perhaps necessary, severity. The *58] powder-treason in the succeeding reign struck a panic into *James I., which operated in different ways: it occasioned the enacting of new laws against the papists, but deterred him from putting them in execution. The intrigues of queen Henrietta in the reign of Charles I., the prospect of a popish successor in that of Charles II., the assassination-plot in the reign of king William, and the avowed claim of a popish pretender to the crown in that and subsequent reigns, will account for the extension of these penalties at those several periods of our history. But if a time shall ever arrive, and perhaps it is not very distant, when all fears of a pretender shall have vanished, and the power and influence of the pope shall become feeble, ridiculous, and despicable not only in England but in every kingdom of Europe, it probably would not then be amiss to review and soften these rigorous edicts; at least, till the *civil* principles of the Roman Catholics called again upon the legislature to renew them: for it ought not to be left in the breast of every merciless bigot to drag down the vengeance of these occasional laws upon inoffensive, though mistaken, subjects; in opposition to the lenient inclination of the civil magistrate, and to the destruction of every principle of toleration and religious liberty.

This hath partly been done by statute 18 Geo. III. c. 60, with regard to such papists as duly take the oath therein prescribed of allegiance to his majesty, abjuration of the pretender, renunciation of the pope's civil power, and abhorrence of the doctrines of destroying and not keeping faith with heretics and deposing or murdering princes excommunicated by authority of the see of Rome: in respect of whom only the statute of 11 & 12 W. III. is repealed so far as it disables them from purchasing or inheriting, or authorizes the apprehending or prosecuting the popish clergy, or subjects to perpetual imprisonment either them or any teachers of youth.[5]

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[5] But now, by the statute 31 Geo. III. c. 32, (amended and explained by the 43 Geo. III. c. 30,) which may be called the toleration act of the Roman Catholics, all the severe and cruel restrictions and penalties enumerated by the learned judge are removed from those Roman Catholics who are willing to comply with the requisitions of that statute, which are that they must appear at some of the courts of Westminster, or at the quarter-sessions held for the county, city, or place where they shall reside, and shall make and subscribe a declaration that they profess the Roman Catholic religion, and also an oath, which is exactly similar to that required by the 18 Geo. III. c. 60, the substance of which is stated above in the text. On this declaration and oath being duly made by any Roman Catholic, the officer of the court shall grant him a certificate; and such officer shall yearly transmit to the privy council lists of all persons who have thus qualified themselves within the year in his respective court. The statute (sect. 4) then provides that a Roman Catholic thus qualified shall not be prosecuted under any statute for not repairing to a parish church, nor shall he be prosecuted for being a papist, nor for attending or performing mass or other ceremonies of the Church of Rome; provided (by sect. 5) that no place shall be allowed for an assembly to celebrate such worship until it is certified to the sessions; nor shall any minister officiate in it until his name and description are recorded there. And (by sect. 6 of 31 Geo. III. c. 32) no such place of assembly shall have its doors locked or barred during the time of meeting or divine worship.

If any Roman Catholic whatever is elected constable, church-warden, overseer, or into any parochial office, he may execute the same by a deputy, to be approved as if he were to act for himself as principal. Id. s. 7. But every minister who has qualified shall be exempt from serving upon juries and from being elected into any parochial office. Id. s. 8. And all the laws for frequenting divine service on Sundays shall continue in force, except where persons attend some place of worship allowed by this statute or the toleration act of the dissenters. 1 W. and M. s. 1, c. 18. Id. s. 9.

If any person disturb a congregation allowed under this act, he shall, as for disturbing a dissenting meeting, be bound over to the next sessions, and, upon conviction there, shall forfeit twenty pounds. Sect. 10.

But no Roman Catholic minister shall officiate in any place of worship having a steeple and a bell, or at any funeral in a church or churchyard, or shall wear the habits of his order, except in a place allowed by this statute, or in a private house, where there shall

In order the better to secure the established church against perils from nonconformists of all denominations, infidels, Turks, Jews, heretics, papists, and sectaries, there are, however, two bulwarks erected; called the *corporation* and *test* acts: by the former of which(*f*) no person can be legally elected to any office relating to the government of any city or corporation, unless within a twelvemonth before he has received the sacrament of the Lord's supper according to the rites of the church of England; and he is also enjoined to take the oaths of allegiance and supremacy at the *same time that he takes the oath of office; or, in default of either of these requisites, such election shall be void.[6] The other, called the test act,(*g*) directs all officers, civil and military, to take the oaths and make the declaration against transubstantiation in any of the king's courts at Westminster, or at the quarter sessions, within six calendar months after their admission; and also within the same time[7] to receive the sacrament of the Lord's supper according to the usage of [*59

(*f*) Stat. 13 Car. II. st. 2, c. 1. (*g*) Stat. 25 Car. II. c. 2, explained by 9 Geo. II. c. 26.

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not be more than five persons besides the family. Id. s. 11. This statute shall not exempt Roman Catholics from the payment of tithes or other dues to the church; nor shall it affect the statutes concerning marriages, or any law respecting the succession to the crown. Id. s. 12. No person who has qualified shall be prosecuted for instructing youth, except in an endowed school, or a school in one of the English universities; and except, also, that no Roman Catholic schoolmaster shall receive into his school the child of any Protestant father, (id. ss. 13, 14, 15;) nor shall any Roman Catholic keep a school until his or her name be recorded as a teacher at the sessions. Id. s. 16.

But no religious order is to be established; and every endowment of a school or college by a Roman Catholic shall still be superstitious and unlawful. Id. s. 17. And no person henceforth shall be summoned to take the oath of supremacy and the declaration against transubstantiation. Id. s. 18. Nor shall Roman Catholics who have qualified be removable from London to Westminster, (id. s. 19;) neither shall any peer who has qualified be punishable for coming into the presence or palace of the king or queen. Id. s. 20. And no papist whatever shall be any longer obliged to register their names and estates, or enrol their deeds and wills. Id. s. 21. And every Roman Catholic who has qualified may be permitted to act as a barrister, attorney, and notary. Id. s. 22.

By the 43 Geo. III. c. 30, Roman Catholics taking the oath and making the declaration prescribed by 31 Geo. III. c. 32 shall be entitled to all the benefits given by 10 Geo. III. c. 60, as fully as if they had taken the oath therein prescribed.

The Roman Catholics cannot sit in either house of parliament, because every member of parliament must take the oath of supremacy, and repeat and subscribe the declaration against transubstantiation. (see 1 book, 162:) nor can they vote at elections for the members of the house of commons, because before they vote they must take the oath of supremacy. Ibid. 180.

The Roman Catholics in Ireland are permitted to vote at elections, but they cannot sit in either house of parliament.

A bequest or disposition for the purpose of educating children in the Roman Catholic religion is unlawful. But the fund will not pass to the testator's next of kin, but it shall be applied to such charitable purposes as his majesty shall please to direct by his sign-manual. 7 Ves. Jr. 490.—CHRISTIAN.

By 43 Geo. III. c. 30, all Roman Catholics who shall take and subscribe the declaration and oath specified in the 31 Geo. III. c. 32 are as fully entitled to the benefits of the 18 Geo. III. c. 60 as if the oath prescribed by that act had been taken.

53 Geo. III. c. 128 provides certain rules as to taking commissions in the army, and relieves Roman Catholics from the restrictions and penalties contained in 25 Car. II. c. 2. —CHITTY.

By stat. 10 Geo. IV. c. 7, almost all disabilities are removed from persons professing this religion. Roman Catholics now enjoy all the privileges attached to property which are enjoyed by their fellow-subjects.—STEWART.

[6] By the 5 Geo. I. c. 6, s. 3, the election into a corporate office shall not be void on account of the person elected having omitted to receive the sacrament within a year before the election, unless he shall be removed within six months after his election, or unless a prosecution be commenced within that time, and be carried on without delay; and during that time the office is not void, but only voidable; and the person elected, until a removal or prosecution within the time limited, is entitled to all the incidental rights of his office in as full an extent as if he had actually received the sacrament within a year previous to his election. 2 Burr. 1016.—CHITTY.

[7] The 25 Car. II. c. 2—the original test act—required that both the sacrament and the

the church of England, in some public church, immediately after divine service and sermon, and to deliver into court a certificate thereof signed by the minister and church-warden, and also to prove the same by two credible witnesses; upon forfeiture of 500*l.* and disability to hold the said office.[8] And of much the same nature with these is the statute 7 Jac. I. c. 2, which permits no person to be naturalized or restored in blood but such as undergo a like test: which test having been removed in 1753, in favour of the Jews, was the next session of parliament restored again with some precipitation.

Thus much for offences which strike at our national religion, or the doctrine and discipline of the church of England in particular. I proceed now to consider some gross impieties and general immoralities which are taken notice of and punished by our municipal law; frequently in concurrence with the ecclesiastical, to which the censure of many of them does also of right appertain; though with a view somewhat different: the spiritual court punishing all sinful enormities for the sake of reforming the private sinner, *pro salute animæ;* while the temporal courts resent the public affront to religion and morality on which all governments must depend for support, and correct more for the sake of example than private amendment.

The fourth species of offences, therefore, more immediately against God and religion, is that of *blasphemy* against the Almighty by denying his being or providence; or by contumelious reproaches of our Saviour Christ.[9] Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule. These are offences punishable at common law by fine and imprisonment, or other infamous corporal punishment;(*h*) for Christianity is part of the laws of England.(*i*)

V. Somewhat allied to this, though in an inferior degree, is the offence of *60] profane and common *swearing* and **cursing.* By the last statute against which, 19 Geo. II. c. 21, which repeals all former ones, every labourer, sailor, or soldier profanely cursing or swearing shall forfeit 1*s.*; every other person, under the degree of a gentleman, 2*s.*; and every gentleman, or person of superior rank, 5*s.*, to the poor of the parish; and, on the second conviction, double; and for every subsequent offence, treble the sum first forfeited; with all charges of conviction: and in default of payment shall be sent to the house of correction for ten days. Any justice of the peace may convict upon his own hearing, or the testimony of one witness; and any constable or peace officer, upon his own hearing, may secure any offender and carry him before a justice

(*h*) 1 Hawk. P. C. 7. (*i*) 1 Ventr. 293. 2 Strange, 834.

oaths should be taken within three months; and, by subsequent statutes, the time for taking the oaths has been enlarged to six months; but the time for taking the sacrament remains unaltered, which must still be taken within three months after admission into the office. And, by several statutes subsequent to the test act, various descriptions of persons, whose offices are not considered civil or military, are required to take the oaths within six months after their respective appointments, though they are not required to take the sacrament. Among these are all ecclesiastical persons promoted to benefices, members of colleges who have attained the age of eighteen years, teachers of scholars or pupils, dissenting ministers, high constables, and practisers of the law. 1 Geo. I. st. 2, c. 13. 2 Geo. II. c. 31. 9 Geo. II. c. 26.—Christian.

[8] But before the end of every session of parliament an act is passed to indemnify all persons who have not complied with the requisition of the corporation and test acts, provided they qualify themselves within a time specified in the act; and provided also that judgment in any action or prosecution has not been obtained against them for their former omission.—Christian.

[9] It is not lawful even to publish a correct account of the proceedings in a court of justice if it contain matter of a scandalous, blasphemous, or indecent nature, (3 B. & A. 167;) and a publication stating our Saviour to be an impostor, and a murderer in principle, and a fanatic, is a libel at common law. 1 B. & C. 26. The general law as to this offence, as collected from 2 Stra. 834, Fitz. 64, Barn. R. 162, is that it is illegal to write against Christianity in general; that it is also illegal to write against any one of its evidences or doctrines, so as to manifest a malicious design to undermine it altogether; but that it is not illegal to write, with decency, on controverted points, whereby it is possible some articles of belief may be affected.—Chitty.

and there convict him.[10] If the justice omits his duty he forfeits 5*l.*, and the constable 40*s.* And the act is to be read in all parish churches and public chapels the Sunday after every quarter-day, on pain of 5*l.*, to be levied by warrant from any justice.[11] Besides this punishment for taking God's name in vain in common discourse, it is enacted, by statute 3 Jac. I. c. 21, that if, in any stage-play, interlude, or show, the name of the Holy Trinity, or any of the persons therein, be jestingly or profanely used, the offender shall forfeit 10*l.*, one moiety to the king, and the other to the informer.

VI. A sixth species of offence against God and religion, of which our antient books are full, is a crime of which one knows not well what account to give. I mean the offence of *witchcraft*, *conjuration*, *enchantment*, or *sorcery*. To deny the possibility, nay, actual existence, of witchcraft and sorcery is at once flatly to contradict the revealed word of God, in various passages both of the Old and New Testament: and the thing itself is a truth to which every nation in the world hath in its turn borne testimony, either by examples seemingly well attested or by prohibitory laws; which at least suppose the possibility of commerce with evil spirits. The civil law punishes with death not only the sorcerers themselves, but also those who consult them,(*j*) imitating in the former the express law of God,(*k*) "Thou shalt not suffer a witch to live." And our own laws, both before and since the conquest, have been *equally penal; ranking this crime in the same class with heresy, and condemning both to the flames.(*l*) The president Montesquieu(*m*) ranks them also both together, but with a very different view: laying it down as an important maxim that we ought to be very circumspect in the prosecution of magic and heresy; because the most unexceptionable conduct, the purest morals, and the constant practice of every duty in life are not a sufficient security against the suspicion of crimes like these. And indeed the ridiculous stories that are generally told, and the many impostures and delusions that have been discovered in all ages, are enough to demolish all faith in such a dubious crime; if the contrary evidence were not also extremely strong. Wherefore it seems to be the most eligible way to conclude, with an ingenious writer of our own,(*n*) that in general there has been such a thing as witchcraft; though one cannot give credit to any particular modern instance of it. [*61

Our forefathers were stronger believers when they enacted, by statute 33 Hen. VIII. c. 8, all witchcraft and sorcery to be felony without benefit of clergy; and again, by statute 1 Jac. I. c. 12, that all persons invoking any evil spirit, or consulting, covenanting with, entertaining, employing, feeding, or rewarding, any evil spirit; or taking up dead bodies from their graves to be used in any witchcraft, sorcery, charm, or enchantment; or killing or otherwise hurting any person by such infernal arts, should be guilty of felony without benefit of clergy, and suffer death. And if any person should attempt by sorcery to discover hidden treasure, or to restore stolen goods, or to provoke unlawful love, or to hurt any man or beast, though the same were not effected, he or she should suffer imprisonment and pillory for the first offence, and death for the second. These acts continued in force till lately, to the terror of all antient females in the kingdom: and many poor wretches were sacrificed thereby to the prejudice of their neighbours and their own illusions; not a few having, by some means or other, confessed the fact at the gallows. But all executions for this dubious crime are now at an end; our legislature having at length followed the wise

(*j*) *Cod. l.* 9, c. 18.
(*k*) Exod. xxii. 18.
(*l*) 3 Inst. 44.
(*m*) Sp. L. b. xii. c. 4.
(*n*) Mr. Addison, Spect. No. 117.

[10] The conviction must be within eight days after the offence. § 12. Each oath or curse being a distinct complete offence, there can be no question, I conceive, but a person may incur any number of penalties in one day,—though Dr. Burn doubts whether any number of oaths or curses in one day amounts to more than one offence. 3 Burn, 325. Persons belonging to his majesty's navy, if guilty of profane cursing and swearing, are liable to suffer such punishment as a court-martial shall think proper to inflict. 22 Geo. II. c. 33.—CHITTY.

[11] By the 4 Geo. IV. c. 31, this latter provision is repealed.—CHITTY.

*62] example of *Louis XIV. in France, who thought proper, by an edict, to restrain the tribunals of justice from receiving informations of witchcraft.(o) And accordingly it is with us enacted, by statute 9 Geo. II. c. 5, that no prosecution shall for the future be carried on against any persons for conjuration, witchcraft, sorcery, or enchantment. But the misdemeanour of persons pretending to use witchcraft, tell fortunes, or discover stolen goods, by skill in the occult sciences, is still deservedly punished with a year's imprisonment, and standing four times in the pillory.[12]

VII. A seventh species of offenders in this class are all *religious impostors:* such as falsely pretend an extraordinary commission from heaven, or terrify and abuse the people with false denunciations of judgments. These, as tending to subvert all religion by bringing it into ridicule and contempt, are punishable by the temporal courts with fine, imprisonment, and infamous corporal punishment.(p)

VIII. Simony, or the corrupt presentation of any one to an ecclesiastical benefice for gift or reward, is also to be considered as an offence against religion; as well by reason of the sacredness of the charge which is thus profanely bought and sold, as because it is always attended with perjury in the person presented.(q)[13] The statute 31 Eliz. c. 6 (which, so far as it relates to the forfeiture of the right of presentation, was considered in a former book)(r) enacts that if any patron, for money or any other corrupt consideration or promise, directly or indirectly given, shall present, admit, institute, induct, instal, or collate, any person to an ecclesiastical benefice or dignity, both the giver and taker shall forfeit two years' value of the benefice or dignity; one moiety to the king, and the other to any one who will sue for the same. If persons also corruptly resign or exchange their benefices, both the giver and taker shall in like manner forfeit double the value of the money or other corrupt consideration.[14] And *63] persons who shall *corruptly ordain or license any minister, or procure him to be ordained or licensed, (which is the true idea of simony,) shall incur a like forfeiture of forty pounds; and the minister himself of ten pounds, besides an incapacity to hold any ecclesiastical preferment for seven years afterwards. Corrupt elections and resignations in colleges, hospitals, and other eleemosynary corporations, are also punished by the same statute with forfeiture of the double value, vacating the place or office, and a devolution of the right of election for that turn to the crown.[15]

IX. Profanation of the Lord's day, vulgarly (but improperly) called *sabbath-*

(o) Voltaire, *Siecl. Louis XIV.* ch. 29. Mod. Un. Hist. xxv. 215. Yet Voughlans (*de droit criminel*, 353, 459) still reckons up sorcery and witchcraft among the crimes punishable in France.

(p) 1 Hawk. P. C. 7.

(q) 3 Inst. 156.

(r) See book ii. p. 279.

[12] By the vagrant act, (5 Geo. IV. c. 8, s. 4,) persons pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry, or otherwise, to deceive and impose on any of his majesty's subjects, are rogues and vagabonds.—Chitty.

[13] But, according to 2 Bla. Rep. 1052, 1 Ld. Raym. 449, Moore, Rep. 564, simony is not an offence *criminally* punishable at common law.—Chitty.

[14] Any resignation or exchange for money is corrupt, however apparently fair the transaction: as where a father, wishing that his son in orders should be employed in the duties of his profession, agreed to secure, by a bond, the payment of an annuity exactly equal to the annual produce of a benefice, in consideration of the incumbent's resigning in favour of his son. The annuity being afterwards in arrear, the bond was put in suit, and the defendant pleaded the simoniacal resignation in bar; and lord Mansfield and the court, though they declared that it was an unconscientious defence, yet, as the resignation had been made for money, determined that it was corrupt and simoniacal, and in consequence that the bond was void. Young *vs.* Jones, E. T. 1782.—Christian.

[15] By stat. 9 Geo. IV. c. 94, bonds of resignation of any benefice in favour of a son, grandson, brother, uncle, nephew, or grand-nephew, upon notice or request, are rendered valid, notwithstanding the 31 Eliz. c. 6; but the new act is not to extend to any engagements unless the deed be deposited within two months with the registrar of the diocese or peculiar jurisdiction wherein the benefice is situated. The passing of this act, it is believed, arose out of the fluctuating and contradictory decisions of our courts upon the subject.—Chitty.

breaking, is a ninth offence against God and religion, punished by the municipal law of England. For, besides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day in the seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes, which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness; it imprints on the minds of the people that sense of their duty to God so necessary to make them good citizens, but which yet would be worn out and defaced by an unremitted continuance of labour, without any stated times of recalling them to the worship of their Maker. And, therefore, the laws of king Athelstan(*s*) forbade all merchandizing on the Lord's day, under very severe penalties. And by the statute 27 Hen. VI. c. 5, no fair or market shall be held on the principal festivals, Good Friday, or any Sunday, (except the four Sundays in harvest,) on pain of forfeiting the goods exposed to sale. And since, by the statute 1 Car. I. c. 1, no persons shall assemble out of their own parishes for any sport whatsoever upon this day; nor, in their parishes, shall use any bull or *bear baiting, interludes, plays, or other *unlawful* exercises or pastimes; on pain that every offender shall pay 3*s*. 4*d*. to [*64 the poor. This statute does not prohibit, but rather impliedly allows, any innocent recreation or amusement, within their respective parishes, even on the Lord's day, after divine service is over. But, by statute 29 Car. II. c. 7, no person is allowed to *work* on the Lord's day, or use any boat or barge, or expose any goods to sale; except meat in public houses, milk at certain hours, and works of necessity or charity, on forfeiture of 5*s*. Nor shall any drover, carrier, or the like travel upon that day, under pain of twenty shillings.[16]

X. Drunkenness is also punished, by statute 4 Jac. I. c. 5, with the forfeiture of 5*s*., or the sitting six hours in the stocks: by which time the statute presumes the offender will have regained his senses, and not be liable to do mischief to his neighbours. And there are many wholesome statutes by way of prevention, chiefly passed in the same reign of king James I., which regulate the licensing of alehouses, and punish persons found tippling therein; or the master of such houses permitting them.[17]

(*s*) C. 24.

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[16] It has been recently held that the driver of a stage-*van* to and from *London* to *York* is a common carrier within the meaning of 3 Car. I. c. 1, and subject to the penalties thereof for travelling on *Sunday*. Rex *vs.* Middleton, 4 D. & R. 824. Where a parol contract was entered into for the purchase of a horse above the value of 10*l*., on a Sunday, with a warranty of soundness, and the horse was not delivered and paid for until the following Tuesday, held, first, that the contract was not complete until the latter day; and, second, that supposing it to be void within the 29 Car. II. c. 7, s. 2, still it was not an available objection on the part of the vendor in an action for a breach of the warranty, the vendee being ignorant of the fact that the former was exercising his ordinary calling on the Sunday. Bloxsome *vs.* Williams, 5 D. & R. 82. 3 B. & C. 232.

The 11 & 12 W. III. c. 21, and all other acts for the regulation of watermen plying upon the river Thames, are repealed by the 7 & 8 Geo. IV. c. 75, which permits a limited number of watermen, under certain regulations, to ply upon the Thames, within certain specified limits, on Sundays. By 29 Car. II. c. 7, no arrest can be made nor process served on a Sunday except for treason, felony, or breach of the peace. *Ante*, book iii. 290. Neither is the hundred answerable *to the party robbed* for a robbery committed on a Sunday. But where a plaintiff was robbed in going to his parish church, in his coach, on a Sunday, he recovered against the hundred, under the statute of Winton, (13 Edw. I. st. 2,) the court observing that the statute of *Charles* must be construed to extend only to cases of *travelling*, and that it might have been otherwise if the plaintiff had been making visits, or the like. Teshmaker *vs.* The Hundred of Edmonton, M. 7 Geo. I. See 1 Stra. 406. Com. 345. Killing game on a Sunday is prohibited, under heavy penalties, by 13 Geo. III. c. 80.—CHITTY.

[17] Justices of the peace have an absolute and uncontrolled power and discretion in

XI. The last offence which I shall mention, more immediately against religion and morality, and cognizable by the temporal courts, is that of open and notorious *lewdness;* either by frequenting houses of ill fame, which is an indictable offence;(*t*)[18] or by some grossly scandalous and public indecency, for which the punishment is by fine and imprisonment.(*u*)[19] In the year 1650, when the ruling power found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals, not only incest and wilful adultery were made capital crimes, but also the repeated act of keeping a brothel, or committing fornication, were (upon a second conviction) made felony without benefit of clergy.(*w*) But at the restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into the contrary extreme of licentiousness, it was not thought proper to renew a law of *such unfashionable rigour. And these offences have been ever since left to the feeble coercion of the spiritual court according to the rules of the canon law; a law which has treated the offence of incontinence, nay, even adultery itself, with a great degree of tenderness and lenity, owing perhaps to the constrained celibacy of its first compilers. The temporal courts therefore take no cognizance of the crime of adultery otherwise than as a private injury.(*x*)

*65]

But, before we quit this subject, we must take notice of the temporal punish-

(*t*) Poph. 208.
(*u*) 1 Siderf. 168.
(*w*) Scobell, 121.
(*x*) See book iii. p. 139.

granting and refusing ale-licenses; but if it should appear from their own declarations or the circumstances of their conduct that they have either refused or granted a license from a partial or corrupt motive, they are punishable in the court of King's Bench by information, or they may be prosecuted by indictment. 1 Burr. 556. 1 T. R. 692.

But the court of King's Bench refused a mandamus to justices to rehear an application for an ale-house license, which they had refused, though it was suggested that their refusal had proceeded from a mistaken view of their jurisdiction. Rex *vs.* Farringdon Without, (Justices,) 4 D. & R. 735. So they refused a mandamus to rehear a similar application at any other period of the year than within the first twenty days of September, though the justices might have refused the license under a mistake of the law. Rex *vs.* Surrey, (Justices,) 5 D. & R. 308.—Chitty.

[18] As to the offence of keeping or frequenting bawdy-houses, see *post*, 167. A woman cannot be indicted for being a bawd generally; for the bare solicitation of chastity is not indictable. Hawk. b. 1, c. 74. 1 Salk. 382.—Chitty.

[19] Many offences of private incontinence fall properly and exclusively under the jurisdiction of the ecclesiastical court, and are appropriated to it; but where the incontinence or lewdness is public, or accompanied with conspiracy, it is indictable.

Exposing a party's person to the public view is an offence *contra bonos mores*, and indictable. See 1 Sid. 168. 2 Camp. 89. 1 Keb. 620. And, by the vagrant act, (5 Geo. IV. c. 83, s. 4,) exposing a man's person with intent to insult a female is an offence for which the offender may be treated as a rogue and vagabond; and so is the wilfully exposing an obscene print or indecent exhibition: indeed, this would be an indictable offence at common law. 2 Stra. 789. 1 Barn. Rep. 29. 4 Burr. 2527, 2574. And, by the same act of 5 Geo. IV. c. 83, s. 3, every common prostitute wandering in public and behaving in a riotous and indecent manner may be treated as an idle and disorderly person within the meaning of that act.

Publicly selling and buying a wife is clearly an indictable offence, (3 Burr. 1438:) and many prosecutions against husbands for selling and others for buying have recently been sustained, and imprisonment for six months inflicted.

Procuring or endeavouring to procure the seduction of a girl seems indictable. 3 St. Tr. 519. So is endeavouring to lead a girl into prostitution. 3 Burr. 1438; and see *post*, 209, 212, as to the offence of seduction.

It is an indictable offence to dig up and carry away a *dead body* out of a churchyard. 2 T. R. 733. Leach, C. L. 4th ed. 497, S. C. 2 East, P. C. 652; *post*, 236; *ante*, 2 book, 429. And the mere disposing of a dead body for gain and profit is an indictable offence. Russ. & R. C. C. 366, note. 1 Dowl. & R. N. P. C. 13. And it is a misdemeanour to arrest a dead body, and thereby prevent a burial in due time. 4 East, 465. The punishment for such an offence is fine and imprisonment. 2 T. R. 733.

All such acts of indecency and immorality are public misdemeanours, and the offenders may be punished either by an information granted by the court of King's Bench, or by an indictment preferred before a grand jury at the assizes or quarter-sessions.—Chitty.

ment for having *bastard children*, considered in a criminal light; for, with regard to the maintenance of such illegitimate offspring, which is a civil concern, we have formerly spoken at large.(*y*) By the statute 18 Eliz. c. 3, two justices may take order for the punishment of the mother and reputed father, but what that punishment shall be is not therein ascertained; though the contemporary exposition was that a corporal punishment was intended.(*z*) By statute 7 Jac. I. c. 4, a specific punishment (viz., commitment to the house of correction) is inflicted on the woman only. But in both cases it seems that the penalty can only be inflicted if the bastard becomes chargeable to the parish; for otherwise the very maintenance of the child is considered as a degree of punishment. By the last-mentioned statute, the justice may commit the mother to the house of correction, there to be punished and set on work for one year; and in case of a second offence, till she find sureties never to offend again.[20]

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*CHAPTER V. [*67

OF OFFENCES AGAINST THE LAW OF NATIONS.

ACCORDING to the method marked out in the preceding chapter, we are next to consider the offences more immediately repugnant to that universal law of society, which regulates the mutual intercourse between one state and another; those, I mean, which are particularly animadverted on, as such, by the English law.

The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world;(*a*) in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.(*b*) This general law is founded upon this principle,—that different nations ought in time of peace to do one another all the good they can, and in time of war as little harm as possible, without prejudice to their own real interests.(*c*) And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those *principles of natural justice in which all the learned of every nation agree; or they depend upon mutual compacts or treaties between the respective communities, in the construction of which there is also no judge to resort to but the law of nature and reason, being the only one in which all the contracting parties are equally conversant and to which they are equally subject. [*67

In arbitrary states this law, wherever it contradicts, or is not provided for by, the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is

(*y*) See book i. page 458.
(*z*) Dalt. Just. ch. 11.
(*a*) *Ff.* 1, 9.
(*b*) See book i. p. 43.
(*c*) Sp. L. b. i. c. 7.

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[20] The 7 Jac. I. c. 4, s. 7 (which provided certain punishments for lewd females who had bastards) is repealed by 50 Geo. III. c. 51, s. 1, which enacts "that in cases when a woman shall have a bastard child which may be chargeable to the parish, any two justices before whom such woman shall be brought may commit her, at their discretion, to the house of correction in their district, for a time not exceeding twelve calendar months nor less than six weeks." By section 3, upon the woman's good behaviour during her confinement, any two justices may release and discharge her from further confinement. By section 4, justices are restrained from committing any woman till she has been delivered one month. The child must be chargeable, or likely to become so, in order to authorize a conviction. 2 Nolan, 256, 3d ed.—CHITTY.

properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom, without which it must cease to be a part of the civilized world. Thus, in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law-merchant,(*d*) which is a branch of the law of nations, is regularly and constantly adhered to. So too in all disputes relating to prizes, to shipwrecks, to hostages and ransom-bills, there is no other rule of decision but this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.[1]

But though in civil transactions and questions of property between the subjects of different states the law of nations has much scope and extent as adopted by the law of England; yet the present branch of our inquiries will fall *within a narrow compass, as offences against the law of nations can *68] rarely be the object of the criminal law of any particular state. For offences against this law are principally incident to whole states or nations: in which case recourse can only be had to war, which is an appeal to the God of hosts to punish such infractions of public faith as are committed by one independent people against another; neither state having any superior jurisdiction to resort to upon earth for justice. But where the individuals of any state violate this general law, it is then the interest as well as duty of the government under which they live to animadvert upon them with becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war. It is therefore incumbent upon the nation injured, first, to demand satisfaction and justice to be done on the offender by the state to which he belongs; and, if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war.

The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds: 1. Violation of safe-conducts; 2. Infringement of the rights of embassadors; and, 3. Piracy.[2]

I. As to the first, *violation* of *safe-conducts* or *passports*, expressly granted by the king or his embassadors(*e*) to the subjects of a foreign power in time of mutual war, or committing acts of hostilities against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct: these are

(*d*) See book i. p. 273. (*e*) Ibid. p. 260.

[1] By the 33 Geo. III. c. 66, it was enacted that it was unlawful for any of his majesty's subjects to ransom, or enter into any contract for ransoming, any ship or merchandise captured by an enemy; and that all contracts and securities for that purpose, without the license therein mentioned, were absolutely void; and that every person who entered into such a contract should be subject to a penalty of 500*l*.—Christian.

[2] Under the head of offences against the law of nations in the United States Mr. Wharton classes the accepting and exercising, by a citizen, a commission to serve a foreign state against a state at peace with the United States, (Act of Congress, April 20, 1818, s. 1, 3 Story's Laws, 1694;) fitting out and arming within the limits of the United States any vessel for a foreign state to cruise against a state at peace with the United States, (ibid. s. 3;) increasing or assisting within the United States any force of armed vessels of a foreign state at war with a state with which the United States are at peace, (ibid. s. 5;) setting on foot within the United States any military expedition against a state at peace with the United States, (ibid. s. 6;) suing forth or executing any writ or process against any foreign minister or his servants, the writs being also declared void, (Act April 30, 1790, ss. 25, 26, 1 Story, 88;) and violating any passport, or in any other way infracting the law of nations by violence to an ambassador or foreign minister or their domestics. Ibid. s. 27. Wharton's Amer. Crim. Law, 130.—Sharswood.

breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another: and such offences may, according to the writers upon the law of nations, be a just ground of a national war; since it is not in the power of *the foreign prince to cause justice to be done to his subjects by the very individual delinquent, but he must require it of the whole community. And as, during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law, and, more especially, as it is one of the articles of *magna charta*(*f*) that foreign merchants should be entitled to safe-conduct and security throughout the kingdom, there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king, whose honour is more particularly engaged in supporting his own safe-conduct. And, when this malicious rapacity was not confined to private individuals, but broke out into general hostilities, by the statute 2 Hen. V. st. 1, c. 6, breaking of truce and safe-conducts, or abetting and receiving the truce-breakers, was (in affirmance and support of the law of nations) declared to be high treason against the crown and dignity of the king, and conservators of truce and safe-conducts were appointed in every port, and empowered to hear and determine such treasons (when committed at sea) according to the antient marine law then practised in the admiral's court, and, together with two men learned in the law of the land, to hear and determine according to that law the same treasons, when committed within the body of any county. Which statute, so far as it made these offences amount to treason, was suspended by 14 Hen. VI. c. 8, and repealed by 20 Hen. VI. c. 11, but revived by 29 Hen. VI. c. 2, which gave the same powers to the lord chancellor, associated with either of the chief justices, as belonged to the conservators of truce and their assessors; and enacted that, notwithstanding the party be convicted of treason, the injured stranger should have restitution out of his effects prior to any claim of the crown. And it is further enacted, by the statute 31 Hen. VI. c. 4, that if any of the king's subjects attempt or offend upon the sea, or in any port within the king's obeisance, against any stranger in amity, league, or truce, or under safe-conduct, and especially by attaching *his person, or spoiling him or robbing him of his goods, the lord chancellor, with any of the justices of either the king's bench or common pleas, may cause full restitution and amends to be made to the party injured. [*69 [*70

It is to be observed that the suspending and repealing acts of 14 & 20 Hen. VI., and also the reviving act of 29 Hen. VI., were only temporary, so that it should seem that after the expiration of them all the statute 2 Hen. V. continued in full force; but yet it is considered as extinct by the statute 14 Edw. IV. c. 4, which revives and confirms all statutes and ordinances made before the accession of the house of York against breakers of amities, truces, leagues, and safe-conducts, with an express exception to the statute of 2 Hen. V. But (however that may be) I apprehend it was finally repealed by the general statutes of Edw. VI. and queen Mary, for abolishing new-created treasons; though Sir Matthew Hale seems to question it as to treasons committed on the sea.(*g*) But certainly the statute of 31 Hen. VI. remains in full force to this day.

II. As to the rights of *embassadors*, which are also established by the law of nations, and are therefore matter of universal concern, they have formerly been treated of at large.(*h*) It may here be sufficient to remark that the common law of England recognises them in their full extent by immediately stopping all legal process, sued out through the ignorance or rashness of individuals, which may intrench upon the immunities of a foreign minister or any of his train. And, the more effectually to enforce the law of nations in this respect, when violated through wantonness or insolence, it is declared, by the statute 7 Anne, c. 12, that all process whereby the person of any embassador, or of his domestic or domestic servant, may be arrested, or his goods distrained or seized, shall be utterly null and void;[3] and that all persons prosecuting, soliciting, or

(*f*) 9 Hen. III. c. 30. See book i. page 259, &c. (*g*) 1 Hal. P. C. 217. (*h*) See book i. page 253.

[3] A consul is not a public minister within the act. *Ante*, 3 book, 289. The party, to

executing such process, being convicted, by confession or the oath of one wit-
*71] ness, before the *lord chancellor and the chief justices, or any two of them, shall be deemed violators of the laws of nations and disturbers of the public repose, and shall suffer such penalties and corporal punishment as the said judges, or any two of them, shall think fit.(*i*) Thus, in cases of extraordinary outrage, for which the law hath provided no special penalty, the legislature hath intrusted to the three principal judges of the kingdom an unlimited power of proportioning the punishment to the crime.

III. Lastly, the crime of *piracy*, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke,(*k*) *hostis humani generis*. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.[4]

By the antient common law, piracy, if committed by a subject, was held to be a species of high treason, being contrary to his natural allegiance, and by an alien to be felony only; but now, since the statute of treason, 25 Edw. III. c. 2, it is held to be only felony in a subject.(*l*) Formerly it was only cognizable by the admiralty courts, which proceed by the rules of the civil law.(*m*) But it being inconsistent with the liberties of the nation that any man's life should be taken away, unless by the judgment of his peers or the common law of the land, the statute 28 Hen. VIII. c. 15 established a new jurisdiction for this purpose, which proceeds according to the course of the common law, and of which we shall say more hereafter.

*72] *The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there.(*n*) But, by statute, some other offences are made piracy also: as, by statute 11 & 12 W. III. c. 7, if any natural-born subject commits any act of hostility upon the high seas against others of his majesty's subjects, under colour of a commission from any foreign power, this, though it would only be an act of war in an alien, shall be construed piracy in a subject. And, further, any commander or other seafaring person betraying his trust, and running away with any ship, boat, ordnance, ammunition, or goods, or yielding them up voluntarily to a pirate, or conspiring to do these acts, or any person assaulting the commander of a vessel to hinder him from fighting in defence of his ship, or confining him, or making or endeavouring to make a revolt on board, shall, for each of these offences, be adjudged a

(*i*) See the occasion of making this statute, book i. page 255.
(*k*) 3 Inst. 113.
(*l*) Ibid.
(*m*) 1 Hawk. P. C. 98.
(*n*) Ibid. 100.

entitle him to the protection of the act, must be a servant, or employed in the ambassador's house, (3 D. & R. 25;) and a servant within the meaning of the act must be actually and *bonâ fide* such servant. Tidd, Prac. 8th ed. 193. 4 Burr. 2016, 2017. It does not matter whether the servant is a native of the country where the ambassador resides, or a foreigner; and real servants, though not residing with the ambassador, are within the act. 2 Stra. 797. 3 Wils. 35. 1 B. & C. 563. 2 D. & R. 849, S. C. But if the servant do not reside in the ambassador's house, and have goods in his own house more than are necessary for his convenience as such servant, they are not within the protection of the act. 1 B. & C. 554. 2 D. & R. 833, S. C. The servant's name must be registered in the secretary of state's office, and transmitted to the sheriff's office, to support a proceeding against the sheriff for such arrest. 1 Wils. 20, and sect. 5 of the statute. Tidd, Prac. 8th ed. 194.—Chitty.

[4] On the subject of piracy under the Constitution of the United States and acts of Congress, see 1 Kent's Com. 183. Wharton's Amer. Crim. Law, 911. Acts of Congress, April 30, 1790, c. 9, s. 8, 1 Story's Laws, 84. Act March 3, 1819, c. 76, s. 5, 3 Story, 1739. Act 15 May, 1820, c. 113, s. 3, 3 Story, 1798. United States *vs.* Smith, 5 Wheaton, 153. United States *vs.* Palmer, 3 Wheaton, 610. United States *vs.* Kepler, 1 Baldw. 15. United States *vs.* Klintock, 5 Wheat. 144. United States *vs.* Pirates, ibid. 184. United States *vs.* Holmes, ibid. 412.—Sharswood.

pirate, felon, and robber, and shall suffer death, whether he be principal or merely accessory by setting forth such pirates, or abetting them before the fact, or receiving or concealing them or their goods after it. And the statute 4 Geo. I. c. 11 expressly excludes the principals from the benefit of clergy. By the statute 8 Geo. I. c. 24, the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in any wise consulting, combining, confederating, or corresponding with them, or the forcibly boarding any merchant vessel, though without seizing or carrying her off, and destroying or throwing any of the goods overboard, shall be deemed piracy; and such accessories to piracy as are described by the statute of king William are declared to be principal pirates, and all parties convicted by virtue of this act are made felons without benefit of clergy. By the same statutes, also, (to encourage the defence of merchant vessels against pirates,) the commanders or seamen wounded, and the widows of such seamen as are slain, in any piratical engagement, shall be entitled to a bounty, to *be divided among them, [*73 not exceeding one-fiftieth part of the value of the cargo on board: and such wounded seamen shall be entitled to the pension of the Greenwich hospital, which no other seamen are, except only such as have served in a ship of war. And if the commander shall behave cowardly by not defending the ship, if she carries guns or arms, or shall discharge the mariners from fighting, so that the ship falls into the hands of pirates, such commander shall forfeit all his wages, and suffer six months' imprisonment.[5] Lastly, by statute 18 Geo. II. c. 30, any natural-born subject or denizen who in time of war shall commit hostilities at sea against any of his fellow-subjects, or shall assist an enemy on that element, is liable to be tried and convicted as a pirate.[6]

These are the principal cases in which the statute law of England interposes to aid and enforce the law of nations as a part of the common law, by inflicting an adequate punishment upon offences against that universal law committed by private persons. We shall proceed in the next chapter to consider offences which more immediately affect the sovereign executive power of our own particular state, or the king and government; which species of crime branches itself into a much larger extent than either of those of which we have already treated.

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[5] In the construction of the common law, as enlarged by the statutes mentioned in the text, it appears that for mariners to seize the captain, put him on shore against his will, and afterwards employ the ship for their use, is piracy. 2 East, P. C. 796. And embezzling a ship's anchor and cable is piracy, though the master of the vessel concur in it, and though the object is to defraud the underwriters, not the insurers. Russ. & R. C. C. 123. Where the master of a vessel insured the ship and cargo, landed the goods, and, on the destruction of the former, protested both as lost, with intent to defraud the owners and insurers, this was holden to be a mere breach of trust, and no felony, because there was no determination of the special authority with which the defendant was intrusted. 2 East, P. C. 776. The rules as to larceny will here apply.—CHITTY.

[6] See 2 Hawk. P. C. pp. 305, 461–465, 480, s. 1. See also 5 Geo. IV. c. 17, by which dealing in slaves on the high seas, &c. is made piracy and punishable with death. See also 5 Geo. IV. c. 113, s. 9, and Forbes *vs.* Cochrane, 3 D. & R. 679, 2 B. & C. 448, on the same subject.

The 9 Geo. IV. c. 31 repeals so much of the 22 & 23 Car. II. c. 11 "as relates to any mariner laying violent hands on his commander as therein mentioned." See also 9 Geo. IV. c. 84.—CHITTY.

CHAPTER VI.

OF HIGH TREASON.

The third general division of crimes consists of such as more especially affect the supreme executive power, or the king and his government; which amount either to a total renunciation of that allegiance, or at the least to a criminal neglect of that duty which is due from every subject to his sovereign. In a former part of these commentaries(*a*) we had occasion to mention the nature of allegiance as the tie or *ligamen* which binds every subject to be true and faithful to his sovereign *liege* lord the king, in return for that protection which is afforded him, and truth and faith to bear of life, and limb, and earthly honour, and not to know or hear of any ill intended him without defending him therefrom. And this allegiance, we may remember, was distinguished into two species: the one natural and perpetual, which is inherent only in natives of the king's dominions; the other local and temporary, which is incident to aliens also. Every offence, therefore, more immediately affecting the royal person, his crown or dignity, is in some degree a breach of this duty of allegiance, whether natural, or innate, or local, and acquired by residence; and these may be distinguished into four kinds: 1. Treason; 2. Felonies injurious to the king's prerogative; 3. *Præmunire;* 4. Other misprisions and contempts: of which crimes the first and principal is that of treason.

*75] *Treason, *proditio*, in its very name (which is borrowed from the French) imports a betraying, treachery, or breach of faith. It therefore happens only between allies, saith the Mirror:(*b*) for treason is indeed a general appellation, made use of by the law, to denote not only offences against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual, relation, and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such superior or lord.(*c*) This is looked upon as proceeding from the same principle of treachery in private life as would have urged him who harbours it to have conspired in public against his liege lord and sovereign, and, therefore, for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary, these, being breaches of the lower allegiance of private and domestic faith, are denominated *petit* treasons. But when disloyalty so rears its crest as to attack even majesty itself, it is called, by way of eminent distinction, *high* treason, *alta proditio;* being equivalent to the *crimen læsæ majestatis* of the Romans, as Glanvil(*d*) denominates it also in our English law.

As this is the highest civil crime which (considered as a member of the community) any man can possibly commit, it ought therefore to be the most precisely ascertained. For, if the crime of high treason be indeterminate, this alone (says the president Montesquieu) is sufficient to make any government degenerate into arbitrary power.(*e*) And yet, by the antient common law, there was a great latitude left in the breast of the judges to determine what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise, by forced and arbitrary constructions, offences into the *crime and punishment of treason which never were suspected to be such. Thus, the *accroaching*, or attempting to exercise, royal power (a very uncertain charge) was, in the 21 Edw. III., held to be treason in a knight of Hertfordshire, who forcibly assaulted and detained one of the king's subjects till he paid him 90*l.*:(*f*) a crime, it must be owned, well deserving of punishment; but which seems to be of a complexion very different from that of treason. Killing the king's father, or brother, or

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(*a*) Book i. ch. 10.
(*b*) C. 1, § 7.
(*c*) *LL. Ælfredi*, c. 4. *Æthelst.* c. 4. *Canuti*, c. 54, 61.
(*d*) *L.* 1, c. 2.
(*e*) Sp. L. b. xii. c. 7.
(*f*) 1 Hal. P. C. 80.

even his messenger, has also fallen under the same denomination.(*g*) The latter of which is almost as tyrannical a doctrine as that of the imperial constitution of Arcadius and Honorius, which determines that any attempts or designs against the ministers of the prince shall be treason.(*h*) But, however, to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the statute 25 Edw. III. c. 2 was made; which defines what offences only for the future should be held to be treason: in like manner as the *lex Julia majestatis* among the Romans, promulged by Augustus Cæsar, comprehended all the antient laws that had before been enacted to punish transgressors against the state.(*i*)[1] This statute must therefore be our text and guide, in order to examine into the several species of high treason. And we shall find that it comprehends all kinds of high treason under seven distinct branches.

1. "When a man doth compass or imagine the death of our lord the king, of our lady his queen, or of their eldest son and heir." Under this description it is held that a queen regnant (such as queen Elizabeth and queen Anne) is within the words of the act, being invested with royal power and entitled to the allegiance of her subjects;(*j*) but the husband of such a queen is not comprised within these words, *and therefore no treason can be committed against him.(*k*) The king here intended is the king in possession, without any [*77 respect to his title: for it is held that a king *de facto* and not *de jure*, or, in other words, a usurper that hath got possession of the throne, is a king within the meaning of the statute; as there is a temporary allegiance due to him, for his administration of the government and temporary protection of the public; and, therefore, treasons committed against Henry VI. were punished under Edward IV., though all the line of Lancaster had been previously declared usurpers by act of parliament. But the most rightful heir of the crown, or king *de jure* and not *de facto*, who hath never had plenary possession of the throne, as was the case of the house of York during the three reigns of the line of Lancaster, is not a king within this statute against whom treasons may be committed.(*l*) And a very sensible writer on the crown-law carries the point of possession so far that he holds(*m*) that a king out of possession is so far from having any right to our allegiance, by any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him. A doctrine which he grounds upon the statute 11 Hen. VII. c. 1, which is declaratory of the common law, and pronounces all subjects excused from any penalty or forfeiture which do assist and obey a king *de facto*. But, in truth, this seems to be confounding all notions of right and wrong; and the consequence would be that when Cromwell had murdered the elder Charles, and usurped the power (though not the name) of king, the people were bound in duty to hinder the son's restoration: and were the king of Poland or Morocco to invade this kingdom, and by any means to get possession of the crown, (a term, by the way,

(*g*) Britt. c. 22. 1 Hawk. P. C. 34.

(*h*) *Qui de nece virorum illustrium, qui consiliis et consistorio nostro intersunt, senatorum etiam nam et ipsi pars corporis nostri sunt) vel cujus libet postremo, qui minitat nobiscum, cogitaverit: (eadem enim severitate voluntatem sceleris, qua effectum, puniri jura voluerunt) ipse quidem, utpote majestatis reus, gladio feriatur, bonis ejus omnibus fisco nostro addictis.* Cod. 9, 3, 5.

(*i*) Gravin. *Orig.* 1. § 34.

(*j*) 1 Hal. P. C. 151.

(*k*) 3 Inst. 7. 1 Hal. P. C. 106.

(*l*) 3 Inst. 7. 1 Hal. P. C. 104.

(*m*) 1 Hawk. P. C. 36.

[1] The provisions of this act are confirmed by the 36 Geo. III. c. 7, which is made perpetual by the 57 Geo. III. c. 6. This latter statute renders the law of high treason more clear and definite. It provides that if any one within the realm, or without, shall compass or intend death, destruction, or any bodily harm tending thereto, maiming or wounding, imprisonment or restraint, of his majesty, or to depose him from the style, honour, or kingly name of the imperial crown of these realms, or to levy war against him within this realm, in order by force or constraint to compel him to change his measures or counsels, or in order to put any constraint upon or intimidate both or either house of parliament, or to move or stir any foreigner with force to invade this realm, or any of his majesty's dominions, and such compassing or intentions shall express by publishing any printing or writing, or by any other overt act, being convicted thereof on the oaths of two witnesses upon trial, or otherwise, by due course of law, such person shall be adjudged a traitor, and suffer death as in cases of high treason.—CHITTY.

of very loose and indistinct signification,) the subject would be bound by his allegiance to fight for his natural prince to-day, and by the same duty of allegiance to fight against him to-morrow. The true distinction seems to be that *78] the statute of Henry *the Seventh does by no means *command* any opposition to a king *de jure;* but *excuses* the obedience paid to a king *de facto.* When, therefore, a usurper is in possession the subject is *excused* and *justified* in obeying and giving him assistance: otherwise, under a usurpation, no man could be safe, if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience. Nay, further, as the mass of people are imperfect judges of title, of which in all cases possession is *prima facie* evidence, the law compels no man to yield obedience to that prince whose right is by want of possession rendered uncertain and disputable, till Providence shall think fit to interpose in his favour and decide the ambiguous claim: and, therefore, till he is entitled to such allegiance by possession, no treason can be committed against him. Lastly, a king who has resigned his crown, such resignation being admitted and ratified in parliament, is, according to Sir Matthew Hale, no longer the object of treason.(*n*) And the same reason holds in case a king abdicates the government, or, by actions subversive of the constitution, virtually renounces the authority which he claims by that very constitution; since, as was formerly observed,(*o*) when the fact of abdication is once established and determined by the proper judges, the consequence necessarily follows that the throne is thereby vacant, and he is no longer king.

Let us next see what is a *compassing* or *imagining* the death of the king, &c. These are synonymous terms, the word *compass* signifying the purpose or design of the mind or will,(*p*) and not, as in common speech, the carrying such design to effect.(*q*) And therefore an accidental stroke, which may mortally wound the sovereign, *per infortunium*, without any traitorous intent, is no treason: as was the case of Sir Walter Tyrrel, who, by the command of king William Rufus, *79] *shooting at a hart, the arrow glanced against a tree, and killed the king on the spot.(*r*) But, as this compassing or imagining is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some open or *overt* act.[2] And yet the tyrant Dionysius is recorded(*s*) to have executed a subject barely for dreaming that he had killed him, which was held of sufficient proof that he had thought thereof in his waking hours. But such is not the temper of the English law; and therefore in this and the three next species of treason it is necessary that there appear an open or *overt* act of a more full and explicit nature, to convict the traitor upon. The statute expressly requires that the accused "be thereof upon sufficient proof attainted of some open act by men of his own condition." Thus, to provide weapons or ammunition for the purpose of killing the king, is held to be a palpable overt act of treason in imagining his death.(*t*) To conspire to imprison the king by force, and move towards it by assembling company, is an overt act of compass-

(*n*) 1 Hal. P. C. 104.
(*o*) Book i. p. 212.
(*p*) By the ancient law, *compassing* or intending the death of any man, demonstrated by some evident fact, was equally penal as homicide itself. 3 Inst. 5.
(*q*) 1 Hal. P. C. 107.
(*r*) 3 Inst. 6.
(*s*) Plutarch, *in vit.*
(*t*) 3 Inst. 12.

[2] In the case of the regicides, the indictment charged that they did traitorously compass and imagine the death of the king. And the taking off his head was laid, among others, as an overt act of compassing. And the person who was supposed to have given the stroke was convicted on the same indictment. For the compassing is considered as the treason, the overt acts as the means made use of to effectuate the intentions of the heart. And in every indictment for this species of treason, and indeed for levying war, or adhering to the king's enemies, an overt act must be alleged and proved. For the overt act is the charge, to which the prisoner must apply his defence. But it is not necessary that the whole of the evidence intended to be given should be set forth: the common law never required this exactness, nor doth the statute of king William require it. It is sufficient that the charge be reduced to a reasonable certainty, so that the defendant may be apprized of the nature of it and prepared to give an answer to it. Fost. 194.—Christian.

ing the king's death;(*u*) for all force used to the person of the king in its consequence may tend to his death, and is a strong presumption of something worse intended than the present force, by such as have so far thrown off their bounden duty to their sovereign; it being an old observation, that there is generally but a short interval between the prisons and the graves of princes. There is no question, also, but that taking any measures to render such treasonable purposes effectual, as assembling and consulting on the means to kill the king, is a sufficient overt act of high treason.(*w*)[3]

How far mere *words*, spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to treason, has been formerly matter of doubt. We have two instances in the reign of Edward the Fourth *of persons executed for treasonable words: the one a citizen of London, who said he would make his son heir of the *crown*, being the sign of the [*80 house in which he lived; the other a gentleman, whose favourite buck the king killed in hunting, whereupon he wished it, horns and all, in the king's belly.[4] These were esteemed hard cases; and the chief justice Markham rather chose to leave his place than assent to the latter judgment.(*x*) But now it seems clearly to be agreed that, by the common law and the statute of Edward III., words spoken amount to only a high misdemeanour, and no treason. For they may be spoken in heat, without any intention, or be mistaken, perverted, or mis-remembered by the hearers; their meaning depends always on their connection with other words and things; they may signify differently, even according to the tone of voice with which they are delivered; and sometimes silence itself is more expressive than any discourse. As, therefore, there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to high treason. And accordingly, in 4 Car. I., on a refer-

(*u*) 1 Hal. P. C. 109.
(*w*) 1 Hawk. P. C. 38. 1 Hal. P. C. 119.
(*x*) 1 Hal. P. C. 115.

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[3] This subject is so ably explained by Mr. Justice Foster in his first discourse on high treason that it may be useful to annex here two of his sections:—"In the case of the king the statute of treasons hath, with great propriety, retained the rule *voluntas pro facto*. The principle upon which this is founded is too obvious to need much enlargement. The king is considered as the head of the body-politic, and the members of that body are considered as united and kept together by a political union with him and with each other. His life cannot, in the ordinary course of things, be taken away by treasonable practices without involving a whole nation in blood and confusion; consequently every stroke levelled at his person is, in the ordinary course of things, levelled at the public tranquillity. The law, therefore, tendereth the safety of the king with an anxious concern, and, if I may use the expression, with a concern bordering upon jealousy. It considereth the wicked imaginations of the heart in the same degree of guilt as if carried into actual execution from the moment measures appear to have been taken to render them effectual: and therefore, if conspirators meet and consult how to kill the king, though they do not then fall upon any scheme for that purpose, this is an overt act of compassing his death: and so are all means made use of, be it advice, persuasion, or command, to incite or encourage others to commit the fact or join in the attempt; and every person who but assenteth to any overtures for that purpose will be involved in the same guilt.

"The care the law hath taken for the personal safety of the king is not confined to actions or attempts of the more flagitious kind, to assassination or poison, or other attempts directly and immediately aiming at his life. It is extended to every thing wilfully and deliberately done or attempted whereby his life may be endangered; and therefore the entering into measures for deposing or imprisoning him, or to get his person into the power of the conspirators, these offences are overt acts of treason within this branch of the statute; for experience has shown that between the prisons and the graves of princes the distance is very small." Fost. 194.

This was the species of treason with which the state-prisoners were charged who were tried in 1794; and the question, as stated by the court for the jury to try, was, Whether their measures had been entered into with an intent to subvert the monarchy and to depose the king? See Hardy's Trial.—CHITTY.

[4] There was even a refinement and degree of subtlety in the cruelty of that case, for he wished it, horns and all, in the belly of him who counselled the king to kill it; and, as the king killed it of his own accord, or was his own counsellor, it was held to be a treasonable wish against the king himself. 1 Hal. P. C. 115.—CHRISTIAN.

ence to all the judges concerning some very atrocious words spoken by one Pyne, they certified to the king "that though the words were as wicked as might be, yet they were no treason; for, unless it be by some particular statute, no words will be treason."(*y*)[5] If the words be set down in writing, it argues more deliberate intention: and it has been held that writing is an overt act of treason; for *scribere est agere*. But even in this case the bare words are not the treason, but the deliberate act of writing them. And such writing, though unpublished, has, in some arbitrary reigns, convicted its author of treason; particularly in the cases of one Peachum, a clergyman, for treasonable passages in a sermon never preached,(*z*) and of Algernon Sydney, for some papers found in his closet, which, had they been plainly relative to any previous formed design of dethroning or murdering the king, might doubtless have been properly read in evidence as overt *acts of that treason which was specially laid in the indictment.(*a*) But being merely speculative, without any intention (so far as appeared) of making any public use of them, the convicting the authors of treason upon such an insufficient foundation has been universally disapproved. Peachum was therefore pardoned; and though Sydney, indeed, was executed, yet it was to the general discontent of the nation, and his attainder was afterwards reversed by parliament. There was then no manner of doubt but that the publication of such a treasonable writing was a sufficient overt act of treason at the common law;(*b*) though of late even that has been questioned.

*81]

2. The second species of treason is, "if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir." By the king's companion is meant his wife; and by violation is understood carnal knowledge, as well without force as with it: and this is high treason in both parties, if both be consenting, as some of the wives of Henry the Eighth by fatal experience evinced. The plain intention of this law is to guard the blood royal from any suspicion of bastardy, whereby the succession to the crown might be rendered dubious: and, therefore, when this reason ceases the law ceases with it; for to violate a queen or princess dowager is held to be no treason,(*c*)[6] in like manner as, by the feodal law, it was a felony, and attended with a forfeiture of the fief, if the vassal vitiated the wife or daughter of his lord,(*d*) but not so if he only vitiated his widow.(*e*)

3. The third species of treason is, "if a man do levy war against our lord the king, in his realm." And this may be done by taking arms, not only to dethrone the king, but under pretence to reform religion or the laws, or to remove evil counsellors, or other grievances, whether real or pretended.(*f*)[7] For the law does not, neither can it, permit *any private man, or set of men, to interfere forcibly in matters of such high importance, especially as it has

*82]

(*y*) Cro. Car. 125.
(*z*) Ibid.
(*a*) Foster, 198.
(*b*) 1 Hal. P. C. 118. 1 Hawk. P. C. 38.
(*c*) 3 Inst. 9.
(*d*) *Feud. l.* 1, *t.* 5.
(*e*) Ibid. *t.* 21.
(*f*) 1 Hawk. P. C. 37.

[5] This subject is fully and ably discussed by Mr. J. Foster, who maintains that words alone cannot amount to an overt act of treason: but if they are attended or followed by a consultation, meeting, or any act, then they will be evidence or a confession of the intent of such consultation, meeting, or act: and he concludes that "loose words, not relative to facts, are at the worst no more than bare indications of the malignity of the heart." Fost. 202, *et seq.*—Christian.

[6] But the instances specified in the statute do not prove much consistency in the application of this reason; for there is no protection given to the wives of the younger sons of the king, though their issue must inherit the crown before the issue of the king's eldest daughter; and her chastity is only inviolable before marriage, whilst her children would be clearly illegitimate.

Before the 25 Edw. III. it was held to be high treason not only to violate the wife and daughters of the king, but also the nurses of his children, *les norices de lour enfantz*. Britt. c. 8.—Christian.

[7] Lord Mansfield declared, upon the trial of lord George Gordon, that it was the unanimous opinion of the court that an attempt, by intimidation and violence, to force the repeal of a law was a levying war against the king, and high treason. Doug. 576.—Christian.

established a sufficient power for these purposes in the high court of parliament; neither does the constitution justify any private or particular resistance for private or particular grievances, though in cases of national oppression the nation has very justifiably risen as one man to vindicate the original contract subsisting between the king and his people. To resist the king's forces by defending a castle against them, is a levying of war; and so is an insurrection with an avowed design to pull down *all* enclosures, *all* brothels, and the like: the universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the king's authority.(*g*) But a tumult, with a view to pull down a particular house, or lay open a particular enclosure, amounts at most to a riot, this being no general defiance of public government. So, if two subjects quarrel, and levy war against each other, (in that spirit of private war which prevailed all over Europe(*h*) in the early feodal times,) it is only a great riot and contempt, and no treason. Thus it happened between the earls of Hereford and Gloster, in 20 Edw. I., who raised each a little army, and committed outrages upon each other's lands, burning houses, attended with the loss of many lives: yet this was held to be no high treason, but only a great misdemeanour.(*i*) A bare conspiracy to levy war does not amount to this species of treason; but (if particularly pointed at the person of the king, or his government) it falls within the first, of compassing or imagining the king's death.(*k*)

4. "If a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere," he is also declared guilty of high treason. This must likewise be proved by some overt act, as by giving them intelligence,[8] by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the *like.(*l*) By enemies are here [*83 understood the subjects of foreign powers with whom we are at open war. As to foreign pirates or robbers, who may happen to invade our coasts without any open hostilities between their nation and our own, and without any commission from any prince or state at enmity with the crown of Great Britain, the giving them any assistance is also clearly treason, either in the light of adhering to the public enemies of the king and kingdom,(*m*) or else in that of levying war against his majesty. And, most indisputably, the same acts of adherence or aid which (when applied to foreign enemies) will constitute treason under this branch of the statute will (when afforded to our own fellow-subjects in actual rebellion at home) amount to high treason under the description of levying war against the king.(*n*) But to relieve a rebel fled out of the kingdom is no treason; for the statute is taken strictly, and a rebel is not an *enemy;* an enemy being always the subject of some foreign prince, and one who owes no allegiance to the crown of England.(*o*) And if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with either rebels or enemies in the kingdom, provided he leaves them whenever he hath a safe opportunity.(*p*)[9]

(*g*) 1 Hal. P. C. 132.
(*h*) Robertson, Ch. V. i. 45, 286.
(*i*) 1 Hal. P. C. 136.
(*k*) 3 Inst. 9. Foster, 211, 213.
(*l*) 3 Inst. 10.
(*m*) Foster, 219.
(*n*) Ibid. 216.
(*o*) 1 Hawk. P. C. 38.
(*p*) Foster, 216.

[8] Sending intelligence to the enemy of the destinations and designs of this kingdom, in order to assist them in their operations against us or in defence of themselves, is high treason, although such correspondence should be intercepted. Dr. Hensey's case, 1 Burr. 650. The same doctrine was held by lord Kenyon and the court in the case of William Stone, who was tried at the bar of the court of King's Bench in Hilary Term, 1796. In that case it was held that sending a paper to the enemy, though it was afterwards intercepted, containing advice not to invade this country, if sent with the intention of assisting their councils in their conduct and in the prosecution of the war, was high treason. 6 T. R. 527.—CHRISTIAN.

[9] "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be con-

5. "If a man counterfeits the king's great or privy seal," this is also high treason. But if a man take wax bearing the impression of the great seal off from one patent, and fixes it to another, this is held to be only an abuse of the

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victed of treason unless on the testimony of two witnesses to the same overt act or on confession in open court." Const. U. S. art. iii. s. 3, pl. 1.

If any person or persons owing allegiance to the United States of America shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be convicted on confession in open court, or on the testimony of two witnesses to the same overt act of treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death. Act April 20, 1790, s. 1, 1 Story's Laws, 83.

However flagitious may be the crime of conspiring to subvert by force the government of the country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. If war be actually levied,—that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose,—all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose to constitute a levying of war. *Ex parte* Bollman, 4 Cranch, 126. United States *vs.* Burr, ibid. 469. People *vs.* Lynch, 1 Johns. 553.

Levying war is *direct* where the war is levied directly against the government with intent to overthrow it; *constructive*, where it is levied for the purpose of producing changes of a public and general nature by an armed force. Foster, 211. If a body of men conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States by force, they are only guilty of a high misdemeanour; but if they proceed to carry such an intention into execution by force, they are then guilty of treason by levying war. United States *vs.* Mitchell, 2 Dall. 348. To march in arms with a force marshalled and arrayed, committing acts of violence and devastation, in order to compel the resignation of a public officer and thereby render ineffective an act of Congress, is high treason, (Ibid. United States *vs.* Vigols, 2 Dall. 246;) but an insurrection to accomplish some *private* or particular purpose, as to deliver one or more particular persons out of prison, to compel a particular officer to resign, to resist or evade the revenue-laws by smuggling goods, is not treason. United States *vs.* Hanway, 2 Wall. Jr. 144.

The same principle is to be applied in construing the phrase *adhering to the enemies of the United States* as is adopted in the interpretation of the phrase *levying war*. Both were taken from the same English statute; and the rule laid down by Marshall, C. J., in Burr's case, that the common-law definitions were to be considered as authoritative, bears equally on either. Under the English statute, every assistance yielded by a citizen to the enemies of the government under which he lives, unless given from a well-grounded apprehension of immediate death in case of a refusal, is high treason within this branch of the statute. Therefore if citizens of the United States join public enemies in acts of hostility against this country, or even against its allies, or deliver up its castles, forts, or ships of war to its enemies through treachery or in combination with them, or join the enemy's forces, although no acts of hostility be committed by them, or raise troops for the enemy, or supply them with money, arms, or intelligence, although such money, intelligence, &c. be intercepted and never reach them, and delivering up prisoners and deserters to the enemy, are cases of adhering to the enemies of the United States, giving them aid and comfort. Wharton's Amer. Crim. Law, 886. United States *vs.* Hodges, 2 Dall. 87. Resp. *vs.* McCarty, ibid. 87.

Where an indictment for treason in adhering to the enemy charged the defendant with going from the British squadron to the State of Delaware, with intent to procure provisions for the squadron, it was held that this did not amount to treason, as this conduct rested in intention, which is not punishable by our laws. It would be otherwise if a person had carried provisions towards the enemy, with intent to supply him, though that intention should be defeated. If the intention of the defendant had been to procure provisions for the enemy, by uniting with him in hostilities against the citizens of the United States, his progressing towards the shore would have been an overt act of adhering to the enemy, though no other act was committed. The United States *vs.* Pryor, 3 Wash. C. C. Rep. 234.

But when the supreme authority is not able to afford the citizen protection, he may enter into an agreement of neutrality with a public enemy. Miller *vs.* Resolution, 2 Dall. 10. In civil wars every man chooses his party; but generally that side which prevails arrogates the right of treating those who are vanquished as rebels. The voice of the majority must be conclusive as to the adoption of a new system; but all the writers agree

seal, and not a counterfeiting of it; as was the case of a certain chaplain who in such manner framed a dispensation for non-residence. But the knavish artifice of a lawyer much exceeded this of the divine. One of the clerks in chancery glued together two pieces of parchment, on the uppermost of which he wrote a patent, to which he regularly obtained the great seal, the label going through both the skins. He *then dissolved the cement, and taking off the written patent, on the blank skin wrote a fresh patent of a different [*84 import from the former, and published it as true. This was held no counterfeiting of the great seal, but only a great misprision; and Sir Edward Coke(q) mentions it with some indignation that the party was living at that day.

6. The sixth species of treason under this statute is, "if a man counterfeit the king's money, and if a man bring false money into the realm counterfeit to the money of England, knowing the money to be false, to merchandise and make payment withal." As to the first branch, counterfeiting the king's money; this is treason, whether the false money be uttered in payment or not. Also, if the king's own minters alter the standard or alloy established by law, it is treason. But gold and silver money only are held to be within the statute.(r)[10] With regard likewise to the second branch, importing foreign counterfeit money in order to utter it here; it is held that uttering it, without importing it, is not within the statute.(s) But of this we shall presently say more.

7. The last species of treason ascertained by the statute is, "if a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices." These high magistrates, as they represent the king's majesty during the execution of their offices, are therefore for the time equally regarded by the law. But this statute extends only to the actual killing of them, and not wounding or a bare attempt to kill them. It extends also only to the officers therein specified; and therefore the barons of exchequer, as such, are not within the protection of this act:(t) but the lord keeper or commissioners of the great seal now seem to be within it, by virtue of the statutes 5 Eliz. c. 18, and 1 W. and M. c. 21.[11]

(q) 3 Inst. 16. (r) 1 Hawk. P. C. 42. (s) Ibid. 43. (t) 1 Hal. P. C. 231.

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that the minority have, individually, an unrestrainable right to remove with their property into another country; that a reasonable time for that purpose ought to be allowed; and, in short, that none are subjects of the adopted government who have not freely assented to it. Resp. *vs.* Chapman, 1 Dall. 58. See McIlvain *vs.* Coxe's Lessee, 2 Cranch, 279. 4 ibid. 209. Inglis *vs.* The Trustees of the Sailor's Snug Harbour, 3 Peters, 99.—SHARSWOOD.

[10] The moneys charged to be counterfeited must resemble the true and lawful coin; but this resemblance is a mere matter of fact, of which the jury are to judge upon the evidence before them,—the rule being that the resemblance need not be perfect, but such as may in circulation ordinarily impose upon the world. Thus, a counterfeiting with some little variation in the inscription, effigies, or arms, done probably with intent to evade the law, is yet within it; and so is the counterfeiting a different metal, if in appearance it be made to resemble the true coin. Hawk. b. 1, c. 17, s. 81. 1 Russ. 80. 1 Hale, 178, 184, 211, 215. 1 East, P. C. 163. Round blanks, without any impression, are sufficient, if they resemble the coin in circulation. 1 Leach, 285; and see 1 East, P. C. 164. But where the impression of money was stamped on an irregular piece of metal not rounded, without finishing it, so as not to be in a state to pass current, the offence was holden to be incomplete, although the prisoner had actually attempted to pass it in that condition. 2 Bla. Rep. 632; and see 1 Leach, 135.

In treason, as we have before seen, all concerned are in general principals, (1 Hale, 233:) but it has been doubted whether receivers of coiners are guilty of more than misprision of treason, (1 East, P. C. 94, &c.:) and on this doubt a convict was pardoned, (Dyer, 296, a.:) but it seems they are traitors, (1 East, P. C. 95,) except where accessories before; and principals in the second degree are expressly included in the terms of the act which creates the treason, when the construction has been in general lenient, according to the maxim *expressum facit cessare tacitum.* 1 East, P. C. 96. A party who agrees before the fact to receive and vend counterfeit coin is a principal traitor. 1 Hale, 214.—CHITTY.

[11] By the statute 7 Anne, c. 21, it is made high treason to slay any of the lords of ses-

*85] *Thus careful was the legislature, in the reign of Edward the Third, to specify and reduce to a certainty the vague notions of treason that had formerly prevailed in our courts. But the act does not stop here, but goes on. "Because other like cases of treason may happen in time to come, which cannot be thought of nor declared at present, it is accorded, that if any other cause supposed to be treason, which is not above specified, doth happen before any judge, the judge shall tarry without going to judgment of the treason till the cause be showed and declared before the king and his parliament whether it ought to be judged treason or other felony." Sir Matthew Hale(*u*) is very high in his encomiums on the great wisdom and care of the parliament in thus keeping judges within the proper bounds and limits of this act, by not suffering them to run out (upon their own opinions) into constructive treasons, though in cases that seem to them to have a like parity of reason, but reserving them to the decision of parliament. This is a great security to the public, the judges, and even this sacred act itself; and leaves a weighty *memento* to judges to be careful and not over-hasty in letting in treasons by construction or interpretation, especially in new cases that have not been resolved and settled. 2. He observes, that as the authoritative decision of these *casus omissi* is reserved to the king and parliament, the most regular way to do it is by a new declarative act; and therefore, the opinion of any one or of both houses, though of very respectable weight, is not that solemn declaration referred to by this act as the only criterion for judging of future treasons.

In consequence of this power, not indeed originally granted by the statute of Edward III., but constitutionally inherent in every subsequent parliament, (which cannot be abridged of any rights by the act of a precedent one,) the legislature was extremely liberal in declaring new treasons in the unfortunate reign of king Richard the Second; as, particularly the killing of an embassador *86] was made so; *which seems to be founded on better reason than the multitude of other points that were then strained up to this high offence; the most arbitrary and absurd of all which was by the statute 21 Ric. II. c. 3, which made the bare purpose and intent of killing or deposing the king, without any overt act to demonstrate it, high treason. And yet so little effect have over-violent laws to prevent any crime that within two years afterwards this very prince was both deposed and murdered. And in the first year of his successor's reign an act was passed,(*v*) reciting "that no man knew how he ought to behave himself, to do, speak, or say, for doubt of such pains of treason; and therefore it was accorded that in no time to come any treason be judged otherwise than was ordained by the statute of king Edward the Third." This at once swept away the whole load of extravagant treasons introduced in the time of Richard the Second.

But afterwards, between the reigns of Henry the Fourth and queen Mary, and particularly in the bloody reign of Henry the Eighth, the spirit of inventing new and strange treasons was revived: among which we may reckon the offences of clipping money; breaking prison or rescue when the prisoner is committed for treason; burning houses to extort money; stealing cattle by Welshmen; counterfeiting foreign coin; wilful poisoning; execrations against the king, calling him opprobrious names by public writing; counterfeiting the sign-manual or signet; refusing to abjure the pope; deflowering or marrying, without the royal license, any of the king's children, sisters, aunts, nephews, or nieces; bare solicitation of the chastity of the queen or princess, or advances

(*u*) 1 Hal. P. C. 259. (*v*) Stat. 1 Hen. IV. c. 10.

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sion, or lords of justiciary, sitting in judgment, or to counterfeit the king's seals appointed by the act of union. The statute 7 Anne, c. 21 has also enacted that the crimes of high treason and misprision of treason shall be exactly the same in England and Scotland; and that no acts in Scotland, except those above specified, shall be construed high treason in Scotland which are not high treason in England. And all persons prosecuted in Scotland for high treason or misprision of treason shall be tried by a jury, and in the same manner as if they had been prosecuted for the same crime in England.—Christian.

made by themselves; marrying with the king, by a woman not a virgin, without previously discovering to him such her unchaste life; judging or *believing* (manifested by any overt act) the king to have been lawfully married to Anne of Cleves; derogating from the king's royal style and title; impugning his supremacy; and assembling riotously to the *number of twelve and not dispersing upon proclamation: all which new-fangled treasons were totally [*87 abrogated by the statute 1 Mar. c. I, which once more reduced all treasons to the standard of the statute 25 Edw. III. Since which time, though the legislature has been more cautious in creating new offences of this kind, yet the number is very considerably increased, as we shall find upon a short review.[12]

These new treasons, created since the statute 1 Mar. c. 1, and not comprehended under the description of statute 25 Edw. III., I shall comprise under three heads. 1. Such as relate to papists. 2. Such as relate to falsifying the coin or other royal signatures. 3. Such as are created for the security of the Protestant succession in the house of Hanover.

1. The first species, relating to *papists*, was considered in a preceding chapter, among the penalties incurred by that branch of non-conformists to the national church; wherein we have only to remember that, by statute 5 Eliz. c. 1, to defend the pope's jurisdiction in this realm is, for the first time, a heavy misdemeanour; and if the offence be repeated it is high treason. Also, by statute 27 Eliz. c. 2, if any popish priest, born in the dominions of the crown of England, shall come over hither from beyond the seas, unless driven by stress of weather(*w*) and departing in a reasonable time;(*x*) or shall tarry here three days without conforming to the church and taking the oaths; he is guilty of high treason. And, by statute 3 Jac. I. c. 4, if any natural-born subject be withdrawn from his allegiance and reconciled to the pope or see of Rome, or any other prince or state, both he and all such as procure such reconciliation shall incur the guilt of high treason. These were mentioned under the division before referred to as spiritual offences, and I now repeat them as temporal ones also; the reason of distinguishing these overt acts of popery from all others, by setting the mark of high treason upon them, being certainly on a civil and not on a religious account. For every popish priest of course renounces his allegiance to his *temporal sovereign upon taking orders; [*88 that being inconsistent with his new engagements of canonical obedience to the pope; and the same may be said of an obstinate defence of his authority here, or a formal reconciliation to the see of Rome, which the statute construes to be a withdrawing from one's natural allegiance; and therefore, besides being reconciled "to the pope," it also adds, "or any other prince or state."[13]

(*w*) Sir T. Raym. 377. (*x*) Latch. 1.

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[12] The 1 Mar. c. 1 was only a confirmation so far of a much more important statute,—viz., 1 Edw. VI. c. 12.—CHRISTIAN.

See the statute 36 Geo. III. c. 7, (rendered perpetual by 57 Geo. III. c. 6,) confirming the statute of 25 Edw. III.—CHITTY.

[13] In consequence of insults and outrages which had been publicly offered to the person of the king, and of the great multitude of seditious publications aiming at the overthrow of the government of this country, and also of the frequent seditious meetings and assemblies held at that time to destroy the security and tranquillity of the public, two acts of parliament were passed in the 36th year of his present majesty's reign,—one (c. 7) entitled "An act for the safety and preservation of his majesty's person and government against treasonable and seditious practices and attempts;" and the other (c. 8) "An act the more effectually preventing seditious meetings and assemblies."

By the first it was enacted that if any person should compass, imagine, or intend death, destruction, or any bodily harm to the person of the king, or to depose him, or to levy war, in order by force to compel him to change his measures or counsels, or to overawe either house of parliament, or to excite an invasion of any of his majesty's dominions, and shall express and declare such intentions by printing, writing, or any overt act, he shall suffer death as a traitor.

And if any one, by writing, printing, preaching, or other speaking, shall use any words or sentences to excite the people to hatred and contempt of the king, or of the government and constitution of this realm, he shall incur the punishment of a high misdemeanour,—that is, fine, imprisonment, and pillory; and for a second offence he is sub-

2. With regard to treasons relative to the *coin* or other *royal signatures*, we may recollect that the only two offences respecting the coinage, which are made treason by the statute 25 Edw. III., are the actual counterfeiting the gold and silver coin of this kingdom, or the importing such counterfeit money with intent to utter it, knowing it to be false. But, these not being found sufficient to restrain the evil practices of coiners and false moneyers, other statutes have been since made for that purpose. The crime itself is made a species of high treason; as being a breach of allegiance, by infringing the king's prerogative and assuming one of the attributes of the sovereign, to whom alone it belongs to set the value and denomination of coin made at home, or to fix the currency of foreign money: and besides, as all money which bears the stamp of the kingdom is sent into the world upon the public faith, as containing metal of a particular weight and standard, whoever falsifies this is an offender against the state by contributing to render that public faith suspected. And upon the same reasons, by a law of the emperor Constantine,(*y*) false coiners were declared guilty of high treason, and were condemned to be burned alive: as, by the laws of Athens,(*z*) all counterfeiters, debasers, and diminishers of the current coin were subjected to capital punishment. However, it must be owned that this method of reasoning is a little overstrained: counterfeiting or debasing the coin being usually practised rather for the sake of private and unlawful lucre than *89] out of any disaffection for the sovereign. And *therefore both this and its kindred species of treason, that of counterfeiting the seals of the crown or other royal signatures, seem better denominated by the later civilians a branch of the *crimen falsi* or forgery, (in which they are followed by Glanvil,(*a*) Bracton,(*b*) and Fleta,(*c*)) than by Constantine and our Edward the Third, a species of the *crimen læsæ majestatis*, or high treason. For this confounds the distinction and proportion of offences; and, by affixing the same ideas of guilt upon the man who coins a leaden groat and him who assassinates his sovereign, takes off from that horror which ought to attend the very mention of the crime of high treason, and makes it more familiar to the subject. Before the statute 25 Edw. III. the offence of counterfeiting the coin was held to be only a species of petit treason;(*d*) but subsequent acts, in their new extensions of the offence, have followed the example of that statute, and have made it equally high treason, with an endeavour to subvert the government, though not quite equal in its punishment.

In consequence of the principle thus adopted, the statute 1 Mar. c. 1 having at one stroke[14] repealed all intermediate treasons created since the 25 Edw. III., it was thought expedient, by statute 1 Mar. st. 2, c. 6, to revive two species thereof, viz.: 1. That if any person falsely forge or counterfeit any such kind of coin, of gold or silver, as is not the proper coin of this realm, but shall be current within this realm by consent of the crown; or, 2, shall falsely forge or counterfeit the sign-manual, privy signet, or privy seal; such offences shall be deemed high treason. And, by statute 1 & 2 P. and M. c. 11, if any persons do bring into this realm such false or counterfeit foreign money, being current here, knowing the same to be false, with intent to utter the same in payment, they

(*y*) C. 9, 24. 2 *Cod. Theod. de falsa moneta, l.* 9.
(*z*) Pott. Antiq. b. i. c. 26.
(*a*) *L.* 14, c. 7.
(*b*) *L.* 3, c. 3, §§ 1, 2.
(*c*) *L.* 1, c. 22.
(*d*) 1 Hal. P. C. 224.

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ject to a similar punishment, or transportation for seven years, at the discretion of the court.

But a prosecution for a misdemeanour under this act must be brought within six months. And this statute shall not affect any prosecution for the same crimes by the common law, unless a prosecution be previously commenced under the statute.—Christian.

The contagion of French revolutionary principles in 1795 gave occasion for the passing of these acts. The last of them was passed for three years only; and of the former ss. 1, 5, 6 are made perpetual by 57 Geo. III. c. 6: the rest is expired.—Chitty.

[14] This was done far more effectually six years before by 1 Edw. VI. c. 12. The object of the above statute, by this needless repetition, seems only an endeavour to continue to Mary the popularity which had so justly been gained by her brother.—Chitty.

shall be deemed offenders in high treason. The money referred to in these statutes must be such as is absolutely current here, in all payments, by the king's proclamation; of which there is none at present, Portugal money being only taken by *consent, as approaching the nearest to our standard, and falling in well enough with our divisions of money into pounds and shillings: therefore to counterfeit it is not high treason, but another inferior offence. [*90 Clipping or defacing the genuine coin was not hitherto included in these statutes; though an offence equally pernicious to trade, and an equal insult upon the prerogative, as well as personal affront to the sovereign, whose very image ought to be had in reverence by all loyal subjects. And therefore, among the Romans,(e) defacing or even melting down the emperor's statues was made treason by the Julian law; together with other offences of the like sort, according to that vague conclusion, "*aliudve quid simile si admiserint.*" And now, in England, by statute 5 Eliz. c. 11, clipping, washing, rounding, or filing, for wicked gain's sake, any of the money of this realm, or other money suffered to be current here, shall be adjudged high treason; and, by statute 18 Eliz. c. 1, (because "the same law, being penal, ought to be taken and expounded strictly according to the words thereof, and the like offences, not by any equity to receive the like punishment or pains,") the same species of offences is therefore described in other more general words, viz.: impairing, diminishing, falsifying, scaling, and lightening; and made liable to the same penalties. By statute 8 & 9 W. III. c. 26, made perpetual by 7 Anne, c. 25, whoever, without proper authority, shall knowingly make or mend, or assist in so doing, or shall buy, sell, conceal, hide, or knowingly have in his possession, any implements of coinage specified in the act, or other tools or instruments proper only for the coinage of money,[15] or shall convey the same out of the king's mint; he, together with his counsellors, procurers, aiders, and abettors, shall be guilty of high treason, which is by much the severest branch of the coinage-law. The statute goes on further, and enacts that to mark any coin on the edges with letters, or otherwise, in imitation of those used in the mint; or to colour, gild, or case over any coin resembling the current coin, or even round blanks of base metal; shall be construed high treason. But all prosecutions on this act are to be commenced within *three* *months after the commission of the offence;[16] except those for making or amending any coining tool or instrument, or for marking money round the edges; which are directed to be commenced within *six* months after the offence committed.(f)[17] And, lastly, by statute 15 & 16 Geo. II. c. 28, [*91

(e) *Ff.* 48, 4, 6.

(f) Stat. 7 Anne, c. 25.

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[15] As to what tools or instruments are within the act, see Fost. 430. 1 East, P. C. 170, 171. 1 Leach. 189. A mould for coining is within the act. 1 East, P. C. 170. So is a press for coinage. Fost. 430. By the 8 & 9 W. III. c. 26, s. 5, the tools, &c. may be seized to produce in evidence.—CHITTY.

[16] And it is incumbent on the prosecutor to show the prosecution was commenced within that time. Proof by *parol* that the prisoner was apprehended for treason respecting the coin within the three months will not be sufficient, if the indictment is after the three months, and the warrant to apprehend or commit is produced. Russ. & R. C. C. 369.—CHITTY.

[17] If a person is apprehended in the act of coining, or is proved to have made considerable progress in making counterfeit pieces resembling the gold or silver coin of this realm, yet if they are so imperfect as that no one would take them, he cannot be convicted upon the charge of coining under this statute, (Leach, 71, 126;) but he may be convicted if he has made blank pieces without any impression to the similitude of silver coin worn smooth by time. Welch's case, ibid. 293. Or if any one shall put pieces of mixed metal into aqua-fortis,—which attracts the baser metal and leaves the silver upon the surface, or, as the vulgar say, draws out the silver,—this is held to be colouring under this statute. Lavey's case, ibid. 140.

In a case at Durham, where a man had been committed more than three months before his trial, for an offence under this statute, and upon conviction his case was reserved for the opinion of the judges, they determined that the commitment was the commencement of the prosecution, otherwise this crime might be committed with impunity half the year in the four northern counties. See further, *ante*, 84.—CHRISTIAN.

if any person colours or alters any shilling or sixpence, either lawful or counterfeit, to make them respectively resemble a guinea or half-guinea, or any halfpenny or farthing, to make them respectively resemble a shilling or sixpence; this is also high treason; but the offender shall be pardoned in case (being out of prison) he discovers and convicts two other offenders of the same kind.[18]

3. The other species of high treason is such as is created for the security of the *Protestant succession* over and above such treasons against the king and government as were comprised under the statute 25 Edw. III. For this purpose, after the act of settlement was made for transferring the crown to the illustrious house of Hanover, it was enacted, by statute 13 & 14 W. III. c. 3, that the pretended prince of Wales, who was then thirteen years of age and had assumed the title of king James III., should be attainted of high treason; and it was made high treason for any of the king's subjects, by letters, messages, or otherwise, to hold correspondence with him or any person employed by him, or to remit any money for his use, knowing the same to be for his service. And by statute 17 Geo. II. c. 39, it is enacted that, if any of the sons of the pretender shall land or attempt to land in this kingdom, or be found in Great Britain, or Ireland, or any of the dominions belonging to the same, he shall be judged attainted of high treason, and suffer the pains thereof. And to correspond with them, or to remit money for their use, is made high treason in the same manner as it was to correspond with the father. By the statute 1 Anne, st. 2, c. 17, if any person shall endeavour to deprive or hinder any person being the next in succession to the crown, according to the limitations of the act of settlement, from succeeding to the crown, and shall maliciously and directly attempt the same by any *overt act, such offence shall be high treason. And by statute 6 Anne, c. 7, if any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm that any other person hath any right or title to the crown of this realm otherwise than according to the act of settlement, or that the kings of this realm with the authority of parliament are not able to make laws and statutes to bind the crown and the descent thereof, such person shall be guilty of high treason. This offence (or indeed maintaining this doctrine in any wise, that the king and parliament cannot limit the crown) was once before made high treason, by statute 13 Eliz. c. 1, during the life of that princess. And after her decease it continued a high misdemeanour, punishable with forfeiture of goods and chattels, even in the most flourishing era of indefeasible hereditary right and *jure divino* succession. But it was again raised into high treason, by the statute of Anne before mentioned, at the time of a projected invasion in favour of the then pretender; and upon this statute one Matthews, a printer, was convicted and executed in 1719, for printing a treasonable pamphlet entitled "*vox populi vox Dei.*"(g)

*92]

Thus much for the crime of treason, or *læsæ majestatis*, in all its branches; which consists, we may observe, originally, in grossly counteracting that allegiance which is due from the subject by either birth or residence; though, in some instances, the zeal of our legislators to stop the progress of some highly pernicious practices has occasioned them a little to depart from this its primitive idea. But of this enough has been hinted already: it is now time to pass on from defining the crime to describing its punishment.

The punishment of high treason in general is very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk; though usually (by connivance,(h) at length ripened by humanity into law) a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement.(i) 2. That he *be hanged by the neck, and then cut down alive. 3. That his entrails be taken out and burned while he is yet alive. 4. That his head be cut off. 5. That his

*93]

(g) State Tr. ix. 680.
(h) 33 Ass. pl. 7.
(i) 1 Hal. P. C. 382.

[18] But all these statutes have been repealed, the offence to which they relate being now reduced to a felony, by stat. 2 W. IV. c. 34.—Stewart.

body be divided into four parts. 6. That his head and quarters be at the king's disposal.(*k*)

The king may, and often doth, discharge all the punishment, except beheading, especially where any of noble blood are attainted. For beheading being part of the judgment, that may be executed, though all the rest be omitted by the king's command.(*l*) But where beheading is no part of the judgment, as in murder or other felonies, it hath been said that the king cannot change the judgment, although at the request of the party, from one species of death to another.(*m*) But of this we shall say more hereafter.(*n*)

In the case of coining, which is a treason of a different complexion from the rest, the punishment is milder for male offenders, being only to be drawn and hanged by the neck till dead.(*o*) But in treasons of every kind the punishment of women is the same, and different from that of men. For, as the decency due to the sex forbids the exposing and publicly mangling their bodies, their sentence (which is to the full as terrible to sensation as the other) is, to be drawn to the gallows, and there to be burned alive.(*p*)[19]

The consequence of this judgment (attainder, forfeiture, and corruption of blood) must be referred to the latter end of this book, when we shall treat of them all together, as well in treason as in other offences.

CHAPTER VII.

OF FELONIES INJURIOUS TO THE KING'S PREROGATIVE.

*As, according to the method I have adopted, we are next to consider such *felonies* as are more immediately injurious to the king's prerogative, it will not be amiss here, at our first entrance upon this crime, to inquire briefly into the nature and meaning of *felony*, before we proceed upon any of the particular branches into which it is divided. [*94

Felony, in the general acceptation of our English law, comprises every species of crime which occasioned at common law the forfeiture of lands and goods. This most frequently happens in those crimes for which a capital punishment either is or was liable to be inflicted; for those felonies which are called clergyable, or to which the benefit of clergy extends, were antiently punished with death in all lay or unlearned offenders, though now, by the statute-law, that punishment is for the first offence universally remitted. Treason itself, says Sir Edward Coke,(*a*) was antiently comprised under the name felony; and in confirmation of this, we may observe that the statute of treasons, 25 Edw. III.

(*k*) This punishment for treason. Sir Edward Coke tells us, is warranted by divers examples in Scripture: for Joab was drawn, Bithan was hanged, Judas was embowelled, and so of the rest. 3 Inst. 211.

(*l*) 1 Hal. P. C. 351.

(*m*) 3 Inst. 52.

(*n*) See ch. 32.

(*o*) 1 Hal. P. C. 351.

(*p*) 2 Hal. P. C. 399.

(*a*) 3 Inst. 15.

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[19] But now, by the statute 30 Geo. III. c. 48, *women* convicted in all cases of treason shall receive judgment to be drawn to the place of execution, and there to be hanged by the neck till dead. Before this humane statute, women, from the remotest times, were sentenced to be burned alive for every species of treason:—*Et si nule femme de ascune treson soit attainte, soit ars.* Britt. c. 8.—CHRISTIAN.

And now, by 54 Geo. III. c. 146, the judgment against a man for high treason is, in effect, that he shall be drawn on a hurdle to the place of execution, and be there hanged by the neck until he be dead; and that afterwards his head shall be severed from his body, and his body, divided into four quarters, shall be disposed of as the king shall think fit, with power to the king, by special warrant, in part to alter the punishment. A month's time has been allowed between sentence and execution, (1 Burr. 650, 651;) but the last executions for this offence followed (and properly so, for the purpose of example) more closely upon conviction. Thistlewood and his fellow-conspirators were condemned and executed within a few days after their trial.—CHITTY.

*95] c. 2, speaking of some dubious crimes, directs a reference to parliament, *that it may there be adjudged "whether they be treason, or *other* felony." All treasons, therefore, strictly speaking, are felonies, though all felonies are not treason. And to this also we may add, that not only all offences now capital are in some degree or other felony, but that this is likewise the case with some other offences, which are not punished with death, as suicide, where the party is already dead; homicide by chance-medley, or in self-defence; and petit larceny, or pilfering; all which are (strictly speaking) felonies, as they subject the committers of them to forfeitures. So that, upon the whole, the only adequate definition of felony seems to be that which is before laid down, viz., an offence which occasions a total forfeiture of either lands or goods, or both, at the common law, and to which capital or other punishment may be superadded, according to the degree of guilt.

To explain this matter a little further: the word *felony*, or *felonia*, is of undoubted feodal original, being frequently to be met with in the books of feuds, &c.; but the derivation of it has much puzzled the juridical lexicographers, Prateus, Calvinus, and the rest; some deriving it from the Greek φηλος, an impostor or deceiver; others from the Latin *fallo, fefelli*, to countenance which they would have it called *fallonia*. Sir Edward Coke, as his manner is, has given us a still stranger etymology;(*b*) that it is *crimen animo felleo perpetratum*, with a bitter or gallish inclination. But all of them agree in the description that it is such a crime as occasions a forfeiture of all the offender's lands or goods. And this gives great probability to Sir Henry Spelman's Teutonic or German derivation of it;(*c*) in which language, indeed, as the word is clearly of feodal original, we ought rather to look for its signification, than among the Greeks and Romans. *Fe-lon*, then, according to him, is derived from two northern words: **fee**, which signifies (we well know) the fief, feud, or beneficiary estate, and **lon**, which sig-
*96] nifies price or value. Felony is therefore the same as *pretium feudi*, the *consideration for which a man gives up his fief. As we say in common speech, such an act is as much as your life or estate is worth. In this sense it will clearly signify the feodal forfeiture, or act by which an estate is forfeited or escheats to the lord.[1]

To confirm this, we may observe that it is in this sense of forfeiture to the lord that the feodal writers constantly use it. For all those acts, whether of a criminal nature or not, which at this day are generally forfeitures of copyhold estates,(*d*) are styled *felonia* in the feodal law: "*scilicet, per quas feudum amittitur.*"(*e*) As, "*si domino deservire noluerit;*(*f*) *si per annum et diem cessaverit in petenda investitura;*(*g*) *si dominum ejuravit*, i.e. *negavit se a domino feudum habere;*(*h*) *si a domino, in jus eum vocante, ter citatus non comparuerit;*"(*i*) all these, with many others, are still causes of forfeiture in our copyhold estates, and were denominated felonies by the feodal constitutions. So likewise injuries of a more substantial or criminal nature were denominated felonies, that is, forfeitures; as, assaulting or beating the lord;(*k*) vitiating his wife or daughter, "*si dominum cucurbitaverit*, i.e. *cum uxore ejus concubuerit;*"(*l*) all these are esteemed felonies, and the latter is expressly so denominated, "*si fecerit feloniam, dominum forte cucurbitando.*"(*m*) And as these contempts, or smaller offences, were felonies or acts of forfeiture, of course greater crimes, as murder and robbery, fell under the same denomination. On the other hand, the lord might be guilty of felony, or forfeit his seignory to the vassal, by the same acts as the vassal would have forfeited his feud to the lord. "*Si dominus commisit feloniam, per quam vasallus amitteret feudum si eam commiserit in dominum, feudi proprietatem etiam dominus*

(*b*) 1 Inst. 391.
(*c*) Gloss. tit. *Felon.*
(*d*) See book ii. page 284.
(*e*) *Feud. l.* 2, *t.* 16, *in calc.*
(*f*) Ibid. *l.* 1, *t.* 21.
(*g*) Ibid. *l.* 2, *t.* 24.
(*h*) Ibid. *l.* 2, *t.* 34. *l.* 2, *t.* 26, § 3.
(*i*) Ibid. *l.* 2, *t.* 22.
(*k*) Ibid. *l.* 2, *t.* 24, § 2.
(*l*) Ibid. *l.* 1, *t.* 5.
(*m*) Ibid. *l.* 2, *t.* 38. Britton, *l.* 1, c. 22.

[1] But a forfeiture of land is not a necessary consequence of felony; for petit larceny is felony, which does not produce a forfeiture of lands; but every species of felony is followed by forfeiture of goods and personal chattels.—Christian.

perdere debet."(*n*) One instance given of this sort of felony in the lord is beating the servant of his vassal so as that he loses his services; which seems merely in the nature of a civil *injury, so far as it respects the vassal. And all these felonies were to be determined "*per laudamentum sive judicium parium suorum,*" in the lord's court; as with us forfeitures of copyhold lands are presentable by the homage in the court-baron. [*97

Felony, and the act of forfeiture to the lord, being thus synonymous terms in the feodal law, we may easily trace the reason why, upon the introduction of that law into England, those crimes which induced such forfeiture or escheat of lands (and, by small deflection from the original sense, such as induced the forfeiture of goods also) were denominated felonies. Thus, it was said that suicide, robbery, and rape were felonies; that is, the consequence of such crimes was forfeiture; till by long use we began to signify by the term felony the actual crime committed, and not the penal consequence. And upon this system only can we account for the cause why treason in antient times was held to be a species of felony: viz., because it induced a forfeiture.

Hence it follows that capital punishment does by no means enter into the true idea and definition of felony. Felony may be without inflicting capital punishment as in the cases instanced of self-murder, excusable homicide, and petit larceny; and it is possible that capital punishments may be inflicted and yet the offence be no felony; as in case of heresy by the common law, which, though capital, never worked any forfeiture of lands or goods,(*o*) an inseparable incident to felony. And of the same nature was the punishment of standing mute without pleading to an indictment, which at the common law was capital, but without any forfeiture, and therefore such standing mute was no felony. In short, the true criterion of felony is forfeiture; for, as Sir Edward Coke justly observes,(*p*) in all felonies which are punishable with death the offender loses all his lands in fee-simple and also his goods and chattels; in such as are not so punishable, his goods and chattels only.

*The idea of felony is, indeed, so generally connected with that of capital punishment that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore, if a statute makes any new offence felony, the law(*q*) implies that it shall be punished with death, viz., by hanging, as well as with forfeiture; unless the offender prays the benefit of clergy; which all felons are entitled once to have, provided the same is not expressly taken away by statute.[2] And, in compliance herewith, I shall for the future consider it also in the same light as a generical term, including all capital crimes below treason; having premised thus much concerning the true nature and original meaning of felony, in order to account for the reason of those instances I have mentioned, of felonies that are not capital, and capital offences that are not felonies; which seem at first view repugnant to the general idea which we now entertain of felony as a crime to be punished by death; whereas, properly, it is a crime to be punished by forfeiture, and to which death may or may not be, though it generally is, superadded. [*98

I proceed now to consider such felonies as are more immediately injurious to the king's prerogative. These are, 1. Offences relating to the coin, not amounting to treason. 2. Offences against the king's council. 3. The offence of serving a foreign prince. 4. The offence of embezzling or destroying the king's armour or stores of war. To which may be added a fifth: 5. Desertion from the king's armies in time of war.

(*n*) *Fitz. l.* 2 *t.* 26 and 47.
(*o*) 3 Inst. 43.
(*p*) 1 Inst. 391.
(*q*) 1 Hawk. P. C. 107. 2 Hawk. P. C. 444.

[2] The criminal law has been considerably ameliorated, however, in this respect, by the statute 8 Geo. IV. c. 28, s. 8, which enacts that any person convicted of felony not punishable with death shall be punished in the same manner prescribed by the statute or statutes especially relating to such felony; and that every person convicted of a felony for which *no* punishment has been or may be specially provided shall be deemed to be punishable under that statute, and be liable to transportation for seven years, or imprisonment (with whipping, if the court think fit) for any term not exceeding two years. —KERR.

1. Offences relating to the *coin*, under which may be ranked some inferior misdemeanours not amounting to felony, are thus declared by a series of statutes which I shall recite in the order of time. And, first, by statute 27 Edw. I. c. 3, none shall bring pollards and crockards, which were foreign coins of base metal, into the realm, on pain of forfeiture of life and goods. By statute 9 Edw. III. st. 2, no sterling money shall be melted down, upon pain of forfeit-
*99] ure thereof. *By statute 17 Edw. III., none shall be so hardy to bring false and ill money into the realm, on pain of forfeiture of life and member by the persons importing, and the searchers permitting such importation.[3] By statute 3 Hen. V. st. 1, to make, coin, buy, or bring into the realm any gally-half-pence, fuskins, or dotkins, in order to utter them, is felony; and knowingly to receive or pay either them or *blanks*(*r*) is forfeiture of a hundred shillings. By statute 14 Eliz. c. 3, such as forge any foreign coin, although it be not made current here by proclamation, shall (with their aiders and abettors) be guilty of misprision of treason; a crime which we shall hereafter consider.[4] By statute 13 & 14 Car. II. c. 31, the offence of melting down any current silver money shall be punished with forfeiture of the same, and also the double value; and the offender, if a freeman of any town, shall be disfranchised; if not, shall suffer six months' imprisonment. By statute 6 & 7 W. III. c. 17, if any person buys or sells, or knowingly has in his custody, any clippings or filings of the coin, he shall forfeit the same and 500*l.*, one moiety to the king and the other to the informer, and be branded in the cheek with the letter R. By statute 8 & 9 W. III. c. 26, if any person shall blanch or whiten copper for sale, (which makes it resemble silver,) or buy or sell, or offer to sell, any malleable composition which shall be heavier than silver and look, touch, and wear like gold, but be beneath the standard; or if any person shall receive or pay at a less rate than it imports to be of (which demonstrates a consciousness of its baseness, and a fraudulent design) any counterfeit or diminished milled money of this kingdom, not being cut in pieces; (an operation which is expressly directed to be performed when any such money shall be produced in evidence, and which any person, to whom any gold or silver money is tendered, is empowered, by statutes 9 & 10 W. III. c. 21, 13 Geo. III. c. 71, and 14 Geo. III. c. 70, to perform at his own hazard, and the officers of the exchequer and receivers-general of the taxes are

(*r*) 2 Stat. Hen VI. c. 9.

[3] Repealed, by 59 Geo. III. c. 49, s. 10, which enacts "that it shall and may be lawful for any person or persons to export the gold or silver coin of the realm to parts beyond the seas, and also to melt the gold, and silver coin of the realm, and to manufacture or export, or otherwise dispose of, the gold or silver bullion produced thereby: and no person who shall export or melt such gold or silver coin, or who shall manufacture, export, or dispose of such bullion, shall be subject to any restriction, forfeiture, pain, penalty, incapacity, or disability whatever for or in respect of such melting, manufacturing, or exporting the same respectively; any thing in any act or acts in force in Great Britain or Ireland to the contrary thereof in any wise notwithstanding."—Chitty.

[4] The importation of foreign bad coin is further provided against. Thus, by the 37 Geo. III. c. 126, s. 2, coining or counterfeiting any kind of coin not the proper coin of the realm, nor *permitted to be current* (*id est*, by proclamation under great seal) within it, but resembling, or made with intent to resemble or look like, any gold or silver coin of any foreign state, &c., or to pass as such foreign coin, is a felony punishable with seven years' transportation. And, by the same act, (sect. 6,) having in custody, without lawful excuse, more than five pieces of bad coin, is punishable with a forfeiture of not exceeding 5*l.* nor less than 40*s.* for every piece. By section 3, importing counterfeit gold or silver foreign coin, not current, with intent to utter, is felony, punishable with transportation for not exceeding seven years. Importing with an *intent* to utter is a sufficient offence within the act, (1 East, P. C. 176;) and, by 43 Geo. III. c. 139, s. 3, counterfeiting foreign coin not current by proclamation, but resembling copper or mixed metal coin of a foreign state, is a misdemeanour, punishable for the first offence by not exceeding one year's imprisonment, and, for the second, transportation for seven years. And sect. 6 inflicts a penalty of not exceeding 40*s.* nor less than 10*s.* for every such piece of coin in possession of a person who shall have more than five pieces in his custody without lawful excuse. And, by sect. 7, houses of suspected persons may be searched by warrant for such counterfeit coin.

See also 3 Geo. IV. c. 114.—Chitty.

particularly required to perform;) all such persons shall be guilty of felony, and may be prosecuted for the same at any time within three months after the offence committed.[5] *But these precautions not being found sufficient to prevent the uttering of false or diminished money, which was only a misdemeanour at common law, it is enacted, by statute 15 & 16 Geo. II. c. 28, that if any person shall utter or tender in payment[6] any counterfeit coin, knowing it so to be, he shall for the first offence be imprisoned six months, and find sureties for his good behaviour for six months more; for the second offence, shall be imprisoned two years, and find sureties for two years longer; and for the third offence, shall be guilty of felony without benefit of clergy.[7] Also, if a person knowingly tenders in payment any counterfeit money, and at the same time has more in his custody, or shall, within ten days after, knowingly tender other false money, he shall be deemed a common utterer of [*100

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[5] Selling base and counterfeit money at a lower rate than its denomination imports—as twenty bad half-crowns for a guinea—is a crime of great magnitude, and in populous towns is much practised. The offender in this case is either the coiner himself, or the wholesale dealer between the coiner and the utterer, who puts each piece into circulation at its full apparent value. The statute declares that the offender shall *suffer death as in case of felony;* but, not having expressly taken away the benefit of clergy, for the first offence he was subject only to be burned in the hand, and to suffer any imprisonment not exceeding a year; and, since the 19 Geo. III. c. 74, the burning in the hand may be changed by the court into a fine, or whipping publicly or privately, but not more than three times. An offender of this description must necessarily be so conversant with coining or coiners that public policy requires that in the first instance he should be sent out of the kingdom.

It has been determined that the term *milled money* does not mean edged money, or money marked on the edges.

The word *milled* seems to be superfluous, and to signify nothing more than coined money. Running's case, Leach, 708.

In a case where the prisoner had counted out a quantity of bad money and placed it upon a table for a person who had agreed to buy it, but before it was paid for, and whilst it lay upon the table, the prisoner was apprehended, it was held that he had not *paid it or put it off*, so as to be guilty of this crime. Wooldridge's case, Leach, 251.

But in this case he certainly might have been prosecuted for a misdemeanour; for every attempt to commit either a felony or a misdemeanour is a misdemeanour. R. *vs.* Scofield, Cald. 397.

The R. *vs.* Sutton, 2 Stra. 1074, which is the basis of the cases R. *vs.* Scofield and R. *vs.* Higgins, 2 East, 5, is precisely in point upon this subject. A man was convicted of a misdemeanour for having in his possession two iron stamps, with intent to impress the sceptres on sixpences. The court, after hearing two arguments, declared "the intent is the offence, and the having in his custody is an act that is the evidence of that intent."

This case is more fully reported in *Cases in the Time of Lord Hardwicke*, 370; and there it appears that one count was for having in his custody a counterfeit half-guinea, with intent to utter it. The court take no notice of that count in their judgment; but in the argument four indictments are cited, for unlawfully procuring false money with intent to utter it, and with intent to defraud the people of England.

The words in the statute 15 & 16 Geo. II. are, "shall utter, or tender in payment;" and it has been decided that the words "*in payment*" refer to the word "*tender*" only; so that to tender in payment is one offence, and to utter is another; and a man was convicted of *uttering* who having received a good shilling immediately changed it and gave back a bad one, insisting it was the one he received. Frank's case, Leach, 736.

If a man is prosecuted for having uttered or tendered in payment any false money, and for having done the same within ten days afterwards, these two acts must be charged in one count. Tandy's case, Leach, 970.

But it is not necessary to aver in such count that the defendant was a common utterer of false money. Smith's case, ib. 1001.—CHRISTIAN.

[6] It is now settled that the mere act of *having* counterfeit silver in possession, with an intent to utter it as good, is no offence, for there is *no criminal act done*, (Russ. & R. C. C. 184, 288;) but *procuring* base coin, with intent to utter it as good, is a misdemeanour; and having a large quantity of such coin is evidence of having procured it with such intent, unless there are other circumstances to induce a suspicion that the defendant was the maker. Russ. & R. C. C. 308.—CHITTY.

[7] By the 3 Geo. IV. c. 114, the prisoner may be sentenced to hard labour. The reward given by the 15 Geo. II. c. 7 is taken away by 58 Geo. III. c. 70.—CHITTY.

counterfeit money, and shall for the first offence be imprisoned one year, and find sureties for his good behaviour for two years longer, and for the second be guilty of felony without benefit of clergy. By the same statute, it is also enacted, that if any person counterfeits the copper coin he shall suffer two years' imprisonment, and find sureties for two years more. By statute 11 Geo. III. c. 40, persons counterfeiting copper half-pence or farthings, with their abettors, or buying, selling, receiving, or putting off any counterfeit copper money (not being cut in pieces or melted down) at a less value than it imports to be of, shall be guilty of single felony.[8] And by a temporary statute, (14 Geo. III. c. 42,) if any quantity of money, exceeding the sum of five pounds, being or purporting to be the silver coin of this realm, but below the standard of the mint in weight or fineness, shall be imported into Great Britain or Ireland, the same shall be forfeited in equal moieties to the crown and prosecutor.[9] Thus much for offences relating to the coin, as well misdemeanours as felonies, which I thought it most convenient to consider in one and the same view.

2. Felonies against the king's *council(s)* are these: First, by statute 3 Hen. VII. c. 14, if any sworn servant of the king's household conspires or confederates to kill any lord of this *realm, or other person, sworn of the king's council, he shall be guilty of felony. Secondly, by statute 9 Anne, c. 16, to assault, strike, wound, or attempt to kill any privy counsellor in the execution of his office is made felony without benefit of clergy.[10]

*101]

3. Felonies in *serving foreign states*, which service is generally inconsistent with allegiance to one's natural prince, are restrained and punished by statute 3 Jac. I. c. 4, which makes it felony for any person whatever to go out of the realm, to serve any foreign prince, without having first taken the oath of allegiance before his departure. And it is felony also for any gentleman, or person of higher degree, or who hath borne any office in the army, to go out of the realm to serve such foreign prince or state, without previously entering into a bond, with two sureties, not to be reconciled to the see of Rome, or enter into any conspiracy against his natural sovereign. And further, by statute 9 Geo. II. c. 30, enforced by statute 29 Geo. II. c. 17, if any subject of Great Britain shall enlist himself, or if any person shall procure him to be enlisted, in any foreign service, or detain or embark him for that purpose, without license under the king's sign-manual, he shall be guilty of felony without benefit of clergy; but if the person so enlisted or enticed shall discover his seducer within fifteen days, so as he may be apprehended and convicted of the same, he shall be indemnified. By statute

(*) See book i. page 334.

[8] The 15 & 16 Geo. II. c. 28 and the 11 Geo. III. c. 40 specify *half-pence* and *farthings* only; but, other pieces of copper money having been since coined, the provisions of those statutes, by the 37 Geo. III. c. 126, are extended to all other pieces of copper money which are ordered to be current by the king's proclamation. A remarkable error is made in two different pages of Mr. East's publication upon criminal law, which states the punishment for coining copper money, and for selling counterfeit money for less than its denomination imports to be, only burning in the hand and imprisonment not exceeding a year. 1 East. P. C. 162, 181. But the punishment before the 19 Geo. III. in all cases of felony which had the benefit of clergy was burning in the hand, and imprisonment for any time, at the discretion of the judge, not more than for one year, under the 18 Eliz. c. 7, s. 3. By the 19 Geo. III. c. 74, burning in the hand may be changed at the discretion of the judge into a fine, or whipping not more than three times. See p. 372, *post*.—Christian.

[9] This statute, by the 39 Geo. III. c. 74, is revived and made perpetual.—Christian.

But these statutes are all repealed by two recent statutes, (2 W. IV. c. 34 and 1 Vict. c. 90,) by which the law relating to the offence of coining is now declared and regulated. —Stewart.

[10] This latter statute was enacted in consequence of Mr. Harley, the Secretary of State being stabbed by Anthony Guiscard, a French marquis, while under examination before the privy council. See an account of this in one of the Examiners, by Dean Swift.—Archbold.

By stat. 9 Geo. IV. c. 31, these statutes are repealed: and (s. 11) all attempts to kill are made capital offences, without any distinction as to the rank of the party, with the exception of the king and the royal family.—Stewart.

29 Geo. II. c. 17, it is moreover enacted that to serve under the French king as a military officer shall be felony without benefit of clergy; and to enter into the Scotch brigade in the Dutch service, without previously taking the oaths of allegiance and abjuration, shall be a forfeiture of 500*l.*[11]

4. Felony by *embezzling* or *destroying* the king's *armour* or warlike *stores* is, in the first place, so declared to be by statute 31 Eliz. c. 4, which enacts that if any person having the charge or custody of the king's armour, ordnance, ammunition, or habiliments of war, or of any victual, provided for victualling the king's soldiers or mariners, shall, either for gain, or to impede his majesty's service, embezzle the same *to the value of twenty shillings, such offence shall be felony. And the statute 22 Car. II. c. 5 takes away the benefit of clergy from this offence,[12] and from stealing the king's naval stores to the value of twenty shillings; with a power for the judge, after sentence, to transport the offender for seven years. Other inferior embezzlements and misdemeanours that fall under this denomination are punished, by statutes 9 & 10 W. III. c. 41, 1 Geo. I. c. 25, 9 Geo. I. c. 8, and 17 Geo. II. c. 40, with fine, corporal punishment, and imprisonment.[13] And, by statute 12 Geo. III. c. 24, to set on fire, burn, or destroy any of his majesty's ships of war, whether built, building, or repairing; or any of the king's arsenals, magazines, dock-yards, rope-yards, or victualling-offices, or materials thereunto belonging; or military, naval, or victualling stores, or ammunition; or causing, aiding, procuring, abetting, or assisting in such offence, shall be felony without benefit of clergy. [*102

5. Desertion from the king's armies in time of war, whether by land or sea, in England, or in parts beyond the sea, is, by the standing laws of the land, (exclusive of the annual acts of parliament to punish mutiny and desertion,) and particularly by statute 18 Hen. VI. c. 19, and 5 Eliz. c. 5, made felony, but not without benefit of clergy. But, by the statute 2 & 3 Edw. VI. c. 2, clergy is taken away from such deserters, and the offence is made triable by the justices of every shire. The same statutes punish other inferior military offences with fines, imprisonment, and other penalties.[14]

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[11] These statutes of 9 Geo. II. and 29 Geo. II. are repealed by the 59 Geo. III. c. 69, which re-enacts and adds to their provisions; and by it the entering into, or agreeing to enter into, the aid of a foreign prince or people, &c. in any warlike capacity whatever, or going abroad with that intent, or attempting to get others to do so, is a misdemeanour, and punishable by fine or imprisonment, or both; and a penalty of 50*l.* is imposed on masters of ships and owners for assisting in the offence. There are further provisions for preventing the offence.—CHITTY.

[12] This provision of the statute 22 Car. II. c. 5, which takes away the benefit of the clergy, is repealed by the 5 Geo. IV. c. 53; and offenders may be transported for life, or for not less than seven years, or imprisoned, with or without hard labour, for not exceeding seven years.—CHITTY.

[13] By the 39 & 40 Geo. III. c. 89, s. 1, persons, other than contractors, receiving or having stores of war in their possession, may be transported for fourteen years; and, by sect. 2, persons convicted of offences against the 9 & 10 W. III. may, in addition to the punishment thereby to be inflicted, be punished with whipping and imprisonment, or either; but the penalty may be mitigated.—CHITTY.

[14] To this class of felonies injurious to the king's prerogative may be added two felonies lately created by the legislature, who thought it expedient to repress the attempts of mischievous and disaffected persons by transportation or capital punishment. The 37 Geo. III. c. 70 (revived and made perpetual by the 57 Geo. III. c. 7) enacts that if any person shall maliciously and advisedly endeavour to *seduce* any person serving in her majesty's service by sea or land from his duty and allegiance, or to incite any person to commit any act of mutiny or mutinous practice, he shall be guilty of felony, and shall suffer death without benefit of clergy. The crime, wherever committed, may be tried in any county. A sailor in a sick-hospital, where he had been for thirty days, and therefore not entitled to pay, nor liable for what he then does to a court-martial, is a person serving in the king's forces by sea, within the 37 Geo. III., so as to make the seducing him an offence within that act. Russ. & R. C. C. 76.—CHRISTIAN.

CHAPTER VIII.

OF PRÆMUNIRE.

*103] *A THIRD species of offence more immediately affecting the king and his government, though not subject to capital punishment, is that of *præmunire*, so called from the words of the writ preparatory to the prosecution thereof: "*præmunire (a) facias A. B.*" cause A. B. to be forewarned that he appear before us to answer the contempt wherewith he stands charged: which contempt is particularly recited in the preamble to the writ. *b*.[1] It took its original from the exorbitant power claimed and exercised in England by the pope, which, even in the days of blind zeal, was too heavy for our ancestors to bear.

It may justly be observed that religious principles, which (when genuine and pure) have an evident tendency to make their professors better citizens as well as better men, have (when perverted and erroneous) been usually subversive of civil government, and been made both the cloak and the instrument of every pernicious design that can be harboured in the heart of man. The unbounded authority that was exercised by the Druids in the west, under the influence of pagan superstition, and the terrible ravages committed by the Saracens in the east, to propagate the religion of Mahomet, both witness to the truth of that antient universal observation, that, in all ages and in all countries, civil and ecclesiastical tyranny are mutually productive of each other. It is, therefore, the glory of the church of England that she inculcates due obedience to lawful *104] authority, and hath been (as her prelates, on *a trying occasion, once expressed it (c)) in her principles and practice ever most unquestionably loyal. The clergy of her persuasion, holy in their doctrines and unblemished in their lives and conversation, are also moderate in their ambition, and entertain just notions of the ties of society and the rights of civil government. As in matters of faith and morality they acknowledge no guide but the Scriptures, so, in matters of external polity and of private right, they derive all their title from the civil magistrate; they look up to the king as their head, to the parliament as their lawgiver, and pride themselves in nothing more justly than in being true members of the church, emphatically *by law* established. Whereas the notions of ecclesiastical liberty, in those who differ from them, as well in one extreme as the other, (for I here only speak of extremes,) are equally and totally destructive of those ties and obligations by which all society is kept together: equally encroaching on those rights which reason and the original contract of every free state in the universe have vested in the sovereign power; and equally aiming at a distinct independent supremacy of their own, where spiritual men and spiritual causes are concerned. The dreadful effects of such a religious bigotry, when actuated by erroneous principles, even of the Protestant kind, are sufficiently evident from the history of the anabaptists in Germany, the covenanters in Scotland, and that deluge of sectaries in England who murdered their sovereign, overturned the church and monarchy, shook every pillar of law, justice, and private property, and most devoutly established a kingdom of the saints in their stead. But these horrid devastations, the effects of mere madness, or of zeal that was nearly allied to it, though violent and tumultuous, were but of a short duration. Whereas the progress of the papal policy, long actuated by the steady counsels of successive pontiffs, took deeper root, and was at length in some places with difficulty, in others never yet, extirpated. For this we might call to witness the black intrigues of the Jesuits, so lately triumphant over Christendom, but now universally abandoned by even

(a) A barbarous word for *præmoneri*.[1]
(b) Old Nat. Brev. 101, edit. 1534.
(c) Address to James II. 1687

[1] *Præmunio*, in law-Latin, is used in all its tenses and participles for *præmoneo* or *cito*. Ducange Gloss.—CHRISTIAN.

the Roman Catholic powers; but the subject of our present *chapter rather leads us to consider the vast strides which were formerly made in [*105 this kingdom by the popish clergy; how nearly they arrived to effecting their grand design; some few of the means they made use of for establishing their plan; and how almost all of them have been defeated or converted to better purposes by the rigour of our free constitution and the wisdom of successive parliaments.

The antient British church, by whomsoever planted, was a stranger to the bishop of Rome and all his pretended authority. But, the pagan Saxon invaders having driven the professors of Christianity to the remotest corners of our island, their own conversion was afterwards effected by Augustin the monk, and other missionaries from the court of Rome. This naturally introduced some few of the papal corruptions in point of faith and doctrine; but we read of no civil authority claimed by the pope in these kingdoms till the era of the Norman conquest, when the then reigning pontiff having favoured duke William in his projected invasion by blessing his host and consecrating his banners, he took that opportunity also of establishing his spiritual encroachments, and was even permitted so to do by the policy of the conqueror, in order more effectually to humble the Saxon clergy and aggrandize his Norman prelates; prelates who, being bred abroad in the doctrine and practice of slavery, had contracted a reverence and regard for it, and took a pleasure in riveting the chains of a free-born people.

The most stable foundation of legal and rational government is a due subordination of rank and a gradual scale of authority; and tyranny also itself is most surely supported by a regular increase of despotism, rising from the slave to the sultan; with this difference, however, that the measure of obedience in the one is grounded on the principles of society, and is extended no further than reason and necessity will warrant; in the other it is limited only by absolute will and pleasure, without permitting the inferior to examine the title upon which it is founded. More effectually, therefore, to enslave the consciences and minds of the people, the Romish *clergy themselves paid the most implicit obedience to their own superiors or prelates; and they, in their [*106 turns, were as blindly devoted to the will of the sovereign pontiff, whose decisions they held to be infallible, and his authority coextensive with the Christian world. Hence his legates *a latere* were introduced into every kingdom of Europe; his bullies and decretal epistles became the rule both of faith and discipline; his judgment was the final resort in all cases of doubt or difficulty; his decrees were enforced by anathemas and spiritual censures; he dethroned even kings that were refractory, and denied to whole kingdoms (when undutiful) the exercise of Christian ordinances and the benefits of the gospel of God.

But, though the being spiritual head of the church was a thing of great sound, and of greater authority, among men of conscience and piety, yet the court of Rome was fully apprized that (among the bulk of mankind) power cannot be maintained without property; and therefore its attention began very early to be riveted upon every method that promised pecuniary advantage. The doctrine of purgatory was introduced, and with it the purchase of masses to redeem the souls of the deceased. New-fangled offences were created, and indulgences were sold to the wealthy for liberty to sin without danger. The canon law took cognizance of crimes, enjoined penance *pro salute animæ*, and commuted that penance for money. Non-residence and pluralities among the clergy, and marriages among the laity related within the seventh degree, were strictly prohibited by canon; but dispensations were seldom denied to those who could afford to buy them. In short, all the wealth of Christendom was gradually drained by a thousand channels into the coffers of the holy see.

The establishment also of the feodal system in most of the governments of Europe, whereby the lands of all private proprietors were declared to be holden of the prince, gave a hint to the court of Rome for usurping a similar authority over all the preferments of the church, which began first in Italy, and gradu-

*107] ally spread itself to England. The pope became a *feodal lord, and all ordinary patrons were to hold their right of patronage under this universal superior. Estates held by feodal tenure, being originally gratuitous donations, were at that time denominated *beneficia;* their very name, as well as constitution, was borrowed, and the care of the souls of a parish thence came to be denominated a *benefice.* Lay fees were conferred by investiture or delivery of corporal possession; and spiritual benefices, which at first were universally donative, now received in like manner a spiritual investiture by institution from the bishop, and induction under his authority. As lands escheated to the lord in defect of a legal tenant, so benefices lapsed to the bishop, upon non-presentation by the patron, in the nature of a spiritual escheat. The annual tenths collected from the clergy were equivalent to the feodal render, or rent reserved upon a grant; the oath of canonical obedience was copied from the oath of fealty required from the vassal by his superior; and the *primer seisins* of our military tenures, whereby the first profits of an heir's estate were cruelly extorted by his lord, gave birth to as cruel an exaction of first-fruits from the beneficed clergy. And the occasional aids and talliages levied by the prince on his vassals gave a handle to the pope to levy, by the means of his legates *a latere,* Peter-pence and other taxations.

At length the holy father went a step beyond any example of either emperor or feodal lord. He reserved to himself, by his own apostolical authority,(*d*) the presentation to all benefices which became vacant while the incumbent was attending the court of Rome upon any occasion, or on his journey thither or back again; and moreover such also as became vacant by his promotion to a bishopric or abbey: "*etiamsi ad illa personæ consueverint et debuerint per electionem aut quemvis alium modum assumi.*" And this last, the canonists declared, was no detriment at all to the patron, being only like the change of a life in a feodal estate by the lord. Dispensations to avoid these vacancies begat the doctrine of *commendams;* and papal *provisions* were the previous nomination to such *108] benefices, by a kind of anticipation, before they *became actually void, though afterwards indiscriminately applied to any right of patronage exerted or usurped by the pope. In consequence of which, the best livings were filled by Italian and other foreign clergy, equally unskilled in and adverse to the laws and constitution of England. The very nomination to bishoprics, that antient prerogative of the crown, was wrested from king Henry the First, and afterwards from his successor, king John, and seemingly, indeed, conferred on the chapters belonging to each see; but, by means of the frequent appeals to Rome, through the intricacy of the laws which regulated canonical elections, was eventually vested in the pope. And, to sum up this head with a transaction most unparalleled and astonishing in its kind, pope Innocent III. had at length the effrontery to demand, and king John had the meanness to consent to, a resignation of his crown to the pope, whereby England was to become forever St. Peter's patrimony; and the dastardly monarch reaccepted his sceptre from the hands of the papal legate, to hold as the vassal of the holy see at the annual rent of a thousand marks.

Another engine set on foot, or at least greatly improved, by the court of Rome, was a master-piece of papal policy. Not content with the ample provision of tithes which the law of the land had given to the parochial clergy, they endeavored to grasp at the lands and inheritances of the kingdom, and (had not the legislature withstood them) would by this time have probably been masters of every foot of ground in the kingdom. To this end they introduced the monks of the Benedictine and other rules, men of sour and austere religion, separated from the world and its concerns by a vow of perpetual celibacy, yet fascinating the minds of the people by pretences to extraordinary sanctity, while all their aim was to aggrandize the power and extend the influence of their grand superior, the pope. And as, in those times of civil tumult, great rapines and violence were daily committed by overgrown lords and their adherents, they were taught to believe that founding a monastery a little be-

(*d*) *Extrav. l.* 3, *t.* 2, c. 13.

fore their death would atone for a life of incontinence, disorder, and bloodshed. Hence innumerable abbeys and religious houses were built within a *century after the conquest, and endowed not only with the tithes of [*109 parishes which were ravished from the secular clergy, but also with lands, manors, lordships, and extensive baronies. And the doctrine inculcated was, that whatever was so given to, or purchased by, the monks and friars, was consecrated to God himself; and that to alienate or take it away was no less than the sin of sacrilege.

I might here have enlarged upon other contrivances, which will occur to the recollection of the reader, set on foot by the court of Rome for effecting an entire exemption of its clergy from any intercourse with the civil magistrate: such as the separation of the ecclesiastical court from the temporal; the appointment of its judges by merely spiritual authority, without any interposition from the crown; the exclusive jurisdiction it claimed over all ecclesiastical persons and causes; and the *privilegium clericale*, or benefit of clergy, which delivered all clerks from any trial or punishment except before their own tribunal. But the history and progress of ecclesiastical courts,(*e*) as well as of purchases in mortmain,(*f*) have already been fully discussed in the preceding book; and we shall have an opportunity of examining at large the nature of the *privilegium clericale* in the progress of the present one. And therefore I shall only observe at present, that notwithstanding this plan of pontifical power was so deeply laid, and so indefatigably pursued by the unwearied politics of the court of Rome through a long succession of ages; notwithstanding it was polished and improved by the united endeavours of a body of men who engrossed all the learning of Europe for centuries together; notwithstanding it was firmly and resolutely executed by persons the best calculated for establishing tyranny and despotism, being fired with a bigoted enthusiasm, (which prevailed not only among the weak and simple, but even among those of the best natural and acquired endowments,) unconnected with their fellow-subjects, and totally indifferent to what might befall that posterity to which they bore no endearing relation: yet it vanished into *nothing when the eyes of the people were a little [*110 enlightened, and they set themselves with vigour to oppose it. So vain and ridiculous is the attempt to live in society without acknowledging the obligations which it lays us under, and to affect an entire independence of that civil state which protects us in all our rights, and gives us every other liberty, that only excepted of despising the laws of the community.

Having thus in some degree endeavoured to trace out the original and subsequent progress of the papal usurpations in England, let us now return to the statutes of *præmunire*, which were framed to encounter this overgrown yet increasing evil. King Edward I., a wise and magnanimous prince, set himself in earnest to shake off this servile yoke.(*g*) He would not suffer his bishops to attend a general council till they had sworn not to receive the papal benediction. He made light of all papal bulles and processes; attacking Scotland in defiance of one, and seizing the temporalities of his clergy, who, under pretence of another, refused to pay a tax imposed by parliament. He strengthened the statutes of mortmain, thereby closing the great gulf in which all the lands of the kingdom were in danger of being swallowed. And, one of his subjects having obtained a bulle of excommunication against another, he ordered him to be executed as a traitor, according to the antient law.(*h*) And in the thirty-fifth year of his reign was made the first statute against papal provisions, being, according to Sir Edward Coke,(*i*) the foundation of all the subsequent statutes of *præmunire*, which we rank as an offence immediately against the king, because every encouragement of the papal power is a diminution of the authority of the crown.

In the weak reign of Edward the Second the pope again endeavoured to encroach, but the parliament manfully withstood him; and it was one of the principal articles charged against that unhappy prince, that he had given allowance

(*e*) See book iii. page 61.
(*f*) See book ii. page 268.
(*g*) Dav. 83, &c.
(*h*) Bro. Abr. tit. *Corone*, 115; *Treason*, 14. 5 R. p. 1, fol. 12. 3 Ass. 19.
(*i*) 2 Inst. 583.

to the bulles of the see of Rome. But Edward the Third was of a temper extremely different: and, to remedy these *inconveniences first by gentle means, he and his nobility wrote an expostulation to the pope; but receiving a menacing and contemptuous answer, withal acquainting him that the emperor, (who a few years before, at the diet of Nuremberg, A.D. 1323, had established a law against provisions,)(k) and also the king of France, had lately submitted to the holy see, the king replied that if both the emperor and the French king should take the pope's part, he was ready to give battle to them both in defence of the liberties of the crown. Hereupon more sharp and penal laws were devised against provisors,(l) which enact, severally, that the court of Rome shall not present or collate to any bishopric or living in England; and that whoever disturbs any patron in the presentation to a living by virtue of a papal provision, such provisor shall pay fine and ransom to the king at his will, and be imprisoned till he renounces such provision; and the same punishment is inflicted on such as cite the king, or any of his subjects, to answer in the court of Rome. And when the holy see resented these proceedings, and pope Urban V. attempted to revive the vassalage and annual rent to which king John had subjected his kingdom, it was unanimously agreed by all the estates of the realm, in parliament assembled, 40 Edw. III., that king John's donation was null and void, being without the concurrence of parliament, and contrary to his coronation-oath: and all the temporal nobility and commons engaged, that if the pope should endeavour by process or otherwise to maintain these usurpations, they would resist and withstand him with all their power.(m)

*111]

In the reign of Richard the Second it was found necessary to sharpen and strengthen these laws, and therefore it was enacted, by statutes 3 Ric. II. c. 3, and 7 Ric. II. c. 12, first, that no alien should be capable of letting his benefice to farm; in order to compel such as had crept in, at least to reside on their preferments; and afterwards, that no alien *should be capable to be presented to any ecclesiastical preferment, under the penalty of the statutes of provisors. By the statute 12 Ric. II. c. 15, all liegemen of the king, accepting of a living by any foreign provision, are put out of the king's protection, and the benefice made void. To which the statute 13 Ric. II. st. 2, c. 2 adds banishment and forfeiture of lands and goods: and, by c. 3 of the same statute, any person bringing over any citation or excommunication from beyond sea on account of the execution of the foregoing statutes of provisors shall be imprisoned, forfeit his goods and lands, and moreover suffer pain of life and member.

*112]

In the writ for the execution of all these statutes the words *præmunire facias*, being (as we said) used to command a citation of the party, have denominated in common speech not only the writ, but the offence itself of maintaining the papal power, by the name of *præmunire*. And accordingly the next statute I shall mention, which is generally referred to by all subsequent statutes, is usually called the statute of *præmunire*. It is the statute 16 Ric. II. c. 5, which enacts that whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulles, instruments, or other things which touch the king, against him, his crown, and realm, and all persons aiding and assisting therein, shall be put out of the king's protection, their lands and goods forfeited to the king's use, and they shall be attached by their bodies to answer to the king and his council; or process of *præmunire facias* shall be made out against them as in other cases of provisors.

By the statute 2 Hen. IV. c. 3, all persons who accept any provision from the pope, to be exempt from canonical obedience to their proper ordinary, are also subjected to the penalties of *præmunire*. And this is the last of our antient statutes touching this offence; the usurped civil power of the bishop of Rome being pretty well broken down by these statutes, as his usurped religious power was in about a century afterwards; the spirit of the nation being so much raised

(k) Mod. Un. Hist. xxix. 293.
(l) Stat 25 Edw. III. st. 6. 27 Edw. III. st. 1, c. 1. 38 Edw. III. st. 1, c. 4. and st. 2, c. 1, 2, 3, 4.
(m) Seld. in Flet. 10, 4.

*against foreigners that about this time, in the reign of Henry the Fifth, the alien priories, or abbeys for foreign monks, were suppressed, and their lands given to the crown. And no further attempts were afterwards made in support of these foreign jurisdictions. [*113

A learned writer, before referred to, is therefore greatly mistaken when he says(n) that in Henry the Sixth's time the archbishop of Canterbury, and other bishops, offered to the king a large supply if he would consent that all laws against provisors, and especially the statute 16 Ric. II., might be repealed, but that this motion was rejected. This account is incorrect in all its branches. For, first, the application, which he probably means, was made not by the bishops only, but by the unanimous consent of a provisional synod assembled in 1439, 18 Hen. VI., that very synod which at the same time refused to confirm and allow a papal bulle which then was laid before them. Next, the purport of it was not to procure a repeal of the statutes against provisors, or that of Richard II. in particular; but to request that the penalties thereof, which by forced construction were applied to all that sued in the spiritual, and even in many temporal, courts of this realm might be turned against the proper objects only: those who appealed to Rome, or to any foreign jurisdictions; the tenor of the petition being, "that those penalties should be taken to extend only to those that commenced any suits or procured any writs or public instruments at Rome, or elsewhere out of England; and that no one should be prosecuted upon that statute for any suit in the spiritual courts or lay jurisdictions of this kingdom." Lastly, the motion was so far from being rejected that the king promised to recommend it to the next parliament, and in the mean time that no one should be molested upon this account. And the clergy were so satisfied with their success that they granted to the king a whole tenth upon this occasion.(o)

*And, indeed, so far was the archbishop, who presided in this synod, from countenancing the usurped power of the pope in this realm, that he was ever a firm opposer of it. And, particularly in the reign of Henry the Fifth, he prevented the king's uncle from being then made a cardinal and legate *a latere* from the pope; upon the mere principle of its being within the mischief of papal provisions, and derogatory from the liberties of the English church and nation. For, as he expressed himself to the king in his letter upon that subject, "he was bound to oppose it by his ligeance, and also to quit himself to God and the church of this land, of which God and the king had made him governor." This was not the language of a prelate addicted to the slavery of the see of Rome; but of one who was indeed of principles so very opposite to the papal usurpations that in the year preceding this synod, 17 Hen. VI., he refused to consecrate a bishop of Ely that was nominated by pope Eugenius IV. A conduct quite consonant to his former behaviour, in 6 Hen. VI., when he refused to obey the commands of pope Martin V., who had required him to exert his endeavours to repeal the statute of *præmunire*, ("*execrabile illud statutum*," as the holy father phrases it;) which refusal so far exasperated the court of Rome against him that at length the pope issued a bulle to suspend him from his office and authority, which the archbishop disregarded and appealed to a general council. And so sensible were the nation of their primate's merit that the lords spiritual and temporal, and also the university of Oxford, wrote letters to the pope in his defence; and the house of commons addressed the king to send an embassador forthwith to his holiness on behalf of the archbishop, who had incurred the displeasure of the pope for opposing the excessive power of the court of Rome.(p) [*114

*This, then, is the original meaning of the offence which we call *præmunire*, viz., introducing a foreign power into this land, and creating *imperium in imperio* by paying that obedience to papal process which constitutionally [*115

(n) Dav. 96.
(o) Wilk. *Concil. Mag. Brit.* iii. 533.
(p) See Wilk. *Concil. Mag. Brit.* vol. iii. *passim*, and Dr. Duck's Life of Archbishop Chichele, who was the prelate here spoken of, and the munificent founder of All-Souls College in Oxford, in vindication of whose memory the author hopes to be excused this digression.—if indeed it be a digression to show how contrary to the sentiments of so learned and pious a prelate, even in the days of popery, those usurpations were which the statutes of *præmunire* and provisors were made to restrain.

belonged to the king alone, long before the reformation in the reign of Henry the Eighth; at which time the penalties of *præmunire* were indeed extended to more papal abuses than before, as the kingdom then entirely renounced the authority of the see of Rome, though not all the corrupted doctrines of the Roman church. And therefore, by the several statutes of 24 Hen. VIII. c. 12, and 25 Hen. VIII. c. 19 & 21, to appeal to Rome from any of the king's courts, which (though illegal before) had at times been connived at, to sue to Rome for any license or dispensation, or to obey any process from thence, are made liable to the pains of *præmunire*. And, in order to restore to the king in effect the nomination of vacant bishoprics, and yet keep up the established forms, it is enacted, by statute 25 Hen. VIII. c. 20, that if the dean and chapter refuse to elect the person named by the king, or any archbishop or bishop to confirm or consecrate him, they shall fall within the penalties of the statutes of *præmunire*. Also, by statute 5 Eliz. c. 1, to refuse the oath of supremacy will incur the pains of *præmunire;* and to defend the pope's jurisdiction in this realm is a *præmunire* for the first offence, and high treason for the second. So too, by statute 13 Eliz. c. 2, to import any *agnus Dei*, crosses, beads, or other superstitious things pretended to be hallowed by the bishop of Rome, and tender the same to be used; or to receive the same with such intent and not discover the offender; or if a justice of the peace, knowing thereof, shall not within fourteen days declare it to a privy counsellor, they all incur *præmunire*.[2] But importing or selling mass-books, or other popish books, is, by statute 3 Jac. I. c. 5, § 25, only liable to the penalty of forty shillings. Lastly, to contribute to the maintenance of a Jesuit's college, or any popish seminary whatever, beyond sea, or any person in the same, or to contribute to the maintenance of any Jesuit or popish priest in England, is by statute 27 Eliz. c. 2 made liable to the penalties of *præmunire*.

*116] *Thus far the penalties of *præmunire* seem to have kept within the proper bounds of their original institution, the depressing the power of the pope: but, they being pains of no inconsiderable consequence, it has been thought fit to apply the same to other heinous offences, some of which bear more and some less relation to this original offence, and some no relation at all.

Thus, 1. By the statute 1 & 2 Ph. and Mar. c. 8, to molest the possessors of abbey lands granted by parliament to Henry the Eighth and Edward the Sixth is a *præmunire*. 2. So likewise is the offence of acting as a broker or agent in any usurious contract, when above ten per cent. interest is taken, by statute 13 Eliz. c. 8.[3] 3. To obtain any stay of proceedings, other than by arrest of judgment or writ of error, in any suit for a monopoly, is likewise a *præmunire*, by statute 21 Jac. I. c. 3. 4. To obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, is also a *præmunire*, by two statutes; the one 16 Car. I. c. 21, the other 1 Jac. II. c. 8.[4] 5. On the abolition, by statute 12 Car. II. c. 24, of purveyance,(*q*) and the prerogative of pre-emption, or taking any victual, beasts, or goods, for the king's use, at a stated price, without consent of the proprietor, the exertion of any such power for the future was declared to incur the penalties of *præmunire*. 6. To assert maliciously and advisedly, by speaking or writing, that both or either house of parliament have a legislative authority without the king, is declared a *præmunire* by statute 13 Car. II. c. 1. 7. By the *habeas corpus* act also, 31 Car. II. c. 2, it is a *præmunire*, and incapable of the king's pardon, besides other heavy penalties,(*r*) to send any subject of this realm a prisoner into parts beyond the seas. 8. By the statute 1 W. and M. st. 1, c. 8, persons of eighteen years of age refusing to take the new oaths of allegiance, as well as supremacy, upon tender

(*q*) See book i. page 287. (*r*) See book i. p. 138. Book iii. page 137.

[2] Repealed by statute 8 & 9 Vict. c. 59.—Stewart.

[3] This act was made perpetual by the 39 Eliz. c. 18, ss. 30, 32; but, though not expressly repealed, yet it seems to have virtually expired since the 12 Anne, st. 2, c. 16, s. 1.—Chitty.

[4] By the second section of 1 Jac. II. c. 8, the importation must be with the king's license, (except from Ireland, by the 46 Geo. III. c. 121.)—Chitty.

Repealed by 6 Geo. IV. c. 105.—Stewart.

by the proper magistrate, are subject to the penalties of a *præmunire;*[5] and by statute 7 & 8 *W. III. c. 24, serjeants, counsellors, proctors, attorneys, and all officers of courts practising without having taken the oaths of [*117 allegiance and supremacy and subscribing the declaration against popery, are guilty of a *præmunire*, whether the oaths be tendered or no. 9. By the statute 6 Anne, c. 7, to assert maliciously and directly, by preaching, teaching, or advised speaking, that the then pretended prince of Wales, or any person other than according to the acts of settlement and union, hath any right to the throne of these kingdoms, or that the king and parliament cannot make laws to limit the descent of the crown, such preaching, teaching, or advised speaking is a *præmunire;* as writing, printing, or publishing the same doctrines amounted, we may remember, to high treason. 10. By statute 6 Anne, c. 23, if the assembly of peers in Scotland, convened to elect their sixteen representatives in the British parliament, shall presume to treat of any other matter save only the election, they incur the penalties of a *præmunire.* 11. The statute 6 Geo. I. c. 18 (enacted in the year after the infamous South-Sea project had beggared half the nation) makes all unwarrantable undertakings by unlawful subscriptions, then commonly known by the names of bubbles, subject to the penalties of a *præmunire.*[6] 12. The statute 12 Geo. III. c. 11 subjects to the penalties of the statute of *præmunire* all such as knowingly and wilfully solemnize, assist, or are present at any forbidden marriage of such of the descendants of the body of king George II. as are by that act prohibited to contract matrimony without the consent of the crown.(*s*)

Having thus inquired into the nature and several species of *præmunire*, its punishment may be gathered from the foregoing statutes, which are thus shortly summed up by Sir Edward Coke:(*t*) "that from the conviction the defendant shall be out of the king's protection, and his lands and tenements, goods and chattels, forfeited to the king; and that his body shall remain in prison *at the king's pleasure;* *or (as other authorities have it) *during* [*118 *life:*"(*u*) both which amount to the same thing; as the king by his prerogative may any time remit the whole or any part of the punishment, except in the case of transgressing the statute of *habeas corpus.* These forfeitures here inflicted do not (by the way) bring this offence within our former definition of felony, being inflicted by particular statutes and not by the common law. But so odious, Sir Edward Coke adds, was this offence of *præmunire* that a man that was attainted of the same might have been slain by any other man without danger of law; because it was provided by law(*w*) that any man might do to him as to the king's enemy; and any man may lawfully kill an enemy. However, the position itself, that it is at any time lawful to kill an enemy, is by no means tenable: it is only lawful, by the law of nature and nations, to kill him in the heat of battle or for necessary self-defence. And to obviate such savage and mistaken notions,(*x*) the statute 5 Eliz. c. 1 provides that it shall not be lawful to kill any person attainted in a *præmunire*, any law, statute, opinion, or exposition of law to the contrary notwithstanding.[7] But still such delinquent, though protected as a part of the public from public wrongs, can bring no action for any private injury, how atrocious soever, being so far out of the protection of the law that it will not guard his civil rights nor remedy any

(*s*) See book i. ch. 4.
(*t*) 1 Inst. 129.
(*u*) 1 Bulst. 199.
(*w*) Stat. 25 Edw. III. st. 5, c. 22.
(*x*) Bro. Abr. tit. *Corone*, 196.

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[5] By the 31 Geo. I. c. 32, s. 18, it is enacted that no persons shall be summoned to take the oath of supremacy, or make the declaration against transubstantiation, or be prosecuted for not obeying the summons for that purpose.—CHRISTIAN.

[6] By the 6 Geo. IV., the greater part of the provisions of this statute are repealed, and illegal companies are left to be dealt with according to the common law.—CHITTY.

[7] And although this statute has been repealed, by the act 9 & 10 Vict. c. 59, it can scarcely be suggested that a man convicted upon a *præmunire* is wholly out of the pale of the law.—KERR.

grievance which he as an individual may suffer. And no man, knowing him to be guilty, can with safety give him comfort, aid, or relief.(y)[8]

CHAPTER IX.

OF MISPRISIONS AND CONTEMPTS AFFECTING THE KING AND GOVERNMENT.

*119] *The fourth species of offences more immediately against the king and government are entitled misprisions and contempts.

Misprisions (a term derived from the old French *mespris*, a neglect or contempt) are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon: and it is said that a misprision is contained in every treason and felony whatsoever, and that, if the king so please, the offender may be proceeded against for the misprision only.(a) And upon the same principle, while the jurisdiction of the starchamber subsisted, it was held that the king might remit a prosecution for treason, and cause the delinquent to be censured in that court, merely for a high misdemeanour; as happened in the case of Roger, earl of Rutland, in 43 Eliz., who was concerned in the earl of Essex's rebellion.(b) Misprisions are generally divided into two sorts: negative, which consist in the concealment of something which ought to be revealed; and positive, which consist in the commission of something which ought not to be done.

*120] *I. Of the first, or negative kind, is what is called *misprision of treason;* consisting in the bare knowledge and concealment of treason, without any degree of assent thereto: for any assent makes the party a principal traitor; as indeed the concealment, which was construed aiding and abetting, did at the common law: in like manner as the knowledge of a plot against the state, and not revealing it, was a capital crime at Florence and other states of Italy.(c) But it is now enacted, by the statute 1 & 2 Ph. and M. c. 10, that a bare concealment of treason shall only be held a misprision. This concealment becomes criminal if the party apprized of the treason does not, as soon as conveniently may be, reveal it to some judge of assize or justice of the peace.(d) But if there be any probable circumstances of assent, as if one goes to a treasonable meeting, knowing beforehand that a conspiracy is intended against the king; or, being in such company once by accident, and having heard such treasonable conspiracy, meets the same company again, and hears more of it, but conceals it; this is an implied assent in law, and makes the concealer guilty of actual high treason.(e)[1]

There is also one positive misprision of treason, created so by act of parlia-

(y) 1 Hawk. P. C. 55.
(a) Year-Book, 2 Ric. III. 10. Staundf. P. C. 37. Kelw. 71. 1 Hal. P. C. 37. 1 Hawk. P. C. 55, 56.
(b) Hudson of the Court of Star-chamber. MS. in Mus. Brit.
(c) Guicciard. Hist. b. 3 and 13.
(d) 1 Hal. P. C. 372.
(e) 1 Hawk. P. C. 56.

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[8] The terrible penalties of a *præmunire* are denounced by a great variety of statutes; yet prosecutions upon a *præmunire* are unheard of in our courts. There is only one instance of such a prosecution in the State Trials,—in which case the penalties of a *præmunire* were inflicted upon some persons for refusing to take the oath of allegiance in the reign of Charles the Second. Harg. St. Tr. vol. ii. 463.—Christian.

[1] If any person or persons having knowledge of the commission of any treason shall conceal, and not, as soon as may be, disclose and make known the same to the President of the United States, or some one of the judges thereof, or to the president or governor of a particular State, or some one of the judges or justices thereof, such person or persons, on conviction, shall be adjudged guilty of misprision of treason, and shall be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars. Act of Congress, April 20, 1790, s. 2, 1 Story's Laws, 83.—Sharswood.

ment. The statute 13 Eliz. c. 2[2] enacts that those who forge foreign coin, not current in this kingdom, their aiders, abettors, and procurers, shall all be guilty of misprision of treason. For though the law would not put foreign coin upon quite the same footing as our own; yet, if the circumstances of trade concur, the falsifying of it may be attended with consequences almost equally pernicious to the public: as the counterfeiting of Portugal money would be at present; and therefore the law has made it an offence just below capital, and that is all. For the punishment of misprision of treason is loss of the profits of land during life, forfeiture of goods, and imprisonment during life.(*f*)[3] Which total forfeiture of the goods was originally inflicted while *the offence amounted to principal treason, and of course included in it a felony by the common law; and therefore is no exception to the general rule laid down in a former chapter,(*g*) that wherever an offence is punished by such total forfeiture it is felony at the common law. [*121

Misprision of felony is also the concealment of a felony which a man knows but never assented to; for, if he assented, this makes him either principal or accessory. And the punishment of this, in a public officer, by the statute Westm. 1, 3 Edw. I. c. 9, is imprisonment for a year and a day; in a common person, imprisonment for a less discretionary time; and, in both, fine and ransom at the king's pleasure: which pleasure of the king must be observed, once for all, not to signify any extrajudicial will of the sovereign, but such as is declared by his representatives, the judges in his courts of justice; "*voluntas regis in curia, non in camera.*"(*h*)

There is also another species of negative misprisions: namely, the *concealing of treasure-trove*, which belongs to the king or his grantees by prerogative royal: the concealment of which was formerly punishable by death;(*i*) but now only by fine and imprisonment.(*j*)

II. Misprisions which are merely positive are generally denominated *contempts* or *high misdemeanours*; of which

1. The first and principal is the *mal-administration* of such high officers as are in public trust and employment. This is usually punished by the method of parliamentary impeachment; wherein such penalties, short of death, are inflicted, as to the wisdom of the peers shall seem proper; consisting usually of banishment, imprisonment, fines, or perpetual disability. Hitherto also may be referred the *offence of *embezzling the public money*, called among the Romans *peculatus*, which the Julian law punished with death in a magistrate, and with deportation, or banishment, in a private person.(*k*) With us it is not a capital crime, but subjects the committer of it to a discretionary fine and imprisonment.[4] Other misprisions are, in general, such contempts of the executive magistrate as demonstrate themselves by some arrogant and undutiful behaviour towards the king and government. These are [*122

2. Contempts against the king's *prerogative*. As, by refusing to assist him for the good of the public, either in his councils, by advice, if called upon, or in his wars, by personal service for defence of the realm, against a rebellion or in-

(*f*) 1 Hal. P. C. 374.
(*g*) See page 94.
(*h*) 2 Hal. P. C. 375.
(*i*) Glanv. *l.* 1, c. 2.
(*j*) 3 Inst. 133.
(*k*) Inst. 4, 18, 9.

[2] This ought to be 14 Eliz. c. 3; and the author has been led into the mistake by implicitly copying Hawkins.—COLERIDGE.

[3] But this is only in case of high treason. Misprision of a lower degree is punishable only by fine and imprisonment. 1 Hale, 375.—CHITTY.

[4] But now, by 50 Geo. III. c. 59, s. 1, it is enacted that if any person shall embezzle or fraudulently apply moneys issued to him for the public services, he shall be adjudged guilty of a misdemeanour, and shall be subject to transportation, or receive such punishment as the court in which he is convicted may in its discretion think proper.

Section 2 enacts that if any officer, collector, or receiver intrusted with the receipt or management of the public revenues shall furnish false statements or returns of the moneys collected by him, or of the balances left in his hands, he shall be guilty of a misdemeanour, and be fined and imprisoned at the discretion of the court, and be for ever rendered incapable of holding or enjoying any office under the crown.—CHITTY.

vasion.(*l*) Under which class may be ranked the neglecting to join the *posse comitatus*, or power of the county, being thereunto required by the sheriff or justices, according to the statute 2 Hen. V. c. 8, which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility and able to travel.(*m*) Contempts against the prerogative may also be by preferring the interests of a foreign potentate to those of their own, or doing or receiving any thing that may create an undue influence in favour of such extrinsic power; as by taking a pension from any foreign prince without the consent of the king.(*n*) Or by disobeying the king's lawful commands: whether by writs issuing out of his courts of justice, or by a summons to attend his privy council, or by letters from the king to a subject commanding him to return from beyond seas, (for disobedience to which his lands shall be seized till he does return, and himself afterwards punished,) or by his writ of *ne exeat regnum*, or proclamation commanding the subject to stay at home.(*o*) Disobedience to any of these commands is a high misprision and contempt; and so, lastly, is disobedience to any act of parliament where no particular penalty is assigned; for then it is punishable, like the rest of *these contempts, by fine and imprisonment, at the discretion of the king's courts of justice.(*p*)

*123]

3. Contempts and misprisions against the king's *person* and *government* may be by speaking or writing against them, cursing or wishing him ill, giving out scandalous stories concerning him, or doing any thing that may tend to lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people.[5] It has been also held an offence of this species to drink to the pious memory of a traitor; or for a clergyman to absolve persons at the gallows who there persist in the treasons for which they die; these being acts which impliedly encourage rebellion. And for this species of contempt a man may not only be fined and imprisoned, but suffer the pillory,[6] or other infamous corporal punishment;(*q*) in like manner as in the antient German empire such persons as endeavoured to sow sedition, and disturb the public tranquillity, were condemned to become the objects of public notoriety and derision, by carrying a dog upon their shoulders from one great town to another. The emperors Otho I. and Frederick Barbarossa inflicted this punishment on noblemen of the highest rank.(*r*)

4. Contempts against the king's *title*, not amounting to treason or *præmunire*, are the denial of his right to the crown in common and unadvised discourse; for, if it be by advisedly speaking, we have seen(*s*) that it amounts to a *præmunire*. This heedless species of contempt is, however, punished by our law with fine and imprisonment. Likewise, if any person shall in any wise hold, affirm, or maintain that the common law of this realm, not altered by parliament,

(*l*) 1 Hawk. P. C. 59.
(*m*) Lamb. Eir. 315.
(*n*) 3 Inst. 144.
(*o*) See book i. page 266.
(*p*) 1 Hawk. P. C. 60.
(*p*) Ibid.
(*r*) Mod. Un. Hist. xxix. 28, 119
(*s*) See page 91.

[5] To assert falsely that the king labours under the affliction of mental derangement is criminal, and an indictable offence. 3 D. & R. 464. 3 B. & C. 257, S. C. In Rex *vs.* Cobbett, E. T. 1805, Holt on Libel, 114, 115, 6 East, 583, where the defendant was convicted of publishing a libel upon the administration of the Irish government and upon the public conduct and character of the lord-lieutenant and lord-chancellor of Ireland, lord Ellenborough, C. J., observed, "It is no new doctrine that if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law." See also Holt, Rep. 424. 14 How. St. Tr. 1095, S. C.

By the 60 Geo. III. c. 8, the offence of publishing seditious libels is further provided against by empowering the court after verdict to seize upon all copies of the libel, &c.; and, by sect. 4, persons convicted of a second offence may be punished as in cases of high misdemeanour, or by banishment for so long as the court may order. By sect. 5, persons not departing within thirty days after sentence of banishment may be conveyed out of the kingdom; and, by sect. 6, persons banished found at large within the king's dominions may be transported.—Chitty.

[6] By 56 Geo. III. c. 12, the punishment of the pillory was abolished, excepting in cases of perjury, and fine or imprisonment substituted in its place; and it is now altogether abolished, by 1 Vict. c. 23.—Stewart.

ought not to direct the right of the crown of England; this is a misdemeanour, by statute 13 Eliz. c. 1, and punishable with forfeiture of goods and chattels. A contempt may also arise from refusing or neglecting to take the oaths appointed by statute for the better securing the government, and yet *acting in a public office, place of trust, or other capacity, for which the said [*124 oaths are required to be taken, viz., those of allegiance, supremacy, and abjuration; which must be taken within six calendar months after admission. The penalties for this contempt, inflicted by statute 1 Geo. I. st. 2, c. 13, are very little, if any thing, short of those of a *præmunire;* being an incapacity to hold the said offices, or any other; to prosecute any suit; to be guardian or executor; to take any legacy or deed of gift; and to vote at any election for members of parliament; and after conviction the offender shall also forfeit 500*l.* to him or them that will sue for the same. Members, on the foundation of any college in the two universities, who by this statute are bound to take the oaths, must also register a certificate thereof in the college-register within one month after; otherwise, if the electors do not remove him, and elect another within twelve months, or after, the king may nominate a person to succeed him by his great seal or sign-manual. Besides thus taking the oaths for offices, any two justices of the peace may by the same statute summon, and tender the oaths to, any person whom they shall suspect to be disaffected; and every person refusing the same, who is properly called a non-juror, shall be adjudged a popish recusant convict, and subject to the same penalties that were mentioned in a former chapter;(*t*) which in the end may amount to the alternative of abjuring the realm, or suffering death as a felon.[7]

5. Contempts against the king's *palaces* or *courts of justice* have been always looked upon as high misprisions; and by the antient law, before the conquest, fighting in the king's palace, or before the king's judges, was punished with death.(*u*) So too, in the old Gothic constitutions, there were many places privileged by law, *quibus major reverentia et securitas debetur, ut templa et judicia, quæ sancta habebantur,—arces et aula regis,—denique locus quilibet præsente aut adventante rege.* (*v*) And at present, with us, by the statute *33 Hen. VIII. c. [*125 12, malicious striking in the king's palace, wherein his royal person resides, whereby blood is drawn, is punishable by perpetual imprisonment, and fine at the king's pleasure, and also with loss of the offender's right hand; the solemn execution of which sentence is prescribed in the statute at length.[8]

But *striking* in the king's superior courts of justice, in Westminster hall, or at the assizes, is made still more penal than even in the king's palace. The reason seems to be that those courts being antiently held in the king's palace, and before the king himself, striking there included the former contempt against the king's palace, and something more, viz., the disturbance of public justice. For this reason, by the antient common law before the conquest,(*w*) striking in the

(*t*) See page 55.
(*u*) 3 Inst. 140. *LL. Alured. cap.* 7 and 34.
(*v*) Stiernhook, *de jure Goth. l.* 3. c. 3.
(*w*) *LL. Inæ.* c. 6. *LL. Canut.* 56. *LL. Alured.* c. 7.

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[7] By stat. 10 Geo. IV. c. 7, s. 24, any person assuming any ecclesiastical title established in England or Ireland shall forfeit 100*l.* for each offence; and, by stat. 14 & 15 Vict. c. 60, briefs, rescripts, or letters-apostolical are declared unlawful and void.—STEWART.

[8] Mr. Hargrave has given in the 11th vol. of the State Trials, p. 16, an extract from Stowe's Annals, containing a very curious account of the circumstances of the trial of Sir Edmund Knevet, who was prosecuted upon this statute soon after it was enacted: "for which offence he was not onely judged to lose his hand, but also his body to remain in prison, and his lands and goods at the king's pleasure. Then the said Sir Edmund Knevet desired that the king, of his benigne grace, would pardon him of his right hand and take the left: for (quoth he) if my right be spared, I may hereafter doe such good service to his grace as shall please him to appoint. Of this submission and request the justices forthwith informed the king, who of his goodness, considering the gentle heart of the said Edmund, and the good report of lords and ladies, granted him pardon, that he should lose neither hand, land, nor goods, but should go free at liberty."—CHRISTIAN.

So much of the 33 Hen. VIII. c. 12 (part of s. 6 to s. 18) as relates to the punishment of manslaughter and of malicious striking, by reason whereof blood shall be shed, is repealed by 9 Geo. IV. c. 31.—CHITTY.

king's court of justice, or drawing a sword therein, was a capital felony; and our modern law retains so much of the antient severity as only to exchange the loss of life for the loss of the offending limb. Therefore a stroke or blow in such a court of justice, whether blood be drawn or not, or even assaulting a judge sitting in the court by drawing a weapon, without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of his lands during life.(*x*) A *rescue* also of a prisoner from any of the said courts, without striking a blow, is punished with perpetual imprisonment and forfeiture of goods, and of the profits of lands during life,(*y*) being looked upon as an offence of the same nature with the last; but only, as no blow is actually given, the amputation of the hand is excused. For the like reason, an affray or riot near the said courts, but out of their actual view, is punished only with fine and imprisonment.(*z*)[9]

*126] *Not only such as are guilty of an actual violence, but of threatening or reproachful words to any judge sitting in the courts, are guilty of a high misprision, and have been punished with large fines, imprisonment, and corporal punishment.(*a*) And, even in the inferior courts of the king, an affray or contemptuous behaviour is punishable with a fine by the judges there sitting, as by the steward in a court-leet, or the like.(*b*)

Likewise all such as are guilty of any injurious treatment to those who are immediately under the protection of a court of justice are punishable by fine and imprisonment; as, if a man assaults or threatens his adversary for sueing him, a counsel or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in custody, and properly executing his duty:(*c*) which offences, when they proceeded further than bare threats, were punished in the Gothic constitutions with exile and forfeiture of goods.(*d*)

Lastly, to endeavour to dissuade a witness from giving evidence, to disclose an examination before the privy council, or to advise a prisoner to stand mute, (all of which are impediments of justice,) are high misprisions, and contempts of the king's courts, and punishable by fine and imprisonment.[10] And antiently it was held that if one of the grand jury disclosed to any person indicted the evidence that appeared against him, he was thereby made accessory to the offence, if felony, and in treason a principal. And at this day it is agreed that he is guilty of a high misprision,(*e*) and liable to be fined and imprisoned.(*f*)[11]

(*x*) Staund. P. C. 38. 3 Inst. 140, 141.
(*y*) 1 Hawk. P. C. 57.
(*z*) Cro. Car. 373.
(*a*) Ibid. 503.
(*b*) 1 Hawk. P. C. 58.
(*c*) 3 Inst. 141, 142.
(*d*) Stiernhook. *de jure Goth. l.* 3, c. 3.
(*e*) See Bar. 212. 27 Ass. pl. 44, § 4, fol. 138.
(*f*) 1 Hawk. P. C. 59.

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[9] Lord Thanet and others were prosecuted by an information filed by the attorney-general for a riot at the trial of Arthur O'Connor and others for high treason under a special commission at Maidstone. Two of the defendants were found guilty generally. The three first counts charged (*inter alia*) that the defendants did riotously make an assault on one J. R., and did then and there *beat, bruise, wound*, and ill treat the said J. R. in the presence of the commissioners. When the defendants were brought up for judgment, lord Kenyon expressed doubts whether upon this information the court was not bound to pronounce the judgment of amputation of the right hand, &c., as required in a prosecution expressly for striking in a court of justice. In consequence of these doubts the attorney-general entered a *nolle prosequi* upon the first three counts, and the court pronounced judgment of fine and imprisonment as for a common riot. 1 East, P. C. 438. —Christian.

[10] The mere attempt to stifle evidence is also criminal, though the persuasion should not succeed, on the principle, now fully established, that an incitement to commit any crime is itself criminal. 6 East, 464. 2 East, 521, 522. 2 Stra. 904. 2 Leach, 925. As to conspiring to prevent a witness from giving evidence, see 2 East, 362. Knowingly making use of a false affidavit is indictable. 8 East, 364. 2 Stra. 1144.—Chitty.

[11] A few years ago, at York, a gentleman of the grand jury heard a witness swear in court, upon the trial of a prisoner, directly contrary to the evidence which he had given before the grand jury. He immediately communicated the circumstance to the judge, who, upon consulting the judge in the other court, was of opinion that public justice in this case required that the evidence which the witness had given before the grand jury should be disclosed; and the witness was committed for perjury, to be tried upon the

CHAPTER X.

OF OFFENCES AGAINST PUBLIC JUSTICE.

*THE order of our distribution will next lead us to take into consideration such crimes and misdemeanours as more especially affect the *commonwealth*, or public polity of the kingdom; which, however, as well as those which are peculiarly pointed against the lives and security of private subjects, are also offences against the king as the *pater-familias* of the nation, to whom it appertains, by his regal office, to protect the community, and each individual therein, from every degree of injurious violence, by executing those laws which the people themselves, in conjunction with him, have enacted, or at least have consented to by an agreement either expressly made in the persons of their representatives, or by a tacit and implied consent, presumed and proved by immemorial usage. [*127

The species of crimes which we have now before us is subdivided into such a number of inferior and subordinate classes that it would much exceed the bounds of an elementary treatise, and be insupportably tedious to the reader, were I to examine them all minutely or with any degree of critical accuracy. I shall therefore confine myself principally to general definitions or descriptions of this great variety of offences, and to the punishments inflicted by law for each particular offence, with now and then a few incidental observations; referring the student, for more particulars, to other voluminous authors, who have treated of these subjects with greater precision and more in detail than is consistent with the plan of these commentaries.

The crimes and misdemeanours that more especially affect the commonwealth may be divided into five species, viz., *offences against public *justice*, against the public *peace*, against public *trade*, against the public *health*, and against the public *police* or *economy*; of each of which we will take a cursory view in their order. [*128

First, then, of offences against public *justice*, some of which are felonious, whose punishment may extend to death; others only misdemeanours. I shall begin with those that are most penal, and descend gradually to such as are of less malignity.

1. Embezzling or vacating *records*, or falsifying certain other proceedings in a court of judicature, is a felonious offence against public justice. It is enacted, by statute 8 Hen. VI. c. 12, that if any clerk or other person shall wilfully take away, withdraw, or avoid any record or process in the superior courts of justice in Westminster hall, by reason whereof the judgment shall be reversed or not take effect, it shall be felony not only in the principal actors, but also in their procurers and abettors.[1] And this may be tried either in the king's bench or

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testimony of the gentlemen of the grand jury. It was held that the object of this concealment was only to prevent the testimony produced before them from being contradicted by subornation of perjury on the part of the persons against whom bills were found. This is a privilege which may be waived by the crown. See p. 303, *post*.—CHRISTIAN.

[1] The 8 Hen. VI. c. 12, s. 3 is now repealed, by 7 & 8 Geo. IV. c. 27, by sect. 21 of which it is enacted that "if any person shall steal, or shall for any fraudulent purpose take from its place of deposit for the time-being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure, or destroy, any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatsoever, of or belonging to any court of record, or relating to any matter civil or criminal begun, depending, or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order, or decree, or any original document whatsoever, of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such court, every such offender shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or

common pleas by a jury *de medietate*,—half officers of any of the superior courts, and the other half common jurors.[2] Likewise, by statute 21 Jac. I. c. 26, to acknowledge any fine, recovery, deed enrolled, statute, recognizance, bail, or judgment, in the name of another person not privy to the same, is felony without benefit of clergy. Which law extends only to proceedings in the courts themselves; but, by statute 4 W. and M. c. 4, to personate any other person (as bail) before any judge of assize or other commissioner authorized to take bail in the country, is also felony.[3] For no man's property would be safe if records might be suppressed or falsified, or persons' names be falsely usurped in courts or before their public officers.

2. To prevent abuses by the extensive power which the law is obliged to repose in gaolers, it is enacted, by statute 14 Edw. III. c. 10, that if any *gaoler* by too great duress of imprisonment makes any prisoner that he hath in ward *129] *become an *approver* or an *appellor* against his will; that is, as we shall see hereafter, to accuse and turn evidence against some other person; it is felony in the gaoler.[4] For, as Sir Edward Coke observes,(*a*) it is not lawful to induce or excite any man even to a just accusation of another, much less to do it by duress of imprisonment; and least of all by a gaoler, to whom the prisoner is committed for safe custody.

3. A third offence against public justice is, *obstructing* the execution of lawful *process*. This is at all times an offence of a very high and presumptuous nature; but more particularly so when it is an obstruction of an arrest upon criminal process. And it hath been holden that the party opposing such arrest becomes thereby *particeps criminis;* that is, an accessory in felony, and a principal in

(a) 3 Inst. 91.

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to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and it shall not in any indictment for such offence be necessary to allege that the article in respect of which the offence is committed is the property of any person, or that the same is of any value."—Chitty.

[2] It is a high misprision in an officer to alter the enrolment of a memorial of an annuity-deed without the sanction of the court. 3 Taunt. 543.

By the 5 Geo. IV. c. 20, s. 10, persons in the post-office embezzling or destroying parliamentary proceedings, &c. sent by post will be guilty of a misdemeanour punishable with fine and imprisonment.—Chitty.

But, by stat. 7 & 8 Geo. IV. c. 29, this statute, so far as it relates to this offence, is repealed; and it is enacted, by s. 21 and 1 Vict. c. 90, s. 5, that stealing or maliciously obliterating any record, writ, affidavit, or document belonging to any court of law or equity shall be a misdemeanour punishable with transportation for seven years, or fine or imprisonment,—and now with penal servitude, (16 & 17 Vict. c. 99;) and, by stat. 2 W. IV. c. 34, ss. 9, 19, and 1 Vict. c. 90, s. 5, where a person having been convicted of any offence relating to the coin shall afterwards be indicted of any offence committed subsequent to such conviction, any clerk or officer of the court where the offender was first convicted, certifying a false copy of any indictment, knowing the same to be false, was liable to be transported for fourteen nor less than seven years, or to be imprisoned for any term not exceeding two years,—and now to penal servitude. By 1 & 2 Vict. c. 94, s. 19, any person employed in the public-record office who shall certify any writing as a true copy, knowing the same to be false in any material part, or any person who shall counterfeit the signature of the assistant record-keeper or who shall counterfeit the seal of the said office, on being convicted thereof, might be transported for life or for not less than seven years, or be imprisoned for not more than four years. By 14 & 15 Vict. c. 99, s. 15, if any officer under that act shall wilfully certify any document as being a true copy or extract, knowing the same not to be so, he shall be guilty of a misdemeanour, and shall be liable on conviction to imprisonment for any term not exceeding eighteen months.—Stewart.

[3] See also 11 Geo. IV. and 1 W. IV. c. 66, s. 11. And the false personation of voters at elections is a misdemeanour. 6 & 7 Vict. c. 18, s. 33.—Stewart.

The merely personating bail before a judge at chambers, or acknowledging bail in a false name, is only a misdemeanour, unless the bail are filed, (2 East, P. C. 109;) and putting in bail in the name of a person not in existence is not within the act. 1 Stra. 304. The courts will not vacate the proceedings against the party personated until the offender is convicted, (T. Jones, 64. 1 Ventr. 501. 3 Keb. 694. 1 Ld. Raym. 445;) and a conviction cannot take place until the bail-piece is filed. 2 Sid. 90.—Chitty.

[4] This act of Edw. III. is now repealed, by the 4 Geo. IV. c. 64, s. 1.—Chitty.

high treason.(*b*)[5] Formerly, one of the greatest obstructions to public justice, both of the civil and criminal kind, was the multitude of pretended privileged places where indigent persons assembled together to shelter themselves from justice, (especially in London and Southwark,) under the pretext of their having been antient palaces of the crown, or the like:(*c*) all of which sanctuaries for iniquity are now demolished, and the opposing of any process therein is made highly penal, by the statutes 8 & 9 W. III. c. 27, 9 Geo. I. c. 28, and 11 Geo. I. c. 22, which enact that persons opposing the execution of any process in such pretended privileged places within the bills of mortality, or abusing any officer in his endeavours to execute his duty therein, so that he receives bodily hurt, shall be guilty of felony, and transported for seven years; and persons in disguise, joining in or abetting any riot or tumult on such account, or opposing any process, or assaulting and abusing any officer executing or for having executed the same, shall be felons without benefit of clergy.[6]

4. An *escape* of a person arrested upon criminal process by eluding the vigilance of his keepers before he is put in hold is also an offence against public justice, and the party himself *is punishable by fine or imprisonment.(*d*) [*130 But the officer permitting such escape, either by negligence or connivance, is much more culpable than the prisoner; the natural desire of liberty pleading strongly in his behalf, though he ought in strictness of law to submit himself quietly to custody till cleared by the due course of justice. Officers therefore who, after arrest, *negligently* permit a felon to escape, are also punishable by fine:(*e*) but *voluntary* escapes, by consent and connivance of the officer, are a much more serious offence; for it is generally agreed that such escapes amount to the same kind of offence, and are punishable in the same degree, as the offence of which the prisoner is guilty and for which he is in custody, whether treason, felony, or trespass. And this, whether he were actually committed to gaol or only under a bare arrest.(*f*) But the officer cannot be thus punished till the original delinquent hath actually received judgment, or been attainted, upon verdict, confession, or outlawry, of the crime for which he was so committed or arrested; otherwise it might happen that the officer might be punished for treason or felony, and the person arrested and escaping might turn out to be an innocent man. But, before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemeanour.(*g*)[7]

(*b*) 2 Hawk. P. C. 121.
(*c*) Such as *White-Friars* and its environs, the *Savoy*, and the *Mint* in Southwark.
(*d*) 2 Hawk. P. C. 122.
(*e*) 1 Hal. P. C. 600.
(*f*) Ibid. 590. 2 Hawk. P. C. 134.
(*g*) 1 Hal. P. C. 588, 589. 2 Hawk. P. C. 134, 135.

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[5] By the 25 Geo. II. c. 37, s. 9, attempting to rescue a person convicted of murder whilst proceeding to execution is felony, and punishable with death. By the 43 Geo. III. c. 58, s. 1, shooting at or levelling loaded fire-arms at a person and attempting to discharge the same, or stabbing or cutting with intent to obstruct, resist, or prevent the lawful apprehension and detainer of the person so stabbing, &c. or the lawful apprehension and detainer of his accomplice, is a felony, without benefit of clergy. It seems the right of the party to arrest should be proved to bring a party resisting within the meaning of the act. 1 Stark. C. N. P. 246. If a cutting or wounding, &c. takes place in an attempt to apprehend the prisoner, without a due notification of the warrant or authority by which the person acts, it does not fall within the meaning of the act, as it is not a wilful resistance of a lawful apprehension. 3 Camp. 68, per lord Ellenborough, C. J., at Maidstone, Aug. 8, 1816.

By 9 Geo. IV. c. 31, s. 25, it is enacted that where any person shall be charged with and convicted of, as a misdemeanour, any assault upon any person with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person, for any offence for which he or they may be liable by law to be apprehended or detained, the court may sentence the offender to be imprisoned, with or without hard labour, for any term not exceeding two years, and may also fine the offender, and require him to find sureties for keeping the peace. See 1 & 2 Geo. IV. c. 88, s. 2. 3 Geo. IV. c. 114, 1 Burn's J. 230, *et seq.*

[6] And, by stat. 9 Geo. IV. c. 31, s. 25, the preventing the apprehension of an offender is a misdemeanour, punishable with fine or imprisonment for two years.—STEWART.

[7] There must be an actual arrest, as well as a lawful arrest, to make an escape criminal

5. Breach of prison by the offender himself, when committed for any cause, was felony at the common law;(*h*) or even conspiring to break it.(*i*) But this severity is mitigated by the statute *de frangentibus prisonam*, 1 Edw. II., which enacts that no person shall have judgment of life or member for breaking prison, unless committed for some capital offence. So that to break prison and escape, when lawfully committed for any treason or felony, remains still felony, as at the common law; and to break prison, (whether it be the county-gaol, the stocks, or other usual place of security,) when lawfully confined upon any other inferior charge, is still *punishable as a high misdemeanour by fine and imprisonment. For the statute which ordains that such offence shall be no longer capital never meant to exempt it entirely from every degree of punishment.(*j*)[8]

*131]

6. Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment; and it is generally the same offence in the stranger so rescuing as it would have been in a gaoler to have *voluntarily* permitted an escape. A rescue, therefore, of one apprehended for felony is felony; for treason, treason; and for a misdemeanour, a misdemeanour also. But here likewise, as upon voluntary escapes, the principal must first be attainted or receive judgment before the rescuer can be punished, and for the same reason; because, perhaps, in fact it may turn out that there has been no offence committed.(*k*)[9] By statute

(*h*) 1 Hal. P. C. 607.
(*i*) Bract. *l.* 3, c. 9.
(*j*) 2 Hawk. P. C. 128.
(*k*) 1 Hal. P. C. 607. Post. 344.

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in an officer. 2 Hawk. c. 19, ss. 1, 2. It must also be for a criminal matter, (id. s. 3;) and the imprisonment must be continuing at the time of the offence. Id. s. 4. 1 Russ. 531. 1 Hale, 594. In some cases it is an escape to suffer a prisoner to have greater liberty than can by law be allowed him; as, to admit him to bail against law, or to suffer him to go beyond the limits of the prison, though he return. 2 Hawk. c. 19, s. 5. A retaking will not excuse an escape. Id. s. 13.

Private individuals who have persons lawfully in their custody are guilty of an escape if they suffer them illegally to depart, (1 Hale, 595;) but they may protect themselves from liability by delivering over their prisoner to some legal and proper officer. 1 Hale, 594, 595. A private person thus guilty of an escape, the punishment is fine, or imprisonment, or both. 2 Hawk. c. 20, s. 6.

By the 52 Geo. III. c. 156, persons aiding the escape of prisoners of war are guilty of felony and liable to transportation. It has been held that the offence of aiding a prisoner of war to escape is not complete if such prisoner is acting in concert with those under whose charge he is, merely to detect the defendant, and has no intention to escape. Russ. & R. C. C. 196.—Chitty.

[8] An actual breaking is the gist of this offence, and must be stated in the indictment. It must also appear that the party was lawfully in prison, and for a crime involving judgment of life or member: it is not enough to allege that he "feloniously broke prison." 2 Inst. 591. 1 Russell, 381. If lawfully committed, a party breaking prison is within the statute, although he may be innocent: as if committed by a magistrate upon strong suspicion. 2 Inst. 590. 1 Hale, P. C. 610. 1 Russell, 378. To constitute a felonious prison-breach, the party must be committed for a crime which is capital at the time of the breaking. 1 Russell, 379, Cole's case. Plowd. Comm. 401. A constructive breaking is not sufficient: therefore, if a person goes out of prison without obstruction, as by a door being left open, it is only a misdemeanour. 1 Hale, P. C. 611. An actual intent to break is not necessary. The statute extends to a prison in law as well as to a prison in fact. 2 Inst. 589. "Prison-breach or rescue is a common-law felony, if the prisoner breaking prison, or rescued, is a convicted felon; and it is punishable at common law by imprisonment, and, under 19 Geo. III. c. 74, § 4, by three times whipping. Throwing down loose bricks at the top of a prison-wall, placed there to impede escape and give alarm, is prison-breach, though they were thrown down by accident." Rex *vs.* Haswell, R. & R. C. C. 458.—Chitty.

[9] By 1 & 2 Geo. IV. c. 98, (entitled an "Act to amend the Law of Rescue,") s. 1, rescuing persons charged with felony is punishable with seven years' transportation, or imprisonment for not less than one year and not more than three years. And, by s. 1, assulting any lawful officer, to prevent the apprehension or detainer of persons charged with felony, is punishable with two years' imprisonment, in addition to other pains and penalties incurred. *Vide* also 5 Geo. IV. c. 84, § 22. This section is repealed by 9 Geo. IV. c. 31, which, by section 25, provides a punishment for these offences. *Vide post*, 217.

By 9 Geo. IV. c. 4, s. 13, (entitled the Mutiny Act,) persons under sentence of death

11 Geo. II. c. 26, and 24 Geo. II. c. 40, if five or more persons assemble to rescue any retailers of spirituous liquors, or to assault the informers against them, it is felony, and subject to transportation for seven years. By the statute 16 Geo. II. c. 31, to convey to any prisoner in custody for treason or felony any arms, instruments of escape or disguise, without the knowledge of the gaoler, though no escape be attempted, or any way to assist such prisoner to attempt an escape, though no escape be actually made, is felony, and subjects the offender to transportation for seven years; or if the prisoner be in custody for petit larceny or other inferior offence, or charged with a debt of 100*l.*, it is then a misdemeanour, punishable with fine and imprisonment.[10] And, by several special statutes,(*l*) to rescue, or attempt to rescue, any person committed for the offences enumerated in those acts, is felony without benefit of clergy; and to rescue, or attempt to rescue, the body of a felon executed for murder, is single felony, and subject to transportation for seven years. Nay, even if any person be charged with any of the offences against the black-act, 9 Geo. I. c. 22, and being required, by order of the privy council, to surrender himself, neglects so to do for forty days, both he and all that knowingly conceal, aid, abet, or succour him, are felons without benefit of clergy.[11]

*7. Another capital offence against public justice is the *returning from transportation*, or being seen at large in Great Britain before the expiration of the term for which the offender was ordered to be transported, or had agreed to transport himself. This is made felony without benefit of clergy in all cases, by statutes 4 Geo. I. c. 11, 6 Geo. I. c. 23, 16 Geo. II. c. 15, and 8 Geo. III. c. 15, as is also the assisting them to escape from such as are conveying them to the port of transportation.[12] [*132

(*l*) 6 Geo. I. c. 23. (Transportation.) 9 Geo. I. c. 22. (Black Act.) 8 Geo. II. c. 20. (Destroying turnpikes, &c.) 19 Geo. II. c. 34. (Smuggling. See the 52 Geo. III. c. 143, s. 11.) 29 Geo. II. c. 37. (Murder.) 27 Geo. II. c. 15. (Black Act.)

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by court-martial, having obtained a conditional pardon, escaping out of custody, and all parties aiding such escape, are punishable as felons. See Rex *vs.* Stanley, R. & R. C. C. 432.—CHITTY.

[10] On an indictment under this act, the offence of delivering instruments of escape to a prisoner has been held to be complete though the prisoner had been pardoned of the offence of which he was convicted, on condition of transportation: and a party may be convicted though there is no evidence that he knew of what offence the prisoner had been convicted. Rex *vs.* Shaw, R. & R. C. C. 526. This act applies only to cases of attempt, (Tilley's case, 2 Leach, 662;) and a case where the commitment is on suspicion only is not within it. Greenif's case, 1 Leach, 363. This act appears virtually to be repealed by 4 Geo. IV. c. 64. s. 43, which makes delivering instruments of escape to any prisoner, whether he actually escape or not, a felony punishable by fourteen years' transportation.—CHITTY.

[11] Some of these acts, as far as they relate to the exclusion of benefit of clergy, and to the form of punishment, are altered and amended by 1 & 2 Geo. IV. c. 88, and 5 Geo. IV. c. 84.

By 4 Geo. IV. c. 54, § 1, to rescue a party in custody for an offence against the Black Act (9 Geo. I. c. 22) is punishable only with transportation, or imprisonment and hard labour.—CHITTY.

By stat. 1 Vict. c. 91, §§ 1 & 2, any person rescuing, or attempting to rescue, any other person who shall be committed or found guilty of murder shall be liable to be transported for life, or for any time not exceeding fifteen years, or to be imprisoned for three; and now penal servitude may be substituted.—STEWART.

[12] These provisions are virtually repealed by the 5 Geo. IV. c. 84, which revives and consolidates into one act the laws relative to the transportation of offenders. By the 22d section it is enacted that if any offender, sentenced or ordered to be transported or banished, or having agreed to transport or banish himself, shall be afterwards found at large, without lawful excuse, before the expiration of the term of transportation or banishment, he shall suffer death without benefit of clergy. By sect. 84, the act is not to extend to persons banished, under the 60 Geo. III. and 1 Geo. IV. c. 8, for blasphemous and seditious libels. If the prisoner can show such circumstances of poverty or sickness which amount to an absolute impossibility to transport himself or leave the kingdom, he will not be within the act. 1 Leach, 396. By the 22d sect. of 5 Geo. IV. c. 84, a reward of 20*l.* is given for prosecuting an offender against the act to conviction.—CHITTY.

But these statutes are repealed by stat. 4 & 5 W. IV. c. 67, by which this offence is

8. An eighth is that of *taking a reward* under pretence of *helping* the owner to his *stolen goods*. This was a contrivance carried to a great length of villainy in the beginning of the reign of George the First; the confederates of the felons thus disposing of stolen goods, at a cheap rate, to the owners themselves, and thereby stifling all further inquiry. The famous Jonathan Wild had under him a well-disciplined corps of thieves, who brought in all their spoils to him, and he kept a sort of public office for restoring them to the owners at half-price. To prevent which audacious practice, to the ruin and in defiance of public justice, it was enacted, by statute 4 Geo. I. c. 11, that whoever shall take a reward under the pretence of helping any one to stolen goods shall suffer as the felon who stole them, unless he causes such principal felon to be apprehended and brought to trial, and also gives evidence against them. Wild, still continuing in his old practice, was upon this statute at last convicted and executed.(*m*)[13]

9. Receiving of stolen goods, *knowing them to be stolen*, is also a high misdemeanour and affront to public justice. We have seen in a former chapter(*n*) that this offence, which is only a misdemeanour at common law, by the statute 3 & 4 W. and M. c. 9, and 5 Anne, c. 31, makes the offender accessory to the theft and felony. But because the accessory cannot in general be tried, unless with the principal or after the principal is convicted, the receivers by that means frequently eluded justice. To remedy which, it is enacted, by statute 1 Anne, c. 9, and 5 Anne, c. 31, that such receivers may still be prosecuted for a misdemeanour, *133] and punished by fine and imprisonment, *though the principal felon be not before taken, so as to be prosecuted and convicted. And, in case of receiving stolen lead, iron, and certain other metals, such offence is, by statute 29 Geo. II. c. 30, punishable by transportation for fourteen years.(*o*) So that now the prosecutor has two methods in his choice: either to punish the receivers for the misdemeanour immediately, before the thief is taken,(*p*) or to wait till the felon is convicted, and then punish them as accessories to the felony. But it is provided, by the same statutes, that he shall only make use of one, and not both, of these methods of punishment. By the same statute, also, 29 Geo. II. c. 30, persons having lead, iron, and other metals in their custody, and not giving a satisfactory account how they came by the same, are guilty of a misdemeanour, and punishable by fine or imprisonment. And, by statute 10 Geo. III. c. 48, all knowing receivers of stolen plate or jewels, taken by robbery on the highway, or when a burglary accompanies the stealing, may be tried as well before as

(*m*) See stat. 6 Geo. I. c. 23, s. 9.
(*n*) See page 38.
(*o*) See also stat. 2 Geo. III. c. 28, s. 12, for the punishment of receivers of goods stolen by bumboats, &c. in the Thames.
(*p*) Foster, 373.

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punishable with transportation for life, and previous imprisonment for any term not exceeding four years; and now penal servitude may be substituted.—Stewart.

[13] In Rex *vs.* Ledbitter, R. & R. C. C. 76, a police-officer was indicted, under 4 Geo. I. c. 11, § 4, for taking money under the pretence of helping a person to goods stolen from him, and convicted of felony, though the officer had no knowledge of the felon, and though he possessed no power to apprehend the felon, and though the property was never restored and the officer had no power to restore it.

By statute 7 & 8 Geo. IV. c. 29, § 58, it is enacted, "That every person who shall corruptly take any money or reward, directly or indirectly, under pretence, or upon account of helping any person, to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, obtained, or converted as aforesaid, shall (unless he cause the offender to be apprehended and brought to trial for the same) be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice, publicly or privately whipped, (if the court shall so think fit,) in addition to such imprisonment."

By § 59, advertising a reward for the return of any stolen property whatsoever, which shall have been stolen or lost, purporting that no questions shall be asked, or printing such advertisements, renders the offending party liable to a penalty of fifty pounds, and full costs, to any person who will sue for the same by action of debt. This act repeals the 25 Geo. II. c. 36, § 1, as far as relates to the advertising rewards for stolen goods.

The 4 Geo. I. c. 11, § 4, relating to, and the 1 Geo. IV. c. 115, directing, the degree of punishment for this offence, are also repealed by this statute.—Chitty.

after the conviction of the principal, and whether he be in or out of custody, and, if convicted, shall be adjudged guilty of felony, and transported for fourteen years.[14]

10. Of a nature somewhat similar to the two last is the offence of *theft bote*, which is where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. *This is frequently called compounding of felony, and formerly was held to [*134 make a man an accessory; but it is now punished only with fine and imprisonment.(*q*) This perversion of justice, in the old Gothic constitutions, was liable to the most severe and infamous punishment. And the Salic law, "*latroni eum similem habuit, qui furtum celare vellet, et occulte sine judice compositionem ejus admittere.*"(*r*) By statute 25 Geo. II. c. 36, even to advertise a reward for the return of things stolen, with no questions asked, or words to the same purport, subjects the advertiser and the printer to a forfeiture of 50*l.* each.

11. Common *barretry* is the offence of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise.(*s*)[15] The punishment for this offence in a common person is by fine and imprisonment; but if the offender (as is too frequently the case) belongs to the profession of the law, a barretor who is thus able as well as willing to do mischief ought also to be disabled from practising for the future.(*t*) And indeed it is enacted, by statute 12 Geo. I. c. 29, that if any one who hath been convicted of forgery, perjury, subornation of perjury, or common barretry, shall practise as an attorney, solicitor, or agent, in any suit, the court, upon complaint, shall examine it in a summary way, and, if proved, shall direct the offender to be transported for seven years. Hereunto may also be referred another offence of equal malignity and audaciousness, that of sueing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king's superior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious but the authority of the judges not equally extensive, it is directed, by statute 8 Eliz. c. 2, to be punished by six months' imprisonment, and treble damages to the party injured.

12. Maintenance is an offence that bears a near relation to the former, being an officious intermeddling in a suit that *no way belongs to one, by main- [*135 taining or assisting either party, with money or otherwise, to prosecute or defend it;(*u*) a practice that was greatly encouraged by the first introduction of uses.(*w*) This is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. And therefore, by the Roman law, it was a species of the *crimen falsi* to enter into any confederacy, or do any act, to support another's lawsuit, by money, witnesses, or patronage.(*x*) A man may, however, maintain the suit of

(*q*) 1 Hawk. P. C. 125.
(*r*) Stierub. *de jure Goth. l.* 3, c. 5.
(*s*) 1 Hawk. P. C. 243.
(*t*) Ibid. 244.
(*u*) Ibid. 249.
(*w*) Dr. & St. 203.
(*x*) *Ff.* 48, 10, 20.

[14] The acts mentioned above are mostly repealed by later acts which are nearly similar to them. See 1 & 2 Geo. IV. c. 75; 7 & 8 Geo. IV. c. 29; 3 Geo. IV. c. 24.—CHITTY.

By stat. 14 & 15 Vict. c. 100, § 14, on an indictment for jointly receiving any property, persons guilty of separately receiving may be convicted. Separate accessories and receivers may be included in the same indictment in the absence of the principal felon.—STEWART.

[15] Disturbing the peace, making false inventions, propagating evil reports and calumnies, and spreading false and groundless rumours, whereby discord and disquiet may ensue amongst neighbours, may properly be ranked under the head Barretry. 1 Inst. 368. 1 Hawk. P. C. 243. See 1 Hale, P. C. c. 27, Bac. Abr. Barretry, 1 Russell, 185, on this subject. See also the *Case of Barretry*, 8 Co. Rep. 36, b. No one can be convicted for a single act of barretry; for every indictment for that offence must charge the defendant with being a *common* barretor. In a late case in the King's Bench, where an attorney, without any corrupt or unworthy motives, prepared a special case in order to take the opinion of the court upon the will of a testator, and suggested several facts which had no foundation, he was held to be guilty of a contempt and fined 30*l.* *In re* Elsam, 5 D. and R. 389; 3 B. & C. 597.—CHITTY.

his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity. Otherwise, the punishment by common law is fine and imprisonment,(*y*) and, by the statute 32 Hen. VIII. c. 9, a forfeiture of ten pounds.

13. Champerty, *campi-partitio*, is a species of maintenance, and punished in the same manner;(*z*) being a bargain with a plaintiff or defendant, *campum partire*, to divide the land or other matter sued for between them, if they prevail at law: whereupon the champertor is to carry on the party's suit at his own expense.(*a*) Thus, *champart*, in the French law, signifies a similar division of profits, being a part of the crop annually due to the landlord by bargain or custom. In our sense of the word it signifies the purchasing of a suit or right of sueing;[16] a practice so much abhorred by our law, that it is one main reason why a *chose* in action, or thing of which one hath the right but not the possession, is not assignable at common law; because no man should purchase any pretence to sue in another's right.[17] These pests of civil society, that are perpetually endeavouring to disturb the repose of their neighbours, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law, "*qui improbe coeunt in alienam litem, ut quicquid ex condemnatione in rem ipsius redactum fuerit inter eos communicaretur, lege Julia de vi privata tenentur;*"(*b*) and they were punished by the forfeiture of a third part of their goods, and perpetual *infamy. Hitherto also must be referred the provision of the statute 32 Hen. VIII. c. 9, that no one shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year before such grant, or hath been in actual possession of the land, or of the reversion or remainder, on pain that both purchasor and vendor shall each forfeit the value of such land to the king and the prosecutor. These offences relate chiefly to the commencement of *civil* suits: but

*136]

14. The *compounding of informations* upon penal statutes is an offence of an equivalent nature in *criminal* causes, and is, besides, an additional misdemeanour against public justice, by contributing to make the laws odious to the people. At once, therefore, to discourage malicious informers, and to provide that offences, when once discovered, shall be duly prosecuted, it is enacted, by statute 18 Eliz. c. 5, that if any person, informing under pretence of any penal law, makes any composition without leave of the court, or takes any money or promise from the defendant to excuse him, (which demonstrates his intent in commencing the prosecution to be merely to serve his own ends, and not for the public good,) he shall forfeit 10*l.*, shall stand two hours on the pillory, and shall be forever disabled to sue on any popular or penal statute.[18]

15. A conspiracy also to indict an innocent man of felony falsely and maliciously, who is accordingly indicted and acquitted, is a further abuse and per-

(*y*) 1 Hawk. P. C. 255.
(*z*) Ibid. 257.
(*a*) Stat. of Conspirat. 33 Edw. I.
(*b*) *Ff.* 48, 7, 6.

[16] See 1 Hawk. P. C. c. 3, Co. Litt. 368, 1 Russell, 176, on this subject. The distinction between maintenance and champerty seems to be this: where there is no agreement to divide the thing in suit, the party intermeddling is guilty of maintenance only; but where he stipulates to receive part of the thing in suit, he is guilty of champerty. It seems that resorting to machinery and contrivances in order to make a party interested in a suit a witness on the trial, amounts to maintenance. Bell *vs.* Smith, 7 D. & R. 846; 5 B. & C. 188.—Chitty.

[17] If an attorney prosecute an action, to be paid his costs in gross, it should seem it would amount to champerty. Com. Dig. Attorney, B. 14. Hob. 117. Tidd Prac. 8th ed. 326.—Chitty.

[18] This statute does not apply to offences cognizable only before magistrates, (1 B. & A. 282:) it applies only to common informers, and not to cases where the penalty is given to the party grieved. 1 Salk. 30. 2 Hawk. 279. The taking the penalty is an offence within the act, though there is no action or proceeding for it. Russ. & R. C. C. 84. 3 Burn, J. 24th ed. 85. A notice of action required by a penal statute is no commencement of the suit, so as to subject the plaintiff, or his agent, to an attachment for attempting to compound an offence previous to the suing out of the writ. 2 Bla. Rep. 781. As to the mode of obtaining leave to compound, see Tidd's Prac. 8th ed. 604.—Chitty.

version of public justice,[19] for which the party injured may either have a civil action by writ of conspiracy, (of which we spoke in the preceding book,)(c) or

(c) See book iii. page 126.

[19] The instance pointed out by the learned commentator is not the only one in which parties may be indicted for a conspiracy; and it may be stated as a general rule that all confederacies wrongfully to prejudice another are misdemeanours at common law, and indictable accordingly, whether the intention is to injure his property, his person, or his character. See 1 Hawk. c. 72, s. 2. But no indictment lies for conspiring to commit a civil trespass on a preserve to take game, though effected in the night and with destructive weapons. 13 East. 228.

The offence of conspiracy is not confined to the prejudicing a particular individual: it may be to injure public trade, to effect public health, to violate public policy, to insult public justice, or to do any act in itself illegal.

There are many cases in which the act itself would not be cognizable by law if done by a single person, which becomes the subject of indictment when effected by several with a joint design. 6 T. R. 636. Thus, each person attending a theatre has a right to express his disapprobation of the piece acted, or a performer on the stage, but if several previously agree to condemn a play or hiss an actor, they will be guilty of conspiring. 2 Camp. 358. In the case of workmen refusing to proceed unless they receive an advance of wages, it is clear that any one of them might singly act on this determination; but it is criminal when it follows from a plan preconcerted by many. 6 T. R. 636. See the statute as to combinations among workmen, *infra*. There are other cases in which, though the act may be morally criminal, it is not illegal, except on the ground of conspiracy: thus the verbal slander of a private individual is not indictable, but it is so where several unite in a scheme to blast his character. 1 Lev. 62. 1 Vent. 304. And in every case that can be adduced of conspiracy the offence depends on the unlawful agreement and not on the act which follows it: the latter is but evidence of the former. 2 Burr. 993. 3 Burr. 1321.

To constitute a conspiracy, as observed in the text, there must be at least two persons implicated in it; and a husband and wife cannot be guilty of it. 1 Hawk. c. 72, s. 8. If all the persons in the indictment be acquitted except one, and the indictment do not lay the offence as committed jointly with other persons unknown, no judgment can be passed on such one. Poph. 242. 3 Burr. 1262. 12 Mod. 262. But one conspirator may be tried singly; as if the others had escaped, or died, before the trial or the finding of the bill, he may be convicted alone. 1 Stra. 193. 2 Stra. 1227. It is no offence to conspire to prosecute a guilty person. 1 Salk. 174.

It is not necessary to constitute the offence that any act should be done in pursuance of the conspiracy, (2 Lord Raym. 1167. 8 Mod. 321. 1 Salk. 174. 1 Bla. Rep. 392,) or that any party was actually injured. 1 Leach, 39.

Conspiracies and *combinations among workmen* for a long time engrossed the attention of, and perplexed, the legislature. Until the passing of the 6 Geo. IV. c. 129, the common law relative to such an offence was considered defective. This act, however, repeals all the former acts on the subject of such combinations, and leaves the offence as it before stood at common law. However, by the 3d section, if a person, by force, violence, threats, or obstruction, compel any person, hired or employed in any trade or business, to depart from his hiring or employment, or obstruct him from returning to his work before finished, *or* prevent, or endeavour to prevent, any person from hiring himself, or from accepting employment; *or* by force, or threats, &c., molest another in his person or property, to induce him to become a member of any club or association, or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association; or not having contributed, or having refused to contribute, to any common fund, or to pay any fine or penalty; or on account of his not having complied, or of refusing to comply, with any regulations, &c. made to obtain an advance, or to reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work; or to regulate the mode of carrying on any manufacture, trade, or business, in the management thereof; *or* by violence, or threats, or obstruction, force any person carrying on any business to make any alteration in his mode of carrying on such business, or to limit his number of workmen; such offender and his accessories may be imprisoned, with or without hard labour, for not exceeding three calendar months. By sect. 4, persons may meet together for the sole purpose of consulting upon and determining the rate of wages, or hours of work, and may enter into an agreement for framing the rate of wages or hours of work. And, by sect. 5, the masters of workmen may do the same. By sect. 6, offenders against the act may be called on to give evidence for the king, or prosecute an informer on any information exhibited under the act. Sect. 7 gives a summary proceeding before a magistrate for an offence under the act.—CHITTY.

the conspirators, for there must be at least two to form a conspiracy, may be indicted at the suit of the king, and were by the antient common law(*d*) to receive what is called the *villenous* judgment, viz., to lose their *liberam legem*, whereby they are discredited and disabled as jurors or witnesses; to forfeit their goods and chattels, and lands for life; to have those lands wasted, their houses razed, their trees rooted up, and their own bodies committed to prison.(*e*) But it now *137] is the better opinion, that the villenous judgment is by long *disuse become obsolete, it not having been pronounced for some ages; but instead thereof, the delinquents are usually sentenced to imprisonment, fine, and pillory. To this head may be referred the offence of sending letters threatening to accuse any person of a crime punishable with death, transportation, pillory, or other infamous punishment, with a view to extort from him any money or other valuable chattels. This is punishable, by statute 30 Geo. II. c. 24, at the discretion of the court, with fine, imprisonment, pillory, whipping, or transportation for seven years.[20]

16. The next offence against public justice is when the suit is past its commencement, and come to trial. And that is, the crime of wilful and corrupt *perjury:* which is defined by Sir Edward Coke(*f*) to be a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *wilfully*, *absolutely*, and *falsely* in a matter *material* to the issue or point in question. The law takes no notice of any perjury but such as is committed in some court of justice having power to administer an oath; or before some magistrate or proper officer invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution: for it esteems all other oaths unnecessary, at least, and therefore will not punish the breach of them.[21] For which reason it is much to be questioned, how far any magistrate is justifiable in taking a voluntary *affidavit* in any extrajudicial matter, as is

(*d*) Bro. Abr. tit. *Conspiracy*, 28. (*e*) 1 Hawk. P. C. 193. (*f*) 3 Inst. 164.

[20] By stat. 6 & 7 Vict. c. 96, s. 3, also the publishing, or threatening to publish, a libel, or proposing to abstain from publishing any thing with intent to extort money or any appointment or office of profit, is punishable by imprisonment for any term not exceeding three years.—Stewart.

[21] And no breach of an oath made in a mere private concern, as in entering into a contract, however malicious, is an indictable offence, but can only be redressed in an action for the individual injury; nor can any criminal proceeding be maintained for the violation of an oath taken, however solemnly, to perform any duties in future, though the offence will be highly aggravated by the breach of an obligation so sacred. 3 Inst. 166. 11 Co. Rep. 98. And even where an oath is required by an act of parliament in an extrajudicial proceeding, the breach of that obligation does not seem to amount to perjury, unless the statute contain an express provision to that effect. And it seems an indictment for perjury is not sustainable on an oath taken before the house of commons, as they have not any power to administer an oath, unless indeed in those particular cases in which an express power is granted to them by statute. But it is indictable to swear falsely in any court of equity, (1 Leach, 50. 1 Sid. 418,) any ecclesiastical court, (Cro. Eliz. 609,) and any other lawful court, whether it be of record or otherwise. Hawk. b. 1, c. 69, s. 3. So a false oath subjects the offender to all the penalties of perjury, though it be taken in a stage of the proceedings when it does not influence the final judgment, but only affects some intermediate step to be taken; thus, if a man offering to bail another swears his property to be greater than it is, in order to be received as a surety, (Cro. Car. 146,) or if he swears falsely before a magistrate to induce him to compel another to find sureties for the peace. Hawk. b. 1, c. 69, s. 3.

The party must be lawfully sworn; and, as above observed, the person by whom the oath is administered must have competent authority to receive it. And therefore no false swearing before individuals acting merely in a private capacity, or before officers who have no legal jurisdiction to administer the particular oath in question, will amount to the offence of perjury. 3 Inst. 166. Cro. C. C. 7th ed. 626. And though the officer stands colourably in the situation which confers a power of receiving an oath on such an occasion, if in fact he is not duly appointed, the proceedings will be of no avail, (Id. ibid. 3 Camp. 432. Wood's Inst. 435;) for though it is sufficient prima facie to show the ostensible capacity in which he acted when the oath was taken, the presumption may be rebutted by other evidence, and the defendant, if he succeed, will be entitled to an acquittal. 3 Camp. 432; see id. 96.—Chitty.

now too frequent upon every petty occasion; since it is more than possible that by such idle oaths a man may frequently *in foro conscientiæ* incur the guilt and at the same time evade the temporal penalties of perjury. The perjury must also be corrupt, (that is, committed *malo animo*,) wilful, positive, and absolute:[22] not upon surprise, or the like: it also must be in some point material to the question in dispute;[23] for if it only be in some trifling collateral circumstance, to which no regard is paid, it is no more penal than in the voluntary extrajudicial oaths before mentioned. *Subornation* of perjury is the offence of procuring another to *take such a false oath as constitutes perjury in the principal.[24] The punishment of perjury and subornation at common [*138 law has been various. It was antiently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods; and now it is fine and imprisonment and never more to be capable of bearing testimony.(*g*) But the statute 5 Eliz. c. 9 (if the offender be prosecuted thereon) inflicts the penalty of perpetual infamy, and a fine of 40*l.* on the suborner: and, in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory. Perjury itself is thereby punished with six months' imprisonment, perpetual infamy, and a fine of 20*l.*, or to have both ears nailed to the pillory. But the prosecution is usually carried on for the offence at common law;

(*g*) 3 Inst. 163.

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[22] If a man swears that he *believes* that to be true which he knows to be false, he swears as absolutely, and is as criminal in point of law, as if he had made a positive assertion that the fact was as he had swore he believed it to be. 3 Wils. 427. 2 Bla. Rep. 881. 1 Leach, 242. Hawk. b. 1, c. 69, s. 7, n. a. The false swearing, however, as to the legal operation of a deed is not indictable. 1 Esp. Rep. 280.—CHITTY.

[23] If the subject-matter is entirely foreign to the purpose, not tending either to extenuate or increase the damages or the guilt, nor likely to induce the jury to give a more easy credit to the substantial part of the evidence, the party will not be liable to an indictment. Hawk. b, 1. c. 69, s. 8. To swear falsely as to the character of a witness is sufficiently material. Com. Rep. 43. 1 Ld. Raym. 258. And in general it is sufficient if the matter be circumstantially material to the issue or affect the ultimate decision. 1 Ld. Raym. 258. 2 id. 889. 2 Roll. R. 369. Thus, perjury may be committed by falsely swearing that another witness is entitled to credit if such assertion conduce to the proof of the point in issue. 1 Ld. Raym. 258. And it is certain that there is no necessity that the false evidence should be sufficient to render the party on whose behalf it is given successful, but it will suffice if that is its evident tendency, (2 Ld. Raym. 889,) or if in a civil action it has the effect of increasing or extenuating the damages, *comme semble.* Wood's Inst. 435. In a late case, in an indictment for perjury, in an answer in chancery to a bill filed against the defendant for the specific performance of an agreement relating to the purchase of land, the defendant had relied on the statute of frauds, (the agreement not being in writing,) and had also denied having ever entered into such an agreement, and upon this denial he was indicted; but it was held that the denial of an agreement which by the statute of frauds was not binding on the parties was immaterial and irrelevant, and not indictable. 1 Ry. & M. 109.

To constitute perjury at common law it is not necessary that the false oath should obtain any credit, or occasion any actual injury to the party against whom the evidence is given: for the prosecution is not grounded on the inconvenience which an individual may sustain, but on the abuse and insult to public justice. 2 Leon. 211. 3 Leon. 230. 7 T. R. 315.

In some cases, where a false oath has been taken, the party may be prosecuted by indictment at common law, though the offence may not amount to perjury. Thus, it appears to have been holden that any person making, or knowingly using, any false affidavit taken abroad (though a perjury could not be assigned on it here) in order to mislead our courts of justice, is punishable as a misdemeanour; and lord Ellenborough, C. J., said "that he had not the least doubt that any person making use of a false instrument, in order to prevent the due course of justice, was guilty of an offence punishable by indictment." 8 East, 364. 2 Russ. 1759.—CHITTY.

[24] To render the offence of subornation of perjury complete, either at common law or on the statute, the false oath must be actually taken, and no abortive attempt to solicit will bring the offender within its penalties. 3 Mod. 122. 1 Leach, 455, notes. But the criminal solicitation to commit perjury, though unsuccessful, is a misdemeanour at common law, punishable not only by fine and imprisonment but by corporal and infamous punishment. 2 East, Rep. 17. 1 Hawk. c. 19, s. 10. 6 East, 464.—CHITTY.

especially as to the penalties before inflicted, the statute 2 Geo. II. c. 25 superadds a power for the court to order the offender to be sent to the house of correction for a term not exceeding seven years, or to be transported for the same period, and makes it felony without benefit of clergy to return or escape within the time.[25] It has sometimes been wished that perjury, at least upon capital accusations whereby another's life has been or might have been destroyed, was also rendered capital, upon a principle of retaliation: as it is in all cases by the laws of France.(*h*) And certainly the odiousness of the crime pleads strongly in behalf of the French law. But it is to be considered, that they admit witnesses to be heard only on the side of the prosecution, and use the rack to extort a confession from the accused. In such a constitution therefore, it is necessary to throw the dread of capital punishment into the other scale in order to keep in awe the witnesses for the crown, on whom alone the prisoner's fate depends; so naturally does one cruel law beget another. But corporal and pecuniary punishments, exile and perpetual infamy, are more suited to the genius of the English law; where the fact is openly discussed between witnesses on *both* sides, and the evidence for the crown may be contradicted and disproved by those of the prisoner. Where, *indeed, the *139] death of an innocent person has actually been the consequence of such wilful perjury, it falls within the guilt of deliberate murder, and deserves an equal punishment; which our antient law in fact inflicted.(*i*) But the mere attempt to destroy life by other means not being capital, there is no reason that an attempt by perjury should; much less that this crime should in *all* judicial cases be punished with death. For to multiply capital punishments lessens their effect when applied to crimes of the deepest dye; and, detestable as perjury is, it is not by any means to be compared with some other offences, for which only death can be inflicted; and therefore it seems already (except perhaps in the instance of deliberate murder by perjury) very properly punished by our present law, which has adopted the opinion of Cicero,(*k*) derived from the law of the twelve tables, "*perjurii pœna divina, exitium; humana, dedecus.*"

17. Bribery is the next species of offence against public justice; which is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in his office.(*l*)[26] In the East it is the custom never to petition any superior for justice, not excepting their kings, without a present. This is calculated for the genius of despotic countries; where the true principles of government are never understood, and it is imagined that there is no obligation from the superior to the inferior, no relative duty owing from the governor to the governed. The Roman law, though it contained many severe injunctions against bribery, as well for selling a man's vote in the senate or other public assembly, as for the bartering of common

(*h*) Montesq. Sp. L. b. xxix. c. 11.
(*i*) Britton, c. 5.
(*k*) *De Leg.* 2, 9.
(*l*) 1 Hawk. P. C. 168.

[25] The statute now in force is 7 & 8 Geo. IV. c. 27. There is another circumstance which attends all convictions for perjury, though it forms no part of the judgment at common law, the incapacity of the offender to bear testimony as a witness. But when the indictment is framed at common law, a pardon under the great seal restores the competency which the conviction destroyed, (1 Vent. 349. 4 Harg. St. Tr. 682. 1 Esp. Rep. 94:) but where the proceedings are grounded on the 5 Eliz. c. 9, this cannot be done without a reversal of the judgment, because it is here made a part of the punishment prescribed. 1 Salk. 289. 5 Esp. Rep. 94.—Chitty.

By stat. 1 Vict. c. 23, the punishment of the pillory is abolished; and, by stat. 16 & 17 Vict. c. 99, penal servitude may be substituted for transportation.—Stewart.

[26] It is equally a crime to give as to receive, and in many cases the attempt itself is an offence complete on the side of him who offers it. 4 Burr. 2500. 2 East, 5. Russ. & R. C. C. 107. Thus, an attempt to bribe a privy counsellor to procure a reversionary patent of an office grantable by the king under the great seal is indictable though it did not succeed. 4 Burr. 2495. 2 Camp. 231. An attempt to bribe at elections to parliament is criminal for the same reason. 4 Burr. 2500; and see *ante*, 1 book, 179. So a promise of money to a corporator to vote for a member of a corporation is criminal, (2 Ld. Raym. 1377. 4 Burr. 2501:) and the offence is not, as the learned commentator supposes, confined to bribing judicial officers. See 1 East, 183. 4 Burr. 2494.—Chitty.

justice, yet by a strange indulgence in one instance it tacitly encouraged this practice: allowing the magistrate to receive small presents, provided they did not in the whole exceed a hundred crowns in the year:(*m*) not considering the insinuating nature and gigantic progress of this vice when once admitted. Plato, therefore, more wisely, in his ideal republic,(*n*) *orders those who take presents for doing their duty to be punished in the severest manner: and by the laws of Athens he that offered was also prosecuted as well as he that received a bribe.(*o*) In England this offence of taking bribes is punished in inferior officers with fine and imprisonment; and in those who offer a bribe, though not taken, the same.(*p*) But in judges, especially the superior ones, it hath been always looked upon as so heinous an offence that the chief justice Thorpe was hanged for it in the reign of Edw. III. By a statute(*q*) 11 Hen. IV., all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe, be punished at the king's will, and be discharged from the king's service forever. And some notable examples have been made in parliament of persons in the highest stations, and otherwise very eminent and able, contaminated with this sordid vice. [*140

18. Embracery is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like.(*r*) The punishment for the person embracing is by fine and imprisonment; and for the juror so embraced, if it be by taking money, the punishment is (by divers statutes of the reign of Edward III.) perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value.[27]

19. The *false verdict* of jurors, whether occasioned by embracery or not, was antiently considered as criminal, and therefore exemplarily punished by attaint, in the manner formerly mentioned.(*s*)[28]

20. Another offence of the same species is the *negligence of public officers*, intrusted with the administration of justice, as sheriffs, coroners, constables, and the like, which makes the offender liable to be fined; and in very notorious cases will amount to a forfeiture of his office, if it be a beneficial one.(*t*) Also, the omitting to apprehend persons offering stolen *iron, lead, and other metals to sale is a misdemeanour, and punishable by a stated fine, or imprisonment, in pursuance of the statute 29 Geo. II. c. 30. [*141

21. There is yet another offence against public justice, which is a crime of deep malignity; and so much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the *oppression* and tyrannical partiality of judges, justices, and other *magistrates*, in the administration and under the colour of their office. However, when prosecuted, either by impeachment in parliament, or by information in the court of king's bench, (according to the rank of the offenders,) it is sure to be severely punished with forfeiture of their offices, (either consequential or immediate,) fines, imprisonment, or other discretionary censure, regulated by the nature and aggravations of the offence committed.[29]

22. Lastly, *extortion* is an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing

(*m*) *Ff.* 48, 11, 6.
(*n*) *De Leg. l.* 12.
(*o*) Pott. Antiq. b. i. c. 23.
(*p*) 3 Inst. 147.
(*q*) Ibid. 146.
(*r*) 1 Hawk. P. C. 259.
(*s*) See book iii. pp. 402, 403.
(*t*) 1 Hawk. P. C. 168.

[27] By the 6 Geo. IV. c. 50, s. 61, the offence of embracery of jurors, and jurors' wilfully and corruptly consenting thereto, is punishable by fine and imprisonment.—CHITTY.

[28] The writ of attaint against jurors is now utterly abolished, by the 6 Geo. IV. c. 50, § 60; and, by § 61, they are rendered punishable for misconduct by another mode.—CHITTY.

[29] On motions for informations against magistrates the question is, not whether the act done might on full investigation be found to be strictly right, but whether it proceeded from oppressive, dishonest, or corrupt motives, (under which fear and favour may generally be included,) or from mistake, or error: in either of the latter cases the court will

of value that is not due to him, or more than is due, or before it is due.(*u*) The punishment is fine and imprisonment, and sometimes a forfeiture of the office.[30]

CHAPTER XI.

OF OFFENCES AGAINST THE PUBLIC PEACE.

*142] *We are next to consider offences against the public *peace;* the conservation of which is intrusted to the king and his officers, in the manner and for the reasons which were formerly mentioned at large.(*a*) These offences are either such as are an actual breach of the peace; or constructively so, by tending to make others break it. Both of these species are also either felonious, or not felonious. The felonious breaches of the peace are strained up to that degree of malignity by virtue of several modern statutes; and particularly,—

1. The *riotous assembling* of *twelve*[1] persons or more, and not dispersing upon proclamation. This was first made high treason by statute 3 & 4 Edw. VI. c. 5, when the king was a minor, and a change in religion to be effected; but that statute was repealed by statute 1 Mar. c. 1, among the other treasons created since the 25 Edw. III.; though the prohibition was in substance re-enacted, with an inferior degree of punishment, by statute 1 Mar. st. 2, c. 12, which made the same offence a single felony. These statutes specified and particularized the name of the riots they were meant to suppress; as, for example, such as were set on foot with intention to offer violence to the privy council, or to change the laws of the kingdom, or for certain other specific purposes: in which cases, if the persons were commanded by proclamation to disperse, and they did not, it was by the statute of Mary made felony, but within the benefit of the clergy; and also the act indemnified the peace-officers and their assistants if they killed any of the mob in endeavouring to suppress such riot. This was thought a necessary security in that sanguinary reign, when popery was

(u) 1 Hawk. P. C. 170. (a) Book i. pp. 118, 268, 350.

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not grant a rule. Rex *vs.* Barron, 3 B. & A. 432. That case seems to lay down the general rule upon this subject clearly and definitively.—Chitty.

[30] By the statute of 3 Edw. I. c. 16, in affirmance of the ancient law, it is enacted that no sheriff, nor other king's officer, shall take any reward to do his office, but shall be paid of that which they take of the king; and that he who so doeth shall yield twice as much, and shall be punished at the king's pleasure. This act, which thus particularly names the sheriff, extends to every ministerial officer concerned in the administration or execution of justice, the common good of the subject, or the service of the king. 2 Inst. 209. Where a statute annexes a fee to an office, it will be extortion to take more than it specifies. 2 Inst. 210. And it seems that if a clerk in the crown-office demands 13*s.* 4*d.* from every defendant who pleads to a joint information, or above 2*s.* where several are indicted together for the venire and entry of the plea for all of them, he will be liable to be indicted. 3 Mod. 247. 3 Inst. 150. But stated and known fees allowed by courts of justice to their own officers are legal and may be properly demanded. Co. Litt. 368, b. And, therefore, before the abolition of gaol-fees, by 14 Geo. III. c. 20, on a prisoner's discharge, the bar-fee of 20*d.* was always allowed to the sheriff. 2 Inst. 210. Nor is it criminal for an officer to take a reward voluntarily offered him for the more diligent or expeditious performance of his duty. 2 Inst. 210, 211. But a promise to pay him money for an act of duty which the law does not suffer him to receive is absolutely void, however freely it may have been given. 2 Burr. 924. 1 Bla. Rep. 204. There are no accessories in extortion. 1 Stra. 75.—Chitty.

[1] It does not seem necessary that twelve persons should have been guilty to constitute a riotous assembly within the acts. See Doug. 1st ed. 673; 2d ed. 699. 5 T. R. 14. 2 Saund. 377, b. n. 12.—Chitty.

intended to be re-established *which was likely to produce great discontents; but at first it was made only for a year, and was afterwards [*143 continued for that queen's life. And, by statute 1 Eliz. c. 16, when a reformation in religion was to be once more attempted, it was revived and continued during her life also, and then expired. From the accession of James the First to the death of queen Anne, it was never once thought expedient to revive it; but in the first year of George the First it was judged necessary, in order to support the execution of the act of settlement, to renew it, and at one stroke to make it perpetual, with large additions. For, whereas the former acts expressly defined and specified what should be accounted a riot, the statute 1 Geo. I. c. 5 enacts, generally, that if any twelve persons are unlawfully assembled to the disturbance of the peace, and any one justice of the peace, sheriff, under-sheriff, or mayor of a town shall think proper to command them by proclamation to disperse, if they contemn his orders and continue together for one hour afterwards, such contempt shall be felony without benefit of clergy.[2] And further, if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading of it, such opposers and hinderers are felons without benefit of clergy; and all persons to whom such proclamation *ought to have been made*, and knowing of such hinderance, and not dispersing, are felons without benefit of clergy. There is the like indemnifying clause in case any of the mob be unfortunately killed in the endeavour to disperse them; being copied from the act of queen Mary. And, by a subsequent clause of the new act, if any persons so riotously assembled begin, even before proclamation, to pull down any church, chapel, meeting-house, dwelling-house, or out-houses, they shall be felons without benefit of clergy.[3]

2. By statute 1 Hen. VII. c. 7, *unlawful hunting* in any legal forest, park, or warren, not being the king's property, *by night*, or with *painted faces*, was declared to be single felony. But now, by the statute 9 Geo. I. c. 22, to appear armed in any enclosed forest or place where deer are usually kept, or in any warren for hares or coneys, or in any high*road, open heath, common, [*144 or down, by day or night, with faces blacked or otherwise *disguised*, or (being so disguised) to hunt, wound, kill, or steal any deer, to rob a warren, or to steal fish, or to procure by gift or promise of reward any person to join them in such unlawful act, is felony without benefit of clergy.[4] I mention these of-

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[2] But, by stat. 1 Vict. c. 91, ss. 1, 2, it is punishable with transportation for life, or for not less than fifteen years, or imprisonment for three; and now, by stat. 16 & 17 Vict. c. 99, penal servitude may be substituted.—STEWART.

[3] These provisions were by subsequent statutes extended to every description of mills and the works attached to them, to buildings or machinery for carrying on any kind of trade or manufacture, or for warehousing goods or merchandise, and to houses, shops, and buildings, with the fixtures, furniture, goods, and commodities whatsoever contained therein.

And now, by 7 & 8 Geo. IV. c. 30, s. 8, it is provided that if any persons, riotously and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy, any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any machinery, fixed or movable, prepared for or employed in any manufacture, or any steam-engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, wagon-way, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and, on conviction, shall suffer death as a felon.—CHITTY.

But, by stat. 4 & 5 Vict. c. 56, s. 2, the punishment was changed to transportation for seven years or imprisonment for three, and is now changed to penal servitude.—STEWART.

[4] The 9 Geo I. c. 22 and 27 Geo. II. c. 15, depriving parties committing these offences of benefit of clergy, were repealed, by 4 Geo. IV. c. 54, s. 3, which subjected the party to transportation or imprisonment at the discretion of the court. The latter act, how-

fences in this place not on account of the damage thereby done to private property, but of the manner in which that damage is committed, namely, with the face blacked or with other disguise, and being armed with offensive weapons, to the breach of the public peace and the terror of his majesty's subjects.

3. Also, by the same statute, 9 Geo. I. c. 22, amended by statute 27 Geo. II. c. 15, knowingly to send any *letter* without a name, or with a fictitious name, *demanding* money, venison, or any other valuable thing, or *threatening* (without any demand) to kill any of the king's subjects, or to fire their houses, out-houses, barns, or ricks, is made felony without benefit of clergy.[5] This offence was formerly high treason, by the statute 8 Hen. V. c. 6.

4. To pull down or destroy any *lock, sluice*, or *floodgate* erected by authority of parliament on a navigable river is, by statute 1 Geo. II. st. 2, c. 19, made felony, punishable with transportation for seven years. By the statute 8 Geo. II. c. 20, the offence of destroying such works, or rescuing any person in custody for the same, is made felony without benefit of clergy; and it may be inquired of and tried in any adjacent county, as if the fact had been therein committed. By the statute 4 Geo. III. c. 12, maliciously to damage or destroy any banks, sluices, or other works on such navigable river, to open the floodgates or otherwise obstruct the navigation, is again made felony, punishable with transportation for seven years. And, by the statute 7 Geo. III. c. 40, (which repeals all former acts relating to turnpikes,) maliciously to pull down or otherwise destroy *145] any *turnpike-gate* or fence, toll-house or *weighing-engine thereunto belonging, erected by authority of parliament, or to rescue any person in custody for the same, is made felony without benefit of clergy, and the indictment may be inquired of and tried in any adjacent county.[6] The remaining

ever, is repealed, (except as to sending letters threatening to kill or murder, or to burn or destroy property; and as to accessories to such offences, and as to rescues,) by 7 & 8 Geo. IV. c. 27. All the statutes relating to these offences are repealed and consolidated, by 7 & 8 Geo. IV. c. 27 and c. 29; and, by 7 & 8 Geo. IV. c. 29, s. 26, stealing or attempting to kill or wound any deer kept in any enclosed ground is declared felony, and the guilty party is liable to be punished as in the case of simple larceny; and committing the same offence in unenclosed grounds is punishable summarily by fine not exceeding 50*l.*, and repeating such offence is deemed felony and punishable as a simple larceny. —Chitty.

[5] The statute now in force upon this subject is the 7 & 8 Geo. IV. c. 29, by sect. 8 of which, persons sending letters containing menacing demands, or threatening to accuse a party of any crime punishable with death, transportation, or pillory, or of any other infamous crime, to extort money, shall be guilty of felony, and, on conviction thereof, be liable, at the discretion of the court, to transportation for life or not less than seven years, or imprisonment for any term not exceeding four years, and, if males, to one, two, or three public whippings, in addition to such imprisonment. Section 9 defines what shall be deemed an infamous crime.

Sending a letter threatening to accuse the prosecutor of having made overtures to the prisoner to commit sodomy with him does not threaten to charge such an infamous crime as to be within the act. Rex *vs.* Hickman, R. & M. C. C. 34. But see Rex *vs.* Wagstaffe, R. & R. C. C. 398. Rex *vs.* Paddle, id. 484.—Chitty.

[6] By 7 and 8 Geo. IV. c. 30, amending and consolidating all former statutes on these subjects, breaking or cutting down any sea bank or wall, or the bank or wall of any river, canal, or marsh, or destroying any lock, sluice, floodgate, or other work on any navigable river or canal, is made felony, punishable with transportation for life or not less than seven years, or with imprisonment for any term not exceeding four years, and, to male offenders, with one, two, or three public whippings. And cutting off or removing the piles for securing any sea bank or wall, or the bank or wall of any river, canal, or marsh, or doing any injury to obstruct the navigation thereof, is made felony, subject to transportation for seven years, or to imprisonment for any term not exceeding two years, and, to males, one, two, or three public whippings. S. 12.

And, by sect. 14, throwing down or otherwise destroying any turnpike-gate, or other erection, or fence connected with or belonging to the same, is made punishable as a misdemeanour.—Chitty.

By stat. 8 & 9 Vict. c. 44, the malicious destruction of any thing kept for the purposes of art, science, or literature in any public repository, or of ornaments in places of religious worship, or of statues or monuments exposed to public view, is a misdemeanour, and punishable with fine and imprisonment.—Stewart.

offences against the public peace are merely misdemeanours, and no felonies; as,—

5. Affrays (from *affraier*, to terrify) are the fighting of two or more persons in some public place, to the terror of his majesty's subjects; for if the fighting be in private it is no *affray*, but an *assault*.(*b*) Affrays may be suppressed by any private person present, who is justifiable in endeavouring to part the combatants, whatever consequence may ensue.(*c*) But more especially the constable, or other similar officer, however denominated, is bound to keep the peace, and to that purpose may break open doors to suppress an affray or apprehend the affrayers, and may either carry them before a justice or imprison them by his own authority for a convenient space, till the heat is over, and may then perhaps also make them find sureties for the peace.(*d*) The punishment of common affrays is by fine and imprisonment, the measure of which must be regulated by the circumstances of the case; for, where there is any material aggravation, the punishment proportionably increases. As where two persons coolly and deliberately engage in a duel: this, being attended with an apparent intention and danger of murder, and being a high contempt of the justice of the nation, is a strong aggravation of the affray, though no mischief has actually ensued.(*e*) *Another aggravation is when, thereby, the officers of justice are disturbed in the due execution of their office, or where a respect to the [*146 particular place ought to restrain and regulate men's behaviour more than in common ones; as in the king's court, and the like. And upon the same account, also, all affrays in a church or churchyard are esteemed very heinous offences, as being indignities to Him to whose service those places are consecrated. Therefore mere quarrelsome words, which are neither an affray nor an offence in any other place, are penal here. For it is enacted, by statute 5 & 6 Edw. VI. c. 4, that if any person shall, by words only, quarrel, chide, or brawl in a church or churchyard, the ordinary shall suspend him, if a layman, *ab ingressu ecclesiæ*, and if a clerk in orders, from the ministration of his office during pleasure. And if any person in such church or churchyard proceeds to smite or lay violent hands upon another, he shall be excommunicated *ipso facto;* or if he strikes him with a weapon, or draws any weapon with intent to strike, he shall, besides excommunication, (being convicted by a jury,) have one of his ears cut off, or, having no ears, be branded with the letter F in his cheek.[7] *Two* persons may be guilty of an affray: but,—

6. *Riots*, *routs*, and *unlawful assemblies* must have *three* persons at least to constitute them. An *unlawful assembly* is when three or more do assemble themselves together to do an unlawful act, as to pull down enclosures, to destroy a warren or the game therein, and part without doing it or making any motion towards it.(*f*)[8] A *rout* is where three or more meet to do an unlawful act upon

(*b*) 1 Hawk. P. C. 134.
(*c*) Ibid. 136.
(*d*) Ibid. 137.
(*e*) Ibid. 138.
(*f*) 3 Inst. 176.

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[7] By 9 Geo. IV. c. 31, s. 1, "so much of 5 & 6 Edw. VI. c. 4, entitled an Act against quarrelling and fighting in churches and churchyards, as relates to the punishment of persons convicted of striking with any weapon, or drawing any weapon with intent to strike, as therein mentioned," is repealed.

It seems that brawling was not made an offence by 5 & 6 Edw. VI. c. 4, but was previously cognizable by the spiritual courts. *Ex parte* Williams, 6 D. & R. 373. 4 B. & C. 313.

With respect to the malicious or contemptuous disturbance of a congregation, or molestation of a minister, during the celebration of divine service, see the statutes 1 M. c. 3 and 1 W. and M. c. 18, *ante*, 54.—CHITTY.

[8] An assembly of a man's friends for the defence of his person against those who threatened to beat him if he go to such a market, &c. is unlawful; for he who is in fear of such insults must provide for his safety by demanding the surety of the peace against the persons by whom he is threatened, and not make use of such violent methods, which cannot but be attended with the danger of raising tumults and disorders, to the disturbance of the public peace. But an assembly of a man's friends at his own *house* for the defence of the possession of it against such as threaten to make an unlawful entry, or for the defence of his person against such as threaten to beat him in his house, is per-

a common quarrel, as forcibly breaking down fences upon a right claimed of common or of way, and make some advances towards it.(g) A *riot* is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel;(h) as, if they beat a man, or hunt and kill game in another's park, chase, warren, or liberty, or do any other unlawful act with force and violence, or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner.[9] *The punishment of unlawful assemblies, if to the number of twelve, we have just now seen, may be capital, according to the circumstances that attend it; but from the number of three to eleven is by fine and imprisonment only.[10] The same is the case in riots and routs by the common law; to which the pillory, in very enormous cases, has been sometimes superadded.(i)[11] And, by the statute 13 Hen. IV. c. 7, any two justices, together with the sheriff or under-sheriff of the county, may come with the *posse comitatus*, if need be, and suppress any such riot, assembly, or rout, arrest the rioters, and record upon the spot the nature and circumstances of the whole transaction, which record alone shall be a sufficient conviction of the offenders. In the interpretation of which statute it hath been holden that all persons, noblemen and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment; and that any battery, wounding, or killing the rioters that may happen in suppressing the riot is justifiable.(j) So that our antient law, previous to the modern riot act, seems pretty well to have guarded against any violent breach of the public peace, especially as any riotous assembly on a public or general account, as, to redress grievances or pull down all enclosures, and also resisting the king's forces if sent to keep the peace, may amount to overt acts of high treason by levying war against the king.

*147]

7. Nearly related to this head of riots is the offence of *tumultuous petitioning*, which was carried to an enormous height in the times preceding the grand rebellion. Wherefore, by statute 13 Car. II. st. 1, c. 5, it is enacted that not more than twenty names shall be signed to any petition to the king or either house of parliament for any alteration of matters established by law in church or state, unless the contents thereof be previously approved in the country by three justices, or the majority of the grand jury at the assizes or quarter sessions, and in London by the lord mayor, aldermen, *and common council;(k) and that no petition shall be delivered by a company of more than ten

*148]

(g) Bro. Abr. tit. *Riot*, 4, 5.
(h) 3 Inst. 176.
(i) 1 Hawk. P. C. 159.
(j) 1 Hal. P. C. 495. Ibid. 161.

(k) This may be one reason (among others) why the corporation of London has since the Restoration usually taken the lead in petitions to parliament for the alteration of any established law.

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mitted by law; for a man's house is looked upon as his castle. He is not, however, to arm himself and assemble his friends in defence of his *close*. 1 Russ. 362.—Chitty.

[9] To constitute a riot, the parties must act without any authority to give colour to their proceedings; for a sheriff, constable, or even a private individual, are not only permitted, but enjoined, to raise a number of people to suppress rioters, &c. 2 Hawk. c. 65, s. 2. The intention also with which the parties assemble, or at least act, must be unlawful; for if a sudden disturbance arise among persons met together for an innocent purpose, they will be guilty of a mere affray, though if they form parties, and engage in any violent proceedings, with promises of mutual assistance, or if they are impelled with a sudden disposition to demolish a house or other building, there can be no doubt they are rioters, and will not be excused by the propriety of their original design. 2 Hawk. c. 65, s. 3. But though there must be an evil intention, whether premeditated or otherwise, the object of the riot itself may be perfectly lawful, as to obtain entry into lands to which one of the parties has a rightful claim; for the law will not, as we have before seen, (*ante*, 3 book, 5,) suffer private individuals to disturb the peace, by obtaining that redress by force which the law would regularly award them. 2 Hawk. c. 65, s. 7. 8 T. R. 357, 364.

Women are punishable as rioters, but infants under the age of discretion are not. 1 Hawk. c. 65, s. 44. In a riot all are principals; and therefore if any person encourages, or promotes, or takes part in a riot, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter. 2 Camp. 370. —Chitty.

[10] By the 3 Geo. IV. c. 144, hard labour may be imposed.—Chitty.

[11] But now the pillory is abolished, by 56 Geo. III. c. 138.—Chitty.

persons, on pain in either case of incurring a penalty not exceeding 100*l.* and three months' imprisonment.[12]

8. An eighth offence against the public peace is that of a *forcible entry* or *detainer*, which is committed by violently taking or keeping possession of lands and tenements with menaces, force, and arms, and without the authority of law. This was formerly allowable to every person disseised, or turned out of possession, unless his entry was taken away or barred by his own neglect, or other circumstances, which were explained more at large in a former book.(*l*) But, this being found very prejudicial to the public peace, it was thought necessary by several statutes to restrain all persons from the use of such violent methods, even of doing themselves justice, and much more if they have no justice in their claim.(*m*) So that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force, with violence and unusual weapons. By the statute 5 Ric. II. st. 1, c. 8, all forcible entries are punished with imprisonment and ransom at the king's will. And, by the several statutes of 15 Ric. II. c. 2, 8 Hen. VI. c. 9, 31 Eliz. c. 11, and 21 Jac. I. c. 15, upon any forcible entry, or forcible detainer after peaceable entry, into any lands or benefices of the church, one or more justices of the peace, taking sufficient power of the county, may go to the place, and there record the force upon his own view, as in case of riots, and upon such conviction may commit the offender to gaol till he makes fine and ransom to the king. And moreover the justice or justices have power to summon a jury to try the forcible entry or detainer complained of; and, if the same be found by that jury, then, besides the fine on the offender, the justices shall make restitution by the sheriff of the possession, without inquiring into the merits of the title, for the force is the only thing to be tried, punished, and remedied by them: and the same may be done by indictment at the general sessions. But this provision does not extend to such as endeavour to maintain possession by force where they *themselves, or their ancestors, have been in the peaceable enjoyment of the [*149
lands and tenements for three years immediately preceding.(*n*)

9. The offence of *riding* or *going armed* with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land, and is particularly prohibited by the statute of Northampton, 2 Edw. III. c. 3, upon pain of forfeiture of the arms and imprisonment during the king's pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour.(*o*)

10. *Spreading false news*, to make discord between the king and nobility, or concerning any great man of the realm, is punishable by common law(*p*) with fine and imprisonment, which is confirmed by statutes Westm. 1, 3 Edw. I. c. 34, 2 Ric. II. st. 1, c. 5, and 12 Ric. II. c. 11.

11. *False* and *pretended prophecies*, with intent to disturb the peace, are equally unlawful, and more penal, as they raise enthusiastic jealousies in the people and terrify them with imaginary fears. They are therefore punished by our law upon the same principle that spreading of public news of any kind, without communicating it first to the magistrate, was prohibited by the antient Gauls.(*q*) Such false and pretended prophecies were punished capitally by statute 1 Edw. VI. c. 12, which was repealed in the reign of queen Mary. And now, by the statute 5 Eliz. c. 15, the penalty for the first offence is a fine of ten pounds and

(*l*) See book iii. p. 174, &c.

(*m*) 1 Hawk. P. C. 141.

(*n*) Holding over by force, where the tenant's title was under a lease now expired, is said to be a forcible detainer. Cro. Jac 199.

(*o*) Pott. Antiq. b. i. c. 26.

(*p*) 2 Inst. 226. 3 Inst. 198.

(*q*) "*Habent legibus sanctum, si quis quid de republica a finitimis rumore aut famâ acceperit, uti ad magistratum deferat neve cum alio communicet: quod sæpe homines temerarios atque imperitos falsis rumoribus terreri, et ad facinus impelli, et de summis rebus consilium capere cognitum est.*" Cæs. *de Bell. Gall. lib.* 6, *cap.* 19.

[12] In the trial of lord George Gordon, it was contended that the article of the Bill of Rights which declares that it is the right of the subject to petition the king, and that all commitments and prosecutions for such petitioning are illegal, had virtually repealed this statute. This, however, was denied by lord Mansfield in the name of the court. Doug. 592.—COLERIDGE.

one year's imprisonment; for the second, forfeiture of all goods and chattels and imprisonment during life.

*150] *12. Besides actual breaches of the peace, any thing that tends to provoke or excite others to break it is an offence of the same denomination. Therefore *challenges to fight*, either by word or letter, or to be the bearer of such challenge, are punishable by fine and imprisonment, according to the circumstances of the offence.(r)[13] If this challenge arises on account of any money won at gaming, or if any assault or affray happen upon such account, the offender, by statute 9 Anne, c. 14, shall forfeit all his goods to the crown and suffer two years' imprisonment.

13. Of a nature very similar to challenges are *libels*, *libelli famosi*, which, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency; but, in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath or expose him to public hatred, contempt, and ridicule.(s) The direct tendency of these libels is the breach of the public peace by stirring up the objects of them to revenge, and perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law;(t) and therefore the sending an abusive letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace.(u) For the same reason, it is immaterial, with respect to the essence of a libel, whether the matter of it be true or false,(v) since the provocation, and not the falsity, is the thing to be punished criminally; though, doubtless, the falsehood of it may aggravate its guilt and enhance its punishment.[14] In a civil action, we may remember, a libel must appear to be false as well as scandalous;(w) for, if

*151] the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever *offence it may be against the public peace; and therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit. But, in a criminal prosecution, the tendency which all libels have to create animosities and to disturb the public peace is the whole that the law considers. And, therefore, in such prosecutions the only points to be inquired into are, first, the making or publishing of the book or writing, and secondly, whether the matter be criminal; and if both these points are against the defendant, the offence against the public is complete.[15] The punishment of such libellers, for either making, repeating,

(r) 1 Hawk. P. C. 135, 138.
(s) Ibid. 193.
(t) Moor. 813.
(u) 2 Brown, 115. 12 Rep. 35. Hob. 215. Poph. 139 1 Hawk. P. C. 195.
(v) Moor. 627 5 Rep. 125. 11 Mod. 99.
(w) See book iii. page 125.

[13] The offences of fighting duels and sending or provoking challenges are fully considered by Mr. J. Grose, in passing sentence on Rice, convicted on a criminal information for a misdemeanour of the latter kind. 3 East, 581, where the opinions of the earlier writers are collected. It is an offence though the provocation to fight do not succeed, (6 East, 464. 2 Smith, 550;) and it is a misdemeanour merely to endeavour to provoke another to send a challenge. 6 East, 464. But mere words which, though they may produce a challenge, do not directly tend to that issue, as calling a man a liar or knave, are not necessarily criminal, (2 Lord Raym. 1031. 6 East, 471,) though it is probable they would be so if it could be shown that they were meant to provoke a challenge. A challenge is one of those offences for which a criminal information will be granted by the court of King's Bench, though this will not be done where the party applying has himself first incited the proposal. 1 Burr. 316.—Chitty.

[14] The words of lord Mansfield, "the greater truth, the greater libel," which his enemies wished with much eagerness to convert to the prejudice of that noble peer's reputation as a judge, were founded in principle and supported by very ancient authority.

Lord Coke has said, "that the greater appearance there is of truth in any malicious invective, so much the more provoking it is." 5 Co. 125.

Where truth is a greater provocation than falsehood, and therefore has a greater tendency to produce a breach of the public peace, then it is certainly true that the greater truth, the greater libel. *Asperis facetiis inlusus, quæ ubi multum ex vero traxere, acrem sui memoriam relinquunt.* Tac. Ann. 15, c. 68.—Christian.

[15] But a modification of this rule has been recently admitted by the legislature; and it

printing, or publishing the libel, is fine and such corporal punishment as the court in its discretion shall inflict, regarding the quantity of the offence and the quality of the offender.(x)[16] By the law of the twelve tables at Rome, libels

(x) 1 Hawk. P. C. 196.

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has been enacted, by stat. 6 & 7 Vict. c. 96, s. 6, that on the trial of any indictment or information for a libel, the defendant having pleaded such plea as hereinafter is mentioned, the truth of the matter charged may be inquired into, but shall not amount to a defence unless it was for the public benefit that the matter charged should be published; and to entitle the defendant to give evidence of the truth of the matters charged, as a defence to such indictment or information, it shall be necessary for the defendant in pleading to the indictment or information to allege the truth of the said matters; and also that it was for the public benefit that the matters charged should be published; to which plea the prosecutor may reply generally; and if after such plea the defendant shall be convicted, the court may, in pronouncing sentence, consider whether the guilt of the defendant is aggravated or mitigated by the plea. But it is provided that in addition to such plea the defendant may plead a plea of not guilty. And, by sect. 7, whenever upon the trial of any such indictment or information, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication by the act of any other person by his authority, the defendant may prove that such publication was made without his authority or consent.—STEWART.

In most of the United States provision is made either in their constitutions or statutes on this subject similar to the provisions of 6 & 7 Vict. In those States where there is no statutory or constitutional limitation the common-law doctrine remains in force. Com. *vs.* Clapp, 4 Mass. 163. Com. *vs.* Snelling, 15 Pick. 337. State *vs.* Allen, 1 McCord, 525. State *vs.* Burnham, 9 N. Hamp. 34. In one celebrated case the Supreme Court of New York were equally divided. People *vs.* Croswell, 3 Johns. Cases, 337. But as it may be shown that the publication was for a justifiable purpose, and not malicious nor with the intent to defame, so there may be cases where the defendant, having proved the purpose justifiable, may give in evidence the truth of the words, where such evidence will tend to negative the malice and intent to defame. Wharton's Amer. Crim. Law, 850. Com. *vs.* Buckingham, 2 Wheeler's C. C. 438.—SHARSWOOD.

[16] Though it has been held—at least for these two centuries—that the truth of a libel is no justification in a criminal prosecution, yet in many instances it is considered an extenuation of the offence; and the court of King's Bench has laid down this general rule,—viz., that it will not grant an information for a libel unless the prosecutor who applies for it makes an affidavit asserting directly and pointedly that he is innocent of the charge imputed to him. But this rule may be dispensed with if the person libelled resides abroad, or if the imputations of the libel are general and indefinite, or if it is a charge against the prosecutor for language which he has held in parliament. Doug. 271, 372.

It had frequently been determined by the court of King's Bench that the only questions for the consideration of the jury in criminal prosecutions for libel were the fact of publication and the truth of the innuendoes,—that is, the truth of the meaning and sense of the passages of the libel as stated and averred in the record; and that the judge or court alone were competent to determine whether the subject of the publication was or was not a libel. See the case of The Dean of St. Asaph, 3 T. R. 428. But, the legality of this doctrine having been much controverted, the 32 Geo. III. c. 60 was passed, entitled An act to remove doubts respecting the functions of juries in cases of libels. And it declares and enacts that on every trial of an indictment or information for a libel the jury may give a general verdict of guilty, or not guilty, upon the whole matter in issue, and shall not be required or directed by the judge to find the defendant guilty merely on the proof of the publication of the paper charged to be a libel, and of the sense ascribed to it in the record. But the statute provides that the judge may give his opinion to the jury respecting the matter in issue, and the jury may at their discretion, as in other cases, find a special verdict, and the defendant, if convicted, may move the court, as before the statute, in arrest of judgment.

A person may be punished for a libel reflecting on the memory and character of the dead; but it must be alleged and proved to the satisfaction of the jury that the author intended by the publication to bring dishonour and contempt on the relations and descendants of the deceased. 4 T. R. 126.

It is not a libel to publish a correct copy of the reports or resolutions of the two houses of parliament, or a true account of the proceedings of a court of justice. "For though," as Mr. Justice Lawrence has well observed, "the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than

which affected the reputation of another were made a capital offence; but before the reign of Augustus the punishment became corporal only.(*y*) Under the emperor Valentinian(*z*) it was again made capital, not only to write, but to publish, or even to omit destroying them. Our law in this and many other respects corresponds rather with the middle age of Roman jurisprudence, when liberty, learning, and humanity were in their full vigour, than with the cruel edicts that were established in the dark and tyrannical ages of the antient *decemviri* or the later emperors.

In this and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less, degree of severity, the *liberty of the press*, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free *152] state; but this consists in laying no *previous* restraints upon publications, and *not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution,(*a*) is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or

(*y*) —— *Quinetiam lex*
Pœnaque lata, malo quæ nollet carmine quenquam
Describi: —— *vertere modum formidine* fustis.
Hor. *ad Aug.* 152.

(*z*) *Cod.* 9, 36.

(*a*) The art of printing, soon after its introduction, was looked upon (as well in England as in other countries) as merely a matter of state, and subject to the coercion of the crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privileges and of license, and finally by the decrees of the court of star-chamber, which limited the number of printers and of presses which each should employ, and prohibited new publications, unless previously approved by proper licensers. On the demolition of this odious jurisdiction, in 1641, the long parliament of Charles I., after their rupture with that prince, assumed the same powers as the starchamber exercised with respect to the licensing of books, and in 1643, 1647, 1649, and 1652 (Scobell, i. 44, 134; ii. 88, 230) issued their ordinances for that purpose, founded principally on the starchamber decree of 1637. In 1662 was passed the statute 13 & 14 Car. II. c. 33, which (with some few alterations) was copied from the parliamentary ordinances. This act expired in 1679, but was revived by statute 1 Jac. II. c. 17, and continued till 1692. It was then continued for two years longer by statute 4 W. and M. c 24; but though frequent attempts were made by the government to revive it, in the subsequent part of the reign, (Com. Jour. 11 Feb. 1694, 26 Nov. 1695, 22 Oct. 1696, 9 Feb. 1694, 31 Jan. 1698,) yet the parliament resisted it so strongly that it finally expired; and the press became properly free in 1694, and has ever since so continued.

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counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings." Rex *vs.* Wright, 8 T. R. 293.

But this will not apply to the publication of part of a trial before it is finally concluded; for that might enable the friends of the parties to pervert the justice of the court by the fabrication of evidence and other impure practices.

Nor ought it to extend to the publication of trials where indecent evidence must from necessity be introduced; for it would be in vain to turn women and children out of court if they are afterwards permitted to read what has passed in their absence.

Lord Hardwicke has declared that any publication which shall prejudice the world with regard to the merits of a cause before it is heard is a contempt of the court in which the cause is pending; and he committed upon a summary motion only the parties who had been guilty of such a publication. 2 Atk. 472.

The reason must be much stronger for suppressing partial and premature publications upon subjects which may be tried by a jury.

The sale of the libel by a servant in a shop is *prima facie* evidence of publication in a prosecution against the master, and is sufficient for conviction, unless contradicted by contrary evidence showing that he was not privy nor in any degree assenting to it. Ibid.; and 5 Burr. 2686. When a person is brought to receive judgment for a libel, his conduct subsequent to his conviction may be taken into consideration, either by way of aggravation or mitigation of the punishment. 3 T. R. 432. And when Johnson the bookseller was brought up for judgment for having published a seditious libel, the attorney-general produced an affidavit that the defendant after his conviction had published the same libel in the Analytical Review. M. T. 1798.

An information or an indictment need not state that the libel is false or that the offence was committed by force and arms. 7 T. R. 4.

Hanging up or burning an effigy with intent to expose some particular person to ridicule and contempt is an offence of the same nature as a libel, and has frequently been punished with great but proper severity.—Christian.

offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry: liberty of private sentiment is still left; the disseminating or making public of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man (says a *fine writer on this subject) may be allowed to keep poisons in his closet, but [*153 not publicly vend them as cordials. And to this we may add that the only plausible argument heretofore used for the restraining the just freedom of the press, "that it was necessary, to prevent the daily abuse of it," will entirely lose its force when it is shown (by a seasonable exertion of the laws) that the press cannot be abused to any bad purpose without incurring a suitable punishment; whereas it never can be used to any good one when under the control of an inspector. So true it will be found that to censure the licentiousness is to maintain the liberty of the press.

CHAPTER XII.

OF OFFENCES AGAINST PUBLIC TRADE.

*OFFENCES against public *trade*, like those of the preceding classes, are either felonious or not felonious. Of the first sort are,— [*154

1. Owling; so called from its being usually carried on in the night, which is the offence of transporting wool or sheep out of this kingdom, to the detriment of its staple manufacture. This was forbidden at common law,(*a*) and more particularly by statute 11 Edw. III. c. 1, when the importance of our woollen manufacture was first attended to; and there are now many later statutes relating to this offence, the most useful and principal of which are those enacted in the reign of queen Elizabeth and since. The statute 8 Eliz. c. 3 makes the transportation of live sheep, or embarking them on board any ship, for the first offence forfeiture of goods and imprisonment for a year, and that at the end of the year the left hand shall be cut off in some public market, and shall be there nailed up in the openest place; and the second offence is felony. The statutes 12 Car. II. c. 32, 7 & 8 W. III. c. 28, make the exportation of wool, sheep, or fullers' earth liable to pecuniary penalties, and the forfeiture of the interest of the ship and cargo by the owners, if privy, and confiscation of goods, and three years' imprisonment to the master and all the mariners. And the statute 4 Geo. I. c. 11 (emended and further enforced by 12 Geo. II. c. 21, and 19 Geo. II. c. 34) makes it transportation for seven years, if the penalties be not paid.[1]

2. Smuggling, or the offence of importing goods without paying the duties imposed thereon by the laws of the customs and *excise, is an offence generally connected and carried on hand in hand with the former. [*155 This is restrained by a great variety of statutes, which inflict pecuniary penal-

(*a*) Mirr. c. 1, § 3.

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[1] By 5 Geo. IV. c. 47, § 2, all acts and parts of acts prohibiting the exportation of wool are repealed; and persons are now at full liberty to export this commodity upon paying a certain duty.

By 57 Geo. III. c. 88, fullers' earth, fulling-clay, and tobacco-pipe clay may be carried coastwise under certain restrictions, contained in 32 Geo. III. c. 50, upon goods prohibited to be exported.

By 4 Geo. IV. c 69, § 24, all prohibitions against the exportation of tobacco-pipe clay are removed, and the same is thereby declared free.—CHITTY.

ties and seizure of the goods for clandestine smuggling, and affix the guilt of felony, with transportation for seven years, upon more open, daring, and avowed practices:[2] but the last of them, 19 Geo. II. c. 34, is for the purpose *instar omnium*; for it makes all forcible acts of smuggling, carried on in defiance of the laws, or even in disguise to evade them, felony without benefit of clergy: enacting, that if three or more persons shall assemble, with fire-arms or other offensive weapons, to assist in the illegal exportation or importation of goods, or in rescuing the same after seizure, or in rescuing offenders in custody for such offences; or shall pass with such goods in disguise; or shall wound, shoot at, or assault any officers of the revenue when in the execution of their duty; such persons shall be felons without the benefit of clergy. As to that branch of the statute which required any person charged upon oath as a smuggler, under pain of death, to surrender himself upon proclamation, it seems to be expired; as the subsequent statutes,(*b*) which continue the original act to the present time, do in terms continue only so much of the said act as relates to the *punishment* of the offenders, and not to the extraordinary method of apprehending or causing them to surrender: and for offences of this positive species, where punishment (though necessary) is rendered so by the laws themselves, which by imposing high duties on commodities increase the temptation to evade them, we cannot surely be too cautious in inflicting the penalty of death.(*c*)[3]

*156] *3. Another offence against public trade is fraudulent *bankruptcy*, which was sufficiently spoken of in a former volume:(*d*) I shall therefore now barely mention the several species of fraud taken notice of by the statute law, viz., the bankrupt's neglect of surrendering himself to his creditors; his non-conformity to the directions of the several statutes; his concealing or embezzling his effects to the value of 20*l.*; and his withholding any books or writings with intent to defraud his creditors: all which the policy of our commercial country has made felony without benefit of clergy.(*e*)[4] And indeed it is allowed by such as are the most averse to the infliction of capital punishment, that the offence of fraudulent bankruptcy, being an atrocious species of the *crimen falsi*, ought to be put upon a level with those of forgery and falsifying the coin.(*f*) And, even without actual fraud, if the bankrupt cannot make it appear that he is disabled from paying his debts by some casual loss, he shall, by the statute 21 Jac. I. c. 19, be set on the pillory for two hours, with one of his ears nailed to the same and cut off. To this head we may also subjoin that, by statute 32 Geo. II. c. 28, it is felony, punishable by transportation for seven years, if a prisoner, charged in execution for any debt under 100*l.*, neglects or refuses on demand to discover and deliver up his effects for the benefit of his creditors. And these are the only felonious offences against public trade, the residue being mere misdemeanours: as,—

(*b*) Stat. 26 Geo. I. c. 32. 32 Geo. II. c. 18. 4 Geo. III. c 12.
(*c*) See book i. page 317. Beccar. c. 33.
(*d*) See book ii. pages 481, 482.
(*e*) Stat. 5 Geo. II. c. 30.
(*f*) Beccar. ch. 34.

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[2] By the stat. 8 & 9 Vict. c. 87, all former statutes on this subject are consolidated: it makes all forcible acts of smuggling, carried on in defiance of the laws or even in disguise to evade them, felony.—Stewart.

[3] By the 6 Geo. IV. c. 108, after reciting the customs-repeal act, the 6 Geo. IV. c. 105, all the laws relative to the prevention of smuggling are consolidated: but the provisions of the act are so numerous that they cannot be comprised within the limit of a note.—Chitty.

[4] By 6 Geo. IV. c. 16, all laws relating to bankrupts are repealed, and all former provisions are reduced into this one act. The different frauds taken notice of do not materially vary from those mentioned in the text. By § 99, it is enacted that the bankrupt or other person swearing falsely before the commissioners shall be guilty of perjury and suffer the pains and penalties in force against that offence. By § 112, any bankrupt neglecting to surrender and submit himself to be examined, or refusing to make discovery of his estate and effects, or declining to deliver up his goods, books, and writings, or concealing or embezzling any part of his effects *to the value of* 10*l.* with intent to defraud his creditors, shall be guilty of felony, and be liable to transportation for life or not less than seven years, or to imprisonment for any term not exceeding seven years, as the court before whom he is convicted may adjudge.—Chitty.

4. Usury; which is an unlawful contract, upon the loan of money, to receive the same again with exorbitant increase. Of this also we had occasion to discourse at large in a former volume.(*g*) We there observed that, by statute 37 Hen. VIII. c. 9, the rate of interest was fixed at 10*l. per cent. per annum*, which the statute 13 Eliz. c. 8 confirms; and ordains that all brokers shall be guilty of a *præmunire* that transact any contracts for more, and the securities themselves shall be *void. The statute 21 Jac. I. c. 17 reduced interest to eight *per cent.*; and, it having been lowered in 1650, during the usurpation, to six *per cent.*, the same reduction was re-enacted after the restoration by statute 12 Car. II. c. 13; and, lastly, the statute 12 Anne, st. 2, c. 16 has reduced it to *five per cent.* Wherefore not only all contracts for taking more are in themselves totally void, but also the lender shall forfeit treble the money borrowed.[5] Also, if any scrivener or broker takes more than five shillings *per cent.* procuration-money, or more than twelve pence for making a bond, he shall forfeit 20*l.* with costs, and shall suffer imprisonment for half a year. And, by statute 17 Geo III. c. 26, to take more than ten shillings *per cent.* for procuring any money to be advanced on any life-annuity, is made an indictable misdemeanour, and punishable with fine and imprisonment: as is also the offence of procuring or soliciting any infant to grant any life-annuity, or to promise, or otherwise engage, to ratify it when he comes of age.[6] [*157

5. Cheating is another offence more immediately against public trade; as that cannot be carried on without a punctilious regard to common honesty and faith between man and man. Hither therefore may be referred that prodigious multitude of statutes which are made to restrain and punish deceits in particular trades, and which are enumerated by Hawkins and Burn, but are chiefly of use among the traders themselves. The offence also of *breaking the assize* of bread, or the rules laid down by the law, and particularly by the statutes 31 Geo. II. c. 29, 3 Geo. III. c. 11, and 13 Geo. III. c. 62, for ascertaining its price in every given quantity, is reducible to this head of cheating: as is likewise, in a peculiar manner, the offence of selling by *false weights and measures*; the standard of which fell under our consideration in a former volume.(*h*)[7] The punishment of bakers breaking the assize was, antiently, to stand in the pillory, by statute 51 Hen. III. st. 6, and for brewers (by the same act) to stand in the tumbrel or dung-cart:(*i*) which, as we learn from domesday-book, was the punishment for knavish brewers in the city of Chester so early as the reign of Edward the Confessor. "*Malam cervisiam faciens, in cathedra ponebatur stercoris.*"(*j*) But now the general punishment for all frauds *of this kind, if indicted (as they may be) at common law, is by fine and imprisonment: though the easier and more usual way is by levying on a summary conviction, by distress and sale, the forfeitures imposed by the several acts of parliament. Lastly, any deceitful practice, in cozening another by artful means, whether in matters [*158

(*g*) See book ii. p. 455, &c.
(*h*) See book i. p. 274.
(*i*) 3 Inst. 219.
(*j*) Seld. tit. of Hon. b. ii. c. 5, § 2.

[5] One half of the penalty is given by the statute to the prosecutor, the other half to the king. It is remarkable that such was the prejudice in ancient times against lending money upon interest that the first statute—the 37 Hen. VIII. c. 9—by which it was legalized, was afterwards repealed by 5 & 6 Edw. VI. c. 20, by which all interest was prohibited, the money lent and the interest were forfeited, and the offender was subject to fine and imprisonment. We have before observed that the policy of limiting the rate of interest upon a contract for the loan of money is denied in modern times; but Cato was of a different opinion. *Cum ille, qui quæsierat, dixisset, Quid fœnerari? Tum Cato, Quid hominem, inquit, occidere?* Cic. Off.—CHRISTIAN.

We have already considered what will constitute usury, *ante*, 2 book, 403. That usury is an indictable offence, see 2 Burr. 799. 4 T. R. 205. 8 East, 41. 1 Chit. Crim. Law, 549.—CHITTY.

[6] This act is repealed, as to annuities granted since the 14th July, 1813, by the 53 Geo. III. c. 141; but similar provisions are re-enacted.—CHITTY.

[7] The principal act now in force, relative to the different weights and measures, is the 5 Geo. IV. c. 76, (continued and amended by 6 Geo. IV. c. 12.) The 35 Geo. III. c. 102, 37 Geo. III. c. 143, and 55 Geo. III. c. 43, relate to the examination of weights and measures. See 5 Burn, 24th ed. tit. Weights and Measures.—CHITTY.

of trade or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment, and pillory.(*k*)[8] And, by the statutes 33 Hen. VIII. c. 1, and 30 Geo. II. c. 24, if any man defrauds another of any valuable chattels by colour of any false token, counterfeit letter, or false pretence, or pawns or disposes of another's goods without the consent of the owner, he shall suffer such punishment, by imprisonment, fine, pillory, transportation, whipping, or other corporal pain, as the court shall direct.[9]

6. The offence of *forestalling* the market is also an offence against public trade. This, which (as well as the two following) is also an offence at common law,(*l*) was described by statute 5 & 6 Edward VI. c. 14 to be the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price when there: any of which practices make the market dearer to the fair trader.

7. Regrating was described by the same statute to be the buying of corn or other dead victual, in any market, and selling it again in the same market, or

(*k*) 1 Hawk. P. C. 188. (*l*) Ibid. 234.

[8] Pillory is now abolished, by the 56 Geo. III. c. 138. See, in general, 3 Chit. Crim. Law, 994, 995. The cases in which fraud is indictable at common law seem confined to the use of false weights and measures, the selling of goods with counterfeit marks, playing with false dice, and frauds affecting the course of justice and immediately injuring the interests of the public or crown; and it is settled that no mere fraud, not amounting to felony, is an indictable offence at common law unless it affects the public. 2 Burr. 1125. 1 Bla. Rep. 273, S. C.—Chitty.

[9] Pillory is now abolished, by the 56 Geo. III. c. 138. The general pawn-brokers' act (39 & 40 Geo. III. c. 99) virtually repeals the 30 Geo. II. c. 24, as to the pawning of another's goods without the consent of the owner, and the offence is thereby punishable by penalties.

The provisions of Hen. VIII. & Geo. II. are extended, by the 52 Geo. III. c. 64, to obtaining bonds, bills of exchange, bank-notes, securities, or orders for the payment of money, or the transfer of goods, or any valuable thing whatever. By the 3 Geo. IV. c. 14, the offender may be sentenced to hard labour. See, as to this offence, 3 Chit. Crim. Law, 996, &c.

These acts extend to every description of false pretences by which goods may be obtained with intent to defraud. 3 T. R. 103.

Now, by 7 & 8 Geo. IV. c. 29, § 53, reciting "that a failure of justice frequently arises from the subtle distinction between larceny and fraud," it is, "for remedy thereof," enacted "that if any person shall by any false pretence obtain from any other person any chattel, money, or other valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported for seven years, or to suffer fine or imprisonment, or both, as the court shall award: provided that if, upon the trial of any person indicted for such misdemeanour, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanour; and no such indictment shall be removable by certiorari; and no person tried for such misdemeanour shall be liable to be afterwards prosecuted for larceny upon the same facts." In an indictment under this statute, according to the rules of construction applicable to former statutes on this subject which seem equally applicable to this, the pretences must be set forth and must be negatived by special averments. 2 T. R. 581. 2 M. & S. 379. The whole of the pretence charged need not, however, be proved: proof of part of the pretence, and that the property was obtained thereby, is sufficient. Rex *vs.* Hill, R. & R. C. C. 190. Obtaining goods by fraudulently giving in payment a check upon a banker with whom the party keeps no cash, and which he knows will not be paid, has been held an indictable offence, and would, it seems, be such within this statute. Rex *vs.* Jackson, 3 Camp. 370. The language of the 30 Geo. II. c. 24 made the offence of obtaining money upon false pretences consist in the actually obtaining the money, and not in using a false pretence for the purpose of obtaining the money: it has been held, therefore, that, in an indictment on that statute, the venue must be laid in the county where the false pretence is used. Rex *vs.* Buttery, cited in Pearson *vs.* M'Gowran, 5 D. & R. 616. 3 B & C. 700, per *Abbott*, C. J. Where the fraud practised is properly the ground for a civil action, an indictment for obtaining money by false pretences cannot be supported. Rex *vs.* Codrington, 1 C. & P. 661. See further, upon this subject, 2 East, P. C. 673, 818, 819, 829, 830. 6 T. R. 565. R. & R. C. C. 81, 127, 317, 504.—Chitty.

within four miles of the place. For this also enhances the price of the provisions, as every successive seller must have a successive profit.

8. Engrossing was also described to be the getting into one's possession, or buying up, large quantities of corn or other dead victuals, with intent to sell them again. This must of course be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion.[10] And so the total engrossing of any other commodity, with an intent to sell it at an unreasonable *price, is an offence indictable and finable at the common law.(*m*) And the general penalty for these three [*159 offences by the common law (for all the statutes concerning them were repealed by 12 Geo. III. c. 71) is, as in other minute misdemeanours, discretionary fine and imprisonment.(*n*) Among the Romans, these offences and other mal-practices to raise the price of provisions were punished by a pecuniary mulct. "*Pœna viginti aureorum statuitur adversus eum, qui contra annonam fecerit, societatemve coieret quo annona carior fiat.*"(*o*)

9. Monopolies are much the same offence in other branches of trade that engrossing is in provisions: being a license or privilege allowed by the king for the sole buying and selling, making, working, or using of any thing whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before.(*p*) These had been carried to an enormous height during the reign of queen Elizabeth, and were heavily complained of by Sir Edward Coke,(*q*) in the beginning of the reign of king James the First; but were in great measure remedied by statute 21 Jac. I. c. 3,[11] which declares

(*m*) Cro. Car. 232.
(*n*) 1 Hawk. P. C. 235.
(*o*) *Ff.* 48, 12, 2.
(*p*) 1 Hawk. P. C. 231.
(*q*) 3 Inst. 81.

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[10] By the 31 Geo. III. c. 30, corn may be bought for the purpose of storing in granaries and reselling it.

The modern law on this subject is well discussed in 1 East, 143. And see 2 Chit. Crim. Law, 527, &c. In that case it was decided that spreading rumours with intent to raise the price of a particular species of aliment, endeavouring to enhance its price by persuading others to abstain from bringing it to market, and engrossing large quantities in order to resell them at the exorbitant prices occasioned by his own artifices, are offences indictable at common law, and subject the party so acting to fine and imprisonment at the discretion of the court in which he is convicted. It was also held that hops, though not used immediately for food, fall within this rule. But, at the present day, it would probably be holden that no offence is committed unless there is an intent to raise the price of provisions by the conduct of the party. For the mere transfer of a purchase in the market where it is made, the buying articles before they arrive at a public market, or the purchasing a large quantity of a particular article, can scarcely be regarded as in themselves necessarily injurious to the community, and, as such, indictable offences. A party buying and selling again does not necessarily increase the price of the commodity to the consumer, for the division of labour or occupations will in general occasion the commodity to be sold cheaper to the consumer. See Smith's Wealth of Na. vol. ii. 309, and index, title "Labour:" and many cases may occur in which a most laudable motive may exist for buying up large quantities of the same commodity. See the arguments, &c. in 14 East, 406. 15 East, 511. Indeed, in the case of the King *vs.* Rusby, on the indictment being argued, the court were equally divided on the question whether regrating is an indictable offence at common law; and though the defendant was convicted, no judgment was ever passed upon him. MSS., "Raising and spreading a story that wool would not be suffered to be exported in such a year, probably by some stock-jobbers in those times, whereby the value of wool was beaten down, though it did not appear the defendants reaped any particular advantage by the deceit, was, on account of its being an injury to trade, punished by indictment; and a confederacy, without a further act done, to impoverish the farmers of excise and lessen the duty has been held an offence punishable by information." Opinion of Mr. West, 2 Chalmers, 247, &c. It is an indictable offence to conspire on a particular day by false rumours to raise the price of public government funds, with intent to injure the subjects who should purchase on that day; and that the indictment was well enough, without specifying the particular persons who purchased as the persons intended to be injured, and that the public government funds of this kingdom might mean either the British or Irish funds, which since the union were each a part of the funds of the United Kingdom. 3 M. & S. 67.—CHITTY.

[11] Amended by stat. 5 & 6 W. IV. c. 83.—STEWART.

such monopolies to be contrary to law and void (except as to patents, not exceeding the grant of fourteen years, to the authors of new inventions; and except also patents concerning printing, saltpetre, gunpowder, great ordnance, and shot;) and monopolists are punished with the forfeiture of treble damages and double costs to those whom they attempt to disturb; and, if they procure any action, brought against them for these damages, to be stayed by any extrajudicial order other than that of the court wherein it is brought, they incur the penalties of *præmunire*. Combinations also among victuallers or artificers to raise the price of provisions or any commodities, or the rate of labour,[12] are in many cases severely punished by particular statutes; and in general, by statute 2 & 3 Edw. VI. c. 15, with the forfeiture of 10*l.* or twenty days' imprisonment, with an allowance of only bread and water, for the first offence; 20*l.* or the pillory for the second; and *40*l.* for the third, or else the pillory, loss of one ear, and perpetual infamy. In the same manner, by a constitution of the emperor Zeno,(*r*) all monopolies and combinations to keep up the price of merchandise, provisions, or workmanship were prohibited, upon pain of forfeiture of goods and perpetual banishment.

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10. To exercise a *trade* in any town without having previously served as an *apprentice* for seven years,(*s*) is looked upon to be detrimental to public trade, upon the supposed want of sufficient skill in the trader; and therefore is punished, by statute 5 Eliz. c. 4, with the forfeiture of forty shillings by the month.[13]

11. Lastly, to prevent the destruction of our home manufactures by *transporting and seducing our artists* to settle abroad, it is provided, by statute 5 Geo. I. c. 27, that such as so entice or seduce them shall be fined 100*l.* and be imprisoned three months; and for the second offence shall be fined at discretion, and be imprisoned a year; and the artificers so going into foreign countries, and not returning within six months after warning given them by the British ambassador where they reside, shall be deemed aliens, and forfeit all their land and goods, and shall be incapable of any legacy or gift. By statute 23 Geo. II. c. 13, the seducers incur, for the first offence, a forfeiture of 500*l.* for each artificer contracted with to be sent abroad, and imprisonment for twelve months; and for the second, 1000*l.*, and are liable to two years' imprisonment: and by the same statute, connected with 14 Geo. III. c. 71, if any person exports any tools or utensils used in the silk, linen, cotton, or woollen manufactures, (excepting woolcards to North America,)(*t*) he forfeits the same and 200*l.*, and the captain of the ship (having knowledge thereof) 100*l.*; and if any captain of a king's ship, or officer of the customs, knowingly suffers such exportation, he forfeits 100*l.* and his employment, and is forever made incapable of bearing any

(*r*) *Cod.* 4, 59, 1. (*s*) See book i. page 427. (*t*) Stat. 15 Geo. III. c. 5.

[12] By the 6 Geo. IV. c. 129, s. 1, all acts relative to combinations of workmen or masters as to wages, time of working, quantity of work, &c. are repealed. By sect. 2, persons compelling journeymen to leave their employment, or to return work unfinished, preventing them from hiring themselves, compelling them to belong to clubs, &c. or to pay fines, or forcing manufacturers to alter their mode of carrying on their business, are punishable with imprisonment, with or without hard labour, for three months. The remaining clauses provide for the mode of conviction of offenders before justices of the peace. For the form and requisites of convictions for these offences under former acts of parliament, see Rex *vs.* Nield, 6 East, 417. Rex *vs.* Ridgway, 1 D. & R. 123, 5 B. & A. 527. Paley on Convictions, 2d ed. by Dowling, 99, *et seq.* By 9 Geo. IV. c. 31, s. 25, assaults in pursuance of any conspiracy to raise the rate of wages, and (s. 26) assaults upon certain workmen to prevent them from working at their trades, are punishable with imprisonment and hard labour.—Chitty.

[13] The 54 Geo. III. c. 96, s. 1 repeals so much of the 5 Eliz. c. 4 as provides that persons shall not exercise any art or manual occupation except they had served an apprenticeship of seven years. Sect. 2 renders valid certain indentures of apprenticeship which would have been void by certain provisions in the old act, and repeals the part of the act containing such provisions. Sect. 3 provides that justices may determine complaints respecting apprenticeships as heretofore. And sect. 4 provides that the customs of London concerning apprentices are not to be affected. For the decisions upon the 5 Eliz. c. 4, respecting the exercising of trades by unqualified persons, see 2 Harrison's Digest, 518, title *Trade*.—Chitty.

public office: and every person collecting such tools or utensils in order to export the same shall, on conviction at the assizes, forfeit such tools and also 200*l.*[14]

CHAPTER XIII.

OF OFFENCES AGAINST THE PUBLIC HEALTH, AND THE PUBLIC POLICE OR ECONOMY.

*THE fourth species of offences more especially affecting the commonwealth are such as are against the public *health* of the nation; a concern [*161 of the highest importance, and for the preservation of which there are in many countries special magistrates or curators appointed.

1. The first of these offences is a felony, but, by the blessing of Providence, for more than a century past incapable of being committed in this nation: for, by statute 1 Jac. I. c. 31, it is enacted that, if any person infected with the plague, or dwelling in any infected house, be commanded by the mayor or constable, or other head officer, of his town or vill, to keep his house, and shall venture to disobey it, he may be enforced, by the watchmen appointed on such melancholy occasions, to obey such necessary command; and, if any hurt ensue by such enforcement, the watchmen are thereby indemnified. And further, if such person so commanded to confine himself goes abroad and converses in company, if he has no plague-sore upon him, he shall be punished as a vagabond by whipping, and be bound to his good behaviour; but, if he has any infectious sore upon him, uncured, he then shall be guilty of felony. By the statute 26 Geo. II. c. 26, (explained and amended by 29 Geo. II. c. 8,) the method of performing *quarantine*, or forty days' probation, by ships coming from infected countries, is put in a much more regular and effectual order than formerly, and masters of ships coming from infected places and disobeying the directions there given, *or having the plague on board and concealing it, are guilty [*162 of felony without benefit of clergy. The same penalty also attends persons escaping from the *lazarets*, or places wherein quarantine is to be performed; and officers and watchmen neglecting their duty; and persons conveying goods or letters from ships performing quarantine.[1]

2. A second, but much inferior, species of offence against public health is the selling of *unwholesome provisions*.[2] To prevent which, the statute 51 Hen. III.

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[14] All the statutes prohibiting artificers from going abroad are repealed, by 5 Geo. IV. c. 97, so that artists may now settle in foreign parts without any restrictions or liabilities. —CHITTY.

[1] By the 6 Geo. IV. c. 78, all the prior statutes relative to the quarantine-laws are repealed, and other provisions are made, similar in their nature to the former. See the prior statutes and decisions thereon, Burn, J. 24th ed. tit. Plague. 2 Chitt. Crim. Law, 551, and 2 Chitt. Commercial Law, 62 to 87.

It is a misdemeanour at common law to expose a person labouring under an infectious disorder, as the smallpox, in the streets or other public places. 4 M. & S. 73, 272. An indictment lies for lodging poor persons in an unhealthy place. Cald. 432.—CHITTY.

Now, by the 16 & 17 Vict. c. 100, s. 9, if the parent or person having care of a child shall not, after notice from the registrar of births, attend to have vaccination performed, such father, mother, or person shall forfeit a sum not exceeding 20*s.*—STEWART.

[2] It is a misdemeanour at common law to give any person injurious food to eat, whether the offender be excited by malice, or a desire of gain; nor is it necessary he should be a public contractor, or the injury done to the public service, to render him criminally liable. 2 East, P. C. 822. 6 East, 133 to 141. If a baker direct his servant to make bread containing a specific quantity of alum, which when mixed with the other ingredients is innoxious, but in the execution of these orders the agent mixes up the drug in so unskilful a way that the bread becomes unwholesome, the master will be liable to be indicted. 3 M. & S. 10. 4 Camp. 10. But an indictment will not lie against

st. 6, and the ordinance for bakers, c. 7, prohibit the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew, under pain of amercement for the first offence, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth.[3] And, by the statute 12 Car. II. c. 25, § 11, any brewing or adulteration of wine is punished with the forfeiture of 100*l.* if done by the wholesale merchant, and 40*l.* if done by the vintner or retail trader.[4] These are all the offences which may properly be said to respect the public health.

V. The last species of offences which especially affect the commonwealth are those against the public *police* or *economy*. By the public police and economy I mean the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations. This head of offences must therefore be very miscellaneous, as it comprises all such crimes as especially affect public society and are not comprehended under any of the four preceding species. These amount some of them to felony, and others to misdemeanours only. Among the former are,—

1. The offence of *clandestine marriages:* for, by the statute 26 Geo. II. c. 33, 1. To solemnize marriage in any other place besides a church or public chapel wherein banns have been usually published, except by license from the archbishop of *Canterbury; and, 2. To solemnize marriage in such church or chapel without due publication of banns, or license obtained from a proper authority, do both of them not only render the marriage void, but subject the person solemnizing it to felony, punished by transportation for fourteen years; as, by three former statutes,(*a*) he and his assistants were subject to a pecuniary forfeiture of 100*l.* 3. To make a false entry in a marriage-register; to alter it when made; to forge or counterfeit such entry, or a marriage-license; to cause, or procure, or act or assist in such forgery; to utter the same as true, knowing it to be counterfeit; or to destroy or procure the destruction of any register, in order to vacate any marriage or subject any person to the penalties of this act; all these offences, knowingly and wilfully committed, subject the party to the guilt of felony without benefit of clergy.[5]

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2. Another felonious offence with regard to this holy estate of matrimony is what some have corruptly called *bigamy*, which properly signifies being twice married, but is more justly denominated *polygamy*, or having a plurality of wives

(*a*) 6 & 7 W. III. c. 6. 7 & 8 W. III. c. 35. 10 Anne, c. 19, s. 176.

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a miller for receiving good barley to grind at his mill, and delivering a mixture of oats and barley which is musty and unwholesome. 4 M. & S. 214.—Chitty.

[3] This statute is now repealed. 7 & 8 Vict. c. 24.—Stewart.

[4] And, by the 1 W. and M. st. 1, c. 34, s. 20, any person selling wine corrupting or adulterating it, or selling it so adulterated, shall forfeit 300*l.*, half to the king and half to the informer, and shall be imprisoned three months.—Chitty.

[5] This act is now repealed, by the 4 Geo. IV. c. 76, and clergy is restored.

By the 21st section of the 4 Geo. IV. c. 76, it is felony with transportation for life to solemnize matrimony in any other place than in a church or chapel wherein banns may be lawfully published, or at any other time than between eight and twelve in the morning, except by special license from the archbishop of Canterbury, or to solemnize it without due publication of banns unless by license, or to solemnize it according to the rites of the Church of England, falsely pretending to be in holy orders: but the prosecution must take place in three months.

By the 28th section of the same act, it is felony, punishable with transportation for life, to insert in the registry-book any false entry of any thing relating to any marriage, or to make, alter, forge, or counterfeit any such entry, or to make, alter, forge, or counterfeit any license of marriage, or to utter or publish as true any such false, &c. register as aforesaid, or a copy thereof, or any such false, &c. license; or to destroy any such register-book of marriages, or any part thereof, with intent to avoid any marriage, or to subject any person to any of the penalties of that act. But this act does not extend to marriages of Quakers or Jews.

Independently of this statute, these offences were punishable at common law, and subjected the offender to severe imprisonment and fine. 2 Sid. 71.—Chitty.

at once.(*b*) Such second marriage, living the former husband or wife, is simply void, and a mere nullity, by the ecclesiastical law of England; and yet the legislature has thought it just to make it felony, by reason of its being so great a violation of the public economy and decency of a well-ordered state. For polygamy can never be endured under any rational civil establishment, whatever specious reasons may be urged for it by the eastern nations, the fallaciousness of which has been fully proved by many sensible writers: *but in northern countries the very nature of the climate seems to reclaim against it, [*164 it never having obtained in this part of the world, even from the time of our German ancestors, who, as Tacitus informs us,(*c*) "*prope soli barbarorum singulis uxoribus contenti sunt.*" It is therefore punished by the laws both of antient and modern Sweden with death.(*d*) And with us in England it is enacted, by statute 1 Jac. I. c. 11, that if any person, being married, do afterwards marry again, the former husband or wife being alive, it is felony, but within the benefit of clergy. The first wife in this case shall not be admitted as a witness against her husband, because she is the true wife; but the second may, for she is indeed no wife at all;(*e*) and so *vice versa* of a second husband. This act makes an exception to five cases in which such second marriage, though in the three first it is void, is yet no felony.(*f*) 1. Where either party hath been continually *abroad* for seven years, whether the party in England hath notice of the other's being living or no. 2. Where either of the parties hath been absent from the other seven years *within* this kingdom, and the remaining party hath had no knowledge of the other's being alive within that time. 3. Where there is a divorce (or separation *a mensa et thoro*) by sentence in the ecclesiastical court 4. Where the first marriage is declared absolutely void by any such sentence, and the parties loosed *a vinculo*. Or, 5. Where either of the parties was under the age of consent at the time of the first marriage; for in such case the first marriage was voidable by the disagreement of either party, which the second marriage very clearly amounts to. But if at the age of consent the parties had agreed to the marriage, which completes the contract, and is, indeed, the real marriage, and afterwards one of them should marry again, I should apprehend that such second marriage would be within the reason and penalties of the act.[6]

(*b*) 3 Inst. 88. Bigamy, according to the canonists, consisted in marrying two virgins successively, one after the death of the other, or one marrying a widow. Such were esteemed incapable of orders, &c., and, by a canon of the Council of Lyons, A.D. 1274, held under Pope Gregory X., were *omni privilegio clericali nudati, et coercioni fori secularis addicti*. 6 *Decretal*. 1, 12. This canon was adopted and explained in England, by statute 4 Edw. I. st. 3, c. 5, and *bigamy* thereupon became no uncommon counter-plea to the claim of the benefit of clergy. M. 40 Edw. III. 42. M. 11 Hen. IV. 11, 48. M. 13 Hen. IV. 6 Staundf. P. C. 134. The cognizance of the plea of *bigamy* was declared, by statute 18 Edw. III. st. 3, c. 2, to belong to the court Christian, like that of *bastardy*. But, by stat. 1 Edw. VI. c. 12, s. 16, *bigamy* was declared to be no longer an impediment to the claim of clergy. See Dal. 21. Dyer, 201.

(*c*) *De Mor. Germ.* 18.

(*d*) Stiernhook, *de jure Sueon. l.* 3, c. 2.

(*e*) 1 Hal. P. C. 693.

(*f*) 3 Inst. 89. Kelw. 27. 1 Hal. P. C. 694.

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[6] By 9 Geo. IV. c. 31, § 22, it is enacted, "That if any person being married shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England *or elsewhere*, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol, or house of correction, for any term not exceeding two years; and any such offence may be dealt with, inquired of, tried, determined, and punished in the county where the offender shall be apprehended or be in custody, as if the offence had been actually committed in that county: provided always that nothing herein contained shall extend to any second marriage contracted out of England by any other than a subject of his majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, *and shall not have been known by such person to be living within that time*, or shall extend to any person who at the time of such second marriage shall have been *divorced from the bond* of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

Three important improvements in the law relating to bigamy are introduced by this enactment. First, the offence is now punishable wherever committed: formerly it was not punishable at all if committed out of the jurisdiction of England. Secondly, the absence of one party for seven years abroad will not now excuse the second marriage, if such party be known by the other party to have been alive within that period: formerly

*165] 3. A third species of felony against the good order and *economy of the kingdom is by idle *soldiers* and *mariners wandering* about the realm, or persons pretending so to be, and abusing the name of that honourable profession.(*g*) Such a one, not having a testimonial or pass from a justice of the peace limiting the time of his passage, or exceeding the time limited for fourteen days, unless he falls sick, or forging such testimonial, is, by statute 39 Eliz. c. 17, made guilty of felony without benefit of clergy. This sanguinary law, though in practice deservedly antiquated, still remains a disgrace to our statute-book, yet attended with this mitigation, that the offender may be delivered, if any honest freeholder or other person of substance will take him into his service, and he abides in the same for one year, unless licensed to depart by his employer, who in such case shall forfeit ten pounds.[7]

4. Outlandish persons calling themselves *Egyptians* or *gypsies* are another object of the severity of some of our unrepealed statutes. These are a strange kind of commonwealth among themselves of wandering impostors and jugglers, who were first taken notice of in Germany about the beginning of the fifteenth century, and have since spread themselves all over Europe. Munster(*h*) who is followed and relied upon by Spelman(*i*) and other writers, fixes the time of their first appearance to the year 1417, under passports, real or pretended, from the emperor Sigismund, king of Hungary. And pope Pius II. (who died A.D. 1464) mentions them in his history as thieves and vagabonds, then wandering with their families over Europe under the name of Zigari, and whom he supposes to have migrated from the country of Zigi, which nearly answers to the modern Circassia. In the compass of a few years they gained such a number of idle proselytes (who imitated their language and complexion, and betook themselves to the same arts of chiromancy, begging, and pilfering) that they became troublesome, and even formidable, to most of the states of Europe. Hence they were expelled from France in the year 1560, and from Spain in 1591.(*k*) And the government in England took the alarm much earlier, for in 1530 they are described, by statute 22 Hen. VIII. c. 10, as "outlandish people, *166] calling themselves *Egyptians, using no craft nor feat of merchandise, who have come into this realm, and gone from shire to shire and place to place in great company, and used great, subtil, and crafty means to deceive the people, bearing them in hand that they by palmestry could tell men's and women's fortunes, and so many times, by craft and subtility, have deceived the people of their money, and also have committed many heinous felonies and robberies." Wherefore they are directed to avoid the realm, and not to return,

(*g*) 3 Inst. 85.
(*h*) *Cosmog. l.* 3.
(*i*) Gloss. 193.
(*k*) Dufresne. Gloss. i. 200.

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the mere absence was a protection, though the absent party was well known by the other to be living. Thirdly, a divorce *a vinculo* alone will now justify the second marriage: formerly a divorce *a mensâ et thoro* was held sufficient. 1 East, P. C. 466. In a prosecution for bigamy it has been said that a marriage in fact must be proved, (Morris *vs.* Miller, 4 Burr. 2059; but see *Trueman's case*, 1 East, P. C. 470;) but if proved by a person who was present it does not seem necessary to prove the registry or license, (Rex *vs.* Allison, R. & R. C. C. 109;) and it matters not that the first marriage is voidable by reason of affinity, &c. 3 Inst. 88. Parties who are within age at the time of the first marriage, subsequently affirming the union by their consent, will be liable to be punished for bigamy if they break that contract and marry again. 1 East, P. C. 468. On an indictment for bigamy, where the first marriage is in England, it is not a valid defence to prove a divorce *a vinculo* out of England before the second marriage, founded on grounds on which a divorce *a vinculo* could not be obtained in England. Rex *vs.* Lolley, R. & R. C. C. 237, cited in Tovey *vs.* Lindsay, 1 Dow. 117. The burden of proving the first marriage to have been legal lies upon the prosecutor. Rex *vs.* James, R. & R. C. C. 17. Rex *vs.* Morton, id. 19. Rex *vs.* Butler, id. 61. The act extends to all dissenters except Jews and Quakers. Upon the subject of bigamy generally, see 1 Hawk. P. C. c. 32. 1 East, P. C. c. 12. 1 Russell, c. 23. Butler's Co. Litt. 79, b. n. 1. 3 Stark. Ev. *Polygamy*.—Chitty.

[7] But this act of Eliz. is now repealed by the 52 Geo. III. c. 31. By the 43 Geo. III. c. 61, soldiers, sailors, mariners, and the wives of soldiers mentioned therein, are relieved against the penalties of the vagrant acts. See also the 58 Geo. III. c. 92, and the annual mutiny act; and see the vagrant act, *post*, 169.—Chitty.

under pain of imprisonment, and forfeiture of their goods and chattels; and upon their trials for any felony which they may have committed, they shall not be entitled to a jury *de medietate linguæ*. And afterwards, it is enacted, by statute 1 & 2 P. and M. c. 4, and 5 Eliz. c. 20, that if any such persons shall be imported into this kingdom, the importer shall forfeit 40*l*. And if the Egyptians themselves remain one month in this kingdom, or if any person, being fourteen years old, (whether natural-born subject or stranger,) which hath been seen or found in the fellowship of such Egyptians, or which hath disguised him or herself like them, shall remain in the same one month, at one or several times, it is felony without benefit of clergy: and Sir Matthew Hale informs us(*l*) that at one Suffolk assizes no less than thirteen gypsies were executed upon these statutes, a few years before the restoration. But, to the honour of our national humanity, there are no instances more modern than this of carrying these laws into practice.[8]

5. To descend next to offences whose punishment is short of death. *Common nuisances* are a species of offence against the public order and economical regimen of the state, being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires.(*m*) The nature of *common* nuisances and their distinction from *private* nuisances were explained in the *preceding volume,(*n*) when we considered more particularly the nature of the private sort as a civil injury to individuals. I shall here only remind the student that common nuisances are such inconvenient and troublesome offences as annoy the whole community in general, and not merely some particular person, and therefore are indictable only, and not actionable, as it would be unreasonable to multiply suits by giving every man a separate right of action for what damnifies him in common only with the rest of his fellow-subjects. Of this nature are, 1. Annoyances in *highways, bridges*, and public *rivers*, by rendering the same inconvenient or dangerous to pass, either positively, by actual obstructions, or negatively, by want of reparations.[9] For both of these, the person so obstructing, or such individuals as are bound to repair and cleanse them, or (in default of these last) the parish at large, may be indicted, distrained to repair and mend them, and in some cases fined. And a presentment thereof by a judge of assize, &c., or a justice of the peace, shall be in all respects equivalent to an indictment.(*o*) Where there is a house erected or an enclosure made upon any part of the king's demesnes, or of a highway or common street, or public water, or such like public things, it is properly called a *purpresture*.(*p*)[10] 2. All those kinds of nuisances (such as of- [*167

(*l*) 1 Hal. P. C. 671.
(*m*) 1 Hawk. P. C. 197.
(*n*) Book iii. p. 216.
(*o*) Stat. 7 Geo. III. c. 42.
(*p*) Co. Litt. 277; from the French *pourpris*, an enclosure.

[8] This act of 5 Eliz. c. 20 is repealed by the 23 Geo. III. c. 51; and now, by the 1 Geo. IV. c. 116, so much of the 1 & 2 P. and M. c. 4 as inflicts capital punishment is repealed. Gypsies are now only punishable under the vagrant act. See *post*, 169.—CHITTY.

[9] Railways have, by stat. 3 & 4 Vict. c. 97, and 5 & 6 Vict. c. 55, been very properly placed under the control and regulation of the state: a penalty is incurred for opening a railway without notice to the board of trade, and for obstructing the government inspector.—STEWART.

[10] The general highway act is now the 13 Geo. III. c. 78, which repeals the 7 Geo. III. c. 42. The 3 Geo. IV. c. 126 is the general turnpike act.

With respect to nuisances in general to *highways*, &c. by *actual obstruction*, it is to be observed that every unauthorized obstruction of the highway, to the annoyance of the king's subjects, is an indictable offence. 3 Camp. 227. Thus, if a wagoner, carrying on a very extensive concern, constantly suffers wagons to remain on the side of the highway on which his premises are situate an unreasonable time, he is guilty of a nuisance. 6 East, 427. 2 Smith, 424. And if stage-coaches regularly stand in a public street in London, though for the purpose of accommodating passengers, so as to obstruct the regular track of carriages, the proprietor may be indicted. 3 Camp. 224. So a timber-merchant occasionally cutting logs of wood in the street, which he could not otherwise convey into his premises, will not be excused by the necessity which, in choosing the situation, he himself created. 3 Camp. 230. It is even said that "if coaches on the occasion of a rout wait an unreasonable length of time in a public street, and obstruct the transit of his majesty's subjects who wish to pass through it in carriages or on foot, the persons who

fensive trades and manufactures) which, when injurious to a private man, are actionable, are, when detrimental to the public, punishable by public prosecution, and subject to fine according to the quantity of the misdemeanour; and particularly the keeping of hogs in any city or market town is indictable as a public nuisance.(q)[11] All disorderly *inns* or *ale-houses*, *bawdy-houses*, *gaming-houses*, *stage-plays*, unlicensed booths, and stages for *rope-dancers*, *mountebanks*, and the like, are public nuisances, and may, upon indictment, be suppressed and fined.(r)[12] Inns in particular, being intended for the lodging and receipt of

(q) Salk. 460. (r) 1 Hawk. P. C. 198, 225.

cause and permit such coaches so to wait are guilty of a nuisance." 3 Camp. 226; and see 1 Russell, 463. Nor is it necessary, in order to fix the responsibility on the defendant, to show that he immediately obstructed the public way, or even intended to do so: it seems to be sufficient if the inconvenience result as an immediate consequence of any public exhibition or act; for the erection of a booth to display rope-dancing and other attractive spectacles, near a public street in London, which draws together a concourse of people, is a nuisance liable to be punished and abated. 1 Ventr. 169. 1 Mod. 76. 2 Keb. 846. Bac. Abr. Nuisance. And it may be collected that a mere transitory obstruction, which must necessarily occur, is excusable if all reasonable promptness be exerted. So that the erection of a scaffolding to repair a house, the unloading a cart or wagon, and the delivery of any large articles, as casks of liquor, if done with as little delay as possible, are lawful, though if an unreasonable time were employed in the operation they would become nuisances. 3 Camp. 231. No length of time will legalize the nuisance. 7 East. 199. 3 Camp. 227. 6 East, 195; *sed vid.* Peake C. N. P. 91. If the party who has been indicted for a nuisance continue the same, he is again indictable for such continuance. 8 T. R. 142. Independently of any legal proceedings, it appears that any person may lawfully abate a public nuisance, at least if it be placed in the middle of a highway and obstruct the passage of his majesty's subjects, (Hawk. b. 1, c. 75, s. 12;) but though a party may remove the nuisance, yet he cannot remove the materials or convert them to his own use, (Dalt. c. 50;) and so much of the thing only as causes the nuisance ought to be removed,—as, if a house be built too high, only so much of it as is too high should be pulled down. 9 Rep. 53. God. 221. 2 Stra. 686.

With respect to nuisances to *water-courses* by *actual obstruction*, any diversion of a public river, whereby the current is weakened and rendered incapable of carrying vessels of the same burden as it could before, is a common nuisance. Hawk. b. 1, c. 75, s. 11. But if a ship or other vessel sink by accident in a river, although it obstruct the navigation, if the owner removes it in a reasonable time, it is not indictable as a nuisance. 2 Esp. 675. No length of time will legalize the nuisance, (6 East, 195, *supra*;) and even the rightful existence of a weir of brushwood will not authorize the building one of stone in its room. 7 East, 199.

With respect to the *punishment* for nuisances to highways, &c., the offenders may be fined and imprisoned. Hawk. b. 1, c. 75, s. 14. But no confinement or corporal punishment is now inflicted. The object of the prosecution is to remove the nuisance, and to that end alone the sentence is in general directed. It is therefore usual, when the nuisance is stated on the proceedings as *continuing*, in addition to a fine, to order the defendant at his own costs to abate the nuisance. 2 Stra. 686. By the 1 & 2 Geo. IV. c. 41, for facilitating the abatement, &c. of nuisances from furnaces in steam-engines, costs may be awarded to the prosecutor, and an order may be made for abating the nuisance; but the act does not extend to furnaces for mines.—Chitty.

[11] It is not essential, in order to constitute this a nuisance, that the smell, or other inconvenience complained of should be unwholesome: it is sufficient if it impairs the enjoyment of life or property. 1 Burr. 333. The material increase in a neighbourhood of noisome smells is indictable. Peake, Rep. 91. If the prosecutor be particularly affected by the nuisance, he will be entitled to costs under 5 W. and M. c. 11, s. 3. 16 East, 194.

To this class of public nuisances may be added that of making great noises in the streets in the night by trumpets or otherwise, (2 Stra. 704;) exhibiting monsters, (2 Ch. Ca. 110;) suffering mischievous animals, having notice of their propensity, to go loose, &c., (Dyer, 25. Vet. 171. 2 Salk. 662. 1 Vent. 295;) carrying about persons infected with contagious diseases. 4 M. & S. 73, 272, *ante*, 162. But neither an old nor a new dovecote is a common nuisance. Hawk. b. 1, c. 7, s. 8.—Chitty.

[12] The keeping of bawdy-houses, gaming-houses, and disorderly houses of all descriptions, together with the unlawful pastimes there pursued, has been from time to time prohibited by various acts of parliament, (see them collected in Collyer's Criminal Statutes, *Nuisance*, 399, *et seq.*,) imposing various punishments and penalties upon offenders; and, by the 3 Geo. IV. c. 114, such offenders are punishable by sentence of imprison-

travellers, may be indicted, suppressed, and the *inn-keepers fined, if they refuse to entertain a traveller without a very sufficient cause; for [*168 thus to frustrate the end of their institution is held to be disorderly behaviour.(s) Thus, too, the hospitable laws of Norway punish, in the severest degree, such inn-keepers as refuse to furnish accommodations at a just and reasonable price.(t) 4. By statute 10 & 11 W. III. c. 17, all *lotteries* are declared to be public nuisances, and all grants, patents, or licenses for the same to be contrary to law. But, as state lotteries have, for many years past, been found a ready mode for raising the supply, an act was made, 19 Geo. III. c. 21, to license and regulate the keepers of such lottery-offices.[13] 5. The making and selling of *fire-works* and *squibs*, or throwing them about in any street, is, on account of the danger that may ensue to any thatched or timber buildings, declared to be a common nuisance by statute 9 & 10 W. III. c. 7, and therefore is punishable by fine.[14] And to this head we may refer (though not declared a common nuisance) the making, keeping, or carriage of too large a quantity of *gunpowder* at one time or in one place or vehicle, which is prohibited by statute 12 Geo. III. c. 61, under heavy penalties and forfeiture.[15] 6. *Eaves-droppers*, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and presentable at the court-leet,(u) or are indictable at the sessions, and punishable by fine and finding sureties for their good behaviour.(v) 7. Lastly, a *common scold*, *communis rixatrix*, (for our law-Latin confines it to the feminine gender,) is a public nuisance to her neighbourhood. For which offence she may be indicted,(w) and, if convicted, shall(x) be sentenced to be placed in a certain engine of correction called the trebucket, castigatory, or *cucking*-stool, which, in

(s) 1 Hawk. P. C. 225.
(t) Stiernhook, *de jure Sueon. l.* 2, c. 9.
(u) Kitch. of Courts, 20.
(v) Ibid. 1 Hawk. P. C. 132.
(w) 6 Mod. 21.
(x) 1 Hawk. P. C. 198, 200.

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ment with hard labour for any term not exceeding the term for which the court before which they are convicted may now imprison for such offences, either in addition to or in lieu of any other punishment which might have been inflicted on such offenders by any law in force before the passing of that act. The keeping of a *cock-pit* is an indictable offence at common law, (as are the other offences above mentioned;) and a *cock-pit* has been held to be a *gaming-house* within the 33 Hen. VIII. c. 9, s. 11. 1 Russell, 300. *Bawdy-houses* and *gaming-houses* are clearly nuisances in the eye of the law. 1 Russell, 299. Rex *vs.* Higginson, 2 Burr. 1232. Rex *vs.* Rogier, 2 D. & R. 431. 1 B. & C. 272. *Playhouses* are not in themselves nuisances, though by neglect or mismanagement they may be rendered so. 1 Hawk. P. C. c. 32, s. 7. But, by 10 Geo. II. c. 28, all places for the exhibition of stage-entertainments must be licensed, (Rex *vs.* Handy, 6 T. R. 286, where it was held that *tumbling* was not a stage-entertainment within that act;) and, by 25 Geo. II. c. 36, all unlicensed places kept for such entertainments are to be deemed disorderly houses.—CHITTY.

[13] The 19 Geo. III. c. 21 was repealed by the 22 Geo. III. c. 47, which was repealed by 42 Geo. III. c. 52, s. 27.

By the 42 Geo. III. c. 119, ss. 1, 2, all lotteries called *little goes* are declared to be public nuisances: and if any one shall keep an office or place to exercise or expose to be played any such lottery, or any lottery whatever not authorized by parliament, or shall knowingly suffer it to be exercised or played at in his house, he shall forfeit 500*l.* The provision as to the offender being deemed a rogue and vagabond seems repealed by the 5 Geo. IV. c. 83, which contained a provision to that effect.

And, by sect. 5 of the 42 Geo. III. c. 119, if any person shall promise to pay any money or goods on any contingency relative to such lottery, or publish any proposal respecting it, he shall forfeit 100*l.* State lotteries are now abolished, by statute 6 Geo. IV.—CHITTY.

[14] The offender may be indicted on the statute or at common law. 4 T. R. 202. 1 Saund. 136, n. 4. Cowp. 650. 2 Burr. 863. And if any person shall make or sell any squibs, rockets, or fire-works, he shall forfeit, upon conviction before a magistrate, 5*l.*,—one half to the informer and the other half to the poor. And if any person shall throw or fire them into any house, street, or highway, he shall forfeit 20*s.* in like manner. 9 & 10 W. III. c. 7.—CHITTY.

[15] By 54 Geo. III. c. 152, so much of the 12 Geo. III. c. 61, s. 21 as enacts that no person shall carry in any land or water carriage any other lading with gunpowder is repealed.

Erecting powder-mills or keeping powder-magazines near a town is a nuisance at common law. See 2 Burn, J. 24th ed. 758. 2 Stra. 1167.—CHITTY.

the Saxon language, is said to signify the scolding-stool, though now it is frequently corrupted into *ducking*-stool, because the residue of the judgment is, that, when she is so placed therein, she shall be plunged in the water for her punishment.(*y*)

*169] 6. *Idleness in any person whatsoever is also a high offence against the public economy. In China it is a maxim that if there be a man who does not work, or a woman that is idle, in the empire, somebody must suffer cold or hunger, the produce of the lands not being more than sufficient, with culture, to maintain the inhabitants; and, therefore, though the idle person may shift off the want from himself, yet it must in the end fall somewhere. The court also of Areopagus, at Athens, punished idleness, and exerted a right of examining every citizen in what manner he spent his time: the intention of which was,(*z*) that the Athenians, knowing they were to give an account of their occupations, should follow only such as were laudable, and that there might be no room left for such as lived by unlawful arts. The civil law expelled all sturdy vagrants from the city:(*a*) and, in our own law, all idle persons or vagabonds, whom our antient statutes describe to be "such as wake on the night and sleep on the day, and haunt customable taverns and ale-houses, and routs about, and no man wot from whence they came nor whither they go," or such as are more particularly described by statute 17 Geo. II. c. 5, and divided into three classes,—*idle* and *disorderly* persons, *rogues* and *vagabonds*, and *incorrigible rogues:* all these are offenders against the good order and blemishes in the government of any kingdom. They are therefore all punished by the statute last mentioned; that is to say, idle and disorderly persons with one month's imprisonment in the house of correction; rogues and vagabonds with whipping and imprisonment not exceeding six months; and incorrigible rogues with the like discipline and confinement not exceeding two years; the breach and escape from which confinement in one of an inferior class ranks him among incorrigible rogues, and in a rogue (before incorrigible) makes him a felon and liable to be transported for seven years. Persons harbouring vagrants are liable to a fine of forty shillings, and to pay all expenses brought upon the parish thereby; in

*170] the same *manner as, by our antient laws, whoever harboured any stranger for more than two nights was answerable to the public for any offence that such his inmate might commit.(*b*)[16]

7. Under the head of public economy may also be properly ranked all sumptuary laws against *luxury*, and extravagant expenses in dress, diet, and the like; concerning the general utility of which to a state, there is much controversy among the political writers. Baron Montesquieu lays it down(*c*) that luxury is necessary in monarchies, as in France; but ruinous to democracies, as in Holland. With regard therefore to England, whose government is compounded of both species, it may still be a dubious question how far private luxury is a public evil, and, as such, cognizable by public laws. And, indeed, our legislators have several times changed their sentiments as to this point; for formerly

*171] there *were a multitude of penal laws existing to restrain excess in apparel;(*d*) chiefly made in the reigns of Edward the Third, Edward the Fourth, and Henry the Eighth, against piked shoes, short doublets, and long coats; all of which were repealed by statute 1 Jac. I. c. 25. But as to excess of diet there still remains one antient statute unrepealed, 10 Edw. III. st. 3, which ordains that no man shall be served at dinner or supper with more than two courses, except upon some great holidays, there specified, in which he may be served with three.

8. Next to that of luxury naturally follows the offence of *gaming*, which is generally introduced to supply or retrieve the expenses occasioned by the former; it being a kind of tacit confession that the company engaged therein

(*y*) 3 Inst. 219.
(*z*) Valer. Maxim. *l.* 2, c. 6.
(*a*) *Nov.* 80, c. 5.
(*b*) *LL. Edw.* c. 27. Bracton, *l.* 3, *tr.* 2, c. 10, § 2.
(*c*) Sp. L. b. vii. c. 2 and 4.
(*d*) 3 Inst. 199.

[16] This act and all others relating to vagrants, &c. are now repealed, by the 5 Geo. IV. c. 83.—Chitty.

do, in general, exceed the bounds of their respective fortunes: and therefore they cast lots to determine upon whom the ruin shall at present fall, that the rest may be saved a little longer. But, taken in any light, it is an offence of the most alarming nature, tending by necessary consequence to promote public idleness, theft, and debauchery among those of a lower class; and among persons of a superior rank it hath frequently been attended with the sudden ruin and desolation of antient and opulent families, an abandoned prostitution of every principle of honour and virtue, and too often hath ended in self-murder.[17] To restrain this pernicious vice among the inferior sort of people, the statute 33 Hen. VIII. c. 9 was made; which prohibits to all but gentlemen the games of tennis, tables, cards, dice, bowls, and other unlawful diversions there specified,(*e*) unless in the time of Christmas, under pecuniary pains and imprisonment. And the same law, and also the statute 33 Geo. II. c. 24, inflict pecuniary penalties, as well upon the master of any public house where servants are permitted to game, as upon the servants themselves who *are found to be gaming there. But this is not the principal ground of modern complaint; it is the gaming in high life that demands the attention of the magistrate; a passion to which every valuable consideration is made a sacrifice, and which we seem to have inherited from our ancestors the antient Germans; whom Tacitus(*f*) describes to have been bewitched with a spirit of play to a most exorbitant degree. "They addict themselves," says he, "to dice (which is wonderful) when sober, and as a serious employment, with such a mad desire of winning or losing, that when stripped of every thing else they will stake at last their liberty and their very selves. The loser goes into a voluntary slavery, and, though younger and stronger than his antagonist, suffers himself to be bound and sold. And this perseverance in so bad a cause they call the point of honour: *ea est in re parva pervicacia, ipsi fidem vocant.*" One would almost be tempted to think Tacitus was describing a modern Englishman. When men are thus intoxicated with so frantic a spirit, laws will be of little avail; because the same false sense of honour that prompts a man to sacrifice himself will deter him from appealing to the magistrate. Yet it is proper that laws should be, and be known publicly, that gentlemen may consider what penalties they wilfully incur, and what a confidence they repose in sharpers, who, if successful in play, are certain to be paid with honour, or, if unsuccessful, have it in their power to be still greater gainers by informing. For, by statute 16 Car. II. c. 7, if any person by playing or betting shall lose more than 100*l.* at one time, he shall not be compellable to pay the same; and the winner shall forfeit treble the value, one moiety to the king, the other to the informer. The statute 9 Anne, c. 14 enacts that all bonds and other securities given for money won at play, or money lent at the time to play withal, shall be utterly void; that all mortgages and encumbrances of lands made upon the same consideration shall be and enure to the use of the heir of the mortgagor; that if any person at any time or sitting loses 10*l.* at play, he may sue the winner, and recover it back by action of debt at law; and in case the loser does not, any other person may sue the winner for treble the sum so lost; and the plaintiff may by bill in equity examine the defendant himself upon oath; and that in any of these suits no privilege of parliament shall be allowed. The *statute further enacts, that if any person by cheating at play shall win any money or valuable thing, or shall at any one time or sitting win more than 10*l.*, he may be indicted thereupon, and [*172 [*173

(*e*) Logetting in the fields, slide-thrift, or shove-groat, cloyish cayles, half-bowl, and coyting.

(*f*) *De Mor. Germ.* c. 24.

[17] At common law, the playing at cards, dice, and other games of chance, merely for the purposes of recreation, and without any view to inordinate gain, is regarded as innocent. Bac. Abr. Gaming, A. Com. Dig. Justices of the Peace, B. 42; and see the preamble to 16 Car. II. c. 7. But a common player at hazard using false dice is liable to be indicted at common law, (2 Roll. Abr. 78. Bac. Abr. Gaming, A.;) and any persons cheating by means of cards or dice might be fined or imprisoned in proportion to the nature of the offence. Bac. Abr. Gaming, A.; and see the 9 Anne, c. 15, s. 6.—CHITTY.

shall forfeit five times the value to any person who will sue for it,[18] and (in case of cheating) shall be deemed infamous, and suffer such corporal punishment as in case of wilful perjury. By several statutes of the reign of king George II.,(*g*) all private lotteries by tickets, cards, or dice (and particularly the games of faro, basset, ace of hearts, hazard, passage, rolly polly, and all other games with dice, except back-gammon) are prohibited, under a penalty of 200*l.* for him that shall erect such lotteries, and 50*l.* a time for the players. Public lotteries, unless by authority of parliament, and all manner of ingenious devices, under the denomination of sales or otherwise, which in the end are equivalent to lotteries, were before prohibited by a great variety of statutes(*h*) under heavy pecuniary penalties. But particular descriptions will ever be lame and deficient, unless all games of mere chance are at once prohibited; the inventions of sharpers being swifter than the punishment of the law, which only hunts them from one device to another. The statute 13 Geo. II. c. 19, to prevent the multiplicity of horse-races, another fund of gaming, directs that no plates or matches under 50*l.* value shall be run, upon penalty of 200*l.* to be paid by the owner of each horse running, and 100*l.* by such as advertise the plate.[19] By statute 18 Geo. II. c. 24, the statute 9 Anne is further enforced, and some deficiencies supplied; the forfeitures of that act may now be recovered in a court of equity; and, moreover, if any man be convicted upon information or indictment of winning or losing at play, or by betting at one time 10*l* or 20*l.* within twenty-four hours, he shall be fined five times the sum for the benefit of the poor of the parish. Thus careful has the legislature been to prevent this destructive vice; which may show that our laws against gaming *174] *are not so deficient, as ourselves and our magistrates in putting those laws in execution.

(*g*) 12 Geo. II. c. 28. 13 Geo. II. c. 19. 18 Geo. II. c. 34. 26, § 109. 8 Geo. I. c. 2, §§ 36, 37. 9 Geo. I. c. 19, §§ 4, 5.
(*h*) 10 & 11 W. III. c. 17. 9 Anne, c. 6, § 56. 10 Anne, c. 6 Geo. II. c. 35, §§ 29, 30.

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[18] In the construction of this act it has been held that a wager on some matter arising from the game, and collateral to it, but not on the event itself, is not an offence within it. 1 Salk. 344. Hawk. b. i. c. 92, s. 47. 2 H. Bla. 43. In the construction of the words "at any one time or sitting," it has been adjudged that where a sum above 10*l.* had been won and paid after a continuance at play, except an interruption during dinner-time, it was to be considered as won at one and the same sitting. 2 Bla. R. 1226.—Chitty.

[19] Newmarket and Black Hambleton are excepted, where a race may be run for any sum or stake less than fifty pounds. But though such horse-races are lawful, yet it has been determined that they are games within the statute of 9 Anne, c. 14, and that of consequence wagers above 10*l.* upon a lawful horse-race are illegal. 2 Bla. Rep. 706. A foot-race and a race against time have also been held to be games within the statute of gaming. 2 Wils. 36. So a wager to travel a certain distance within a certain time, with a post-chaise and a pair of horses, has been considered of the same nature. 6 T. R. 499. A wager for less than 10*l.* upon an illegal horse-race is also void and illegal. 4 T. R. 1. Though the owners of horses may run them for a stake of 50*l.* or more at a proper place for a horse-race, yet it has been held if they run them upon the highway the wager is illegal. 2 B. & P. 51.

Wagers in general, by the common law, were lawful contracts; and all wagers may still be recovered in a court of justice which are not made upon games, or which are not such as are likely to disturb the public peace, or to encourage immorality, or such as will probably affect the interests, characters, and feelings of persons not parties to the wager, or such as are contrary to sound policy or the general interests of the community. See 3 T. R. 693, where the legality of wagers is fully discussed.

Where a person had given 100*l.* upon condition of receiving 300*l.* if peace was not concluded with France within a certain time, and he afterwards brought his action to recover the 300*l.*, it was held the wager was void, as being inconsistent with general policy; but he was allowed to recover back the 100*l.* which he had paid, under a count for so much money had and received by the defendant to his use. 7 T. R. 505. So also a person was permitted to recover back his share of a wager against a stakeholder upon a boxing-match, (5 T. R. 405,) the court not considering the conduct of the plaintiff in these instances so criminal as to deprive him of the benefit of their assistance. See 2 B. & P. 467.—Christian.

The statute 13 Geo. II. c. 19 is now repealed, by stat. 3 & 4 Vict. c. 5.—Stewart.

9. Lastly, there is another offence, constituted by a variety of acts of parliament, which are so numerous and so confused, and the crime itself of so questionable a nature, that I shall not detain the reader with many observations thereupon. And yet it is an offence which the sportsmen of England seem to think of the highest importance, and a matter, perhaps the only one, of general and national concern, associations having been formed all over the kingdom to prevent its destructive progress. I mean the offence of destroying such beasts and fowls as are ranked under the denomination of *game;* which, we may remember, was formerly observed(*i*) (upon the old principles of the forest law) to be a trespass and offence in all persons alike who have not authority from the crown to kill game, (which is royal property,) by the grant either of a free warren or at least a manor of their own. But the laws called the game laws have also inflicted additional punishments (chiefly pecuniary) on persons guilty of this general offence, unless they be people of such rank or fortune as is therein particularly specified. All persons, therefore, of what property or distinction soever, that kill game out of their own territories, or even upon their own estates, without the king's license expressed by the grant of a franchise, are guilty of the first original offence of encroaching on the royal prerogative.[20] And those indigent persons who do so without having such rank or fortune as is generally called a qualification are guilty not only of the original offence, but of the aggravations also created by the statutes for preserving the game; which aggravations are so severely punished, and those punishments so implacably inflicted, that the offence against the king is seldom thought of, provided the miserable delinquent can make his peace with the lord of the manor. The offence, thus aggravated, I have ranked under the present head, because the only rational footing upon which we can consider it as a crime is that in low and indigent persons it promotes idleness, and takes them away from their proper employments and callings, which is an offence against the public police and economy *of the commonwealth. [*175

The statutes for preserving the game are many and various, and not a little obscure and intricate, it being remarked(*j*) that in one statute only, 5 Anne, c. 14, there is false grammar in no fewer than six places, besides other mistakes; the occasion of which, or what denomination of persons were probably the penners of these statutes, I shall not at present inquire. It is, in general, sufficient to observe that the *qualifications* for killing game, as they are usually called, or more properly the *exemptions* from the penalties inflicted by the statute law, are, 1. The having a freehold estate of 100*l.* per annum,[21] there being fifty times the property required to enable a man to kill a partridge as to vote for a knight of the shire: 2. A leasehold for ninety-nine years of 150*l.* per annum: 3. Being the son and heir apparent of an esquire (a very loose and vague description) or person of superior degree: 4. Being the owner or keeper of a forest, park, chase or warren. For unqualified persons transgressing these laws by killing game, keeping engines for that purpose, or even having game in their custody, or for persons (however qualified) that kill game or have it in possession at unseasonable times of the year or unseasonable hours of the day or night, on Sundays or on Christmas day, there are various penalties assigned, corporal and pecuniary, by different statutes;(*k*) on any of which, but only on one at a time, the justices may convict in a summary way, or (in most of them) prosecutions may be carried on at the assizes. And, lastly, by statute 28 Geo. II. c. 12, no person, however qualified to *kill*, may make merchandise of this valuable privilege by *selling* or exposing to sale any game, on pain of like forfeiture as if he had no qualification.[22]

(*i*) See book ii. page 417, &c. (*j*) Burn's Justice, Game, § 3. (*k*) Burn's Justice, tit. Game.

[20] The doctrine, so frequently repeated by the learned commentator, that no person had originally, or has now, a right to kill game upon his own estate without a license or grant from the king, is controverted in 2 book, p. 419, n.—CHRISTIAN.

[21] It must be a fee-simple estate of 100*l.* a year, or an estate for life of 150*l.* per annum. —CHITTY.

[22] All these statutes are repealed, by stat. 1 & 2 W. IV. c. 32, and the law in this respect

CHAPTER XIV.

OF HOMICIDE.

*176] *In the ten preceding chapters we have considered, first, such crimes and misdemeanours as are more immediately injurious to God and his holy religion; secondly, such as violate or transgress the law of nations; thirdly, such as more especially affect the king, the father and representative of his people; fourthly, such as more directly infringe the rights of the public or commonwealth, taken in its collective capacity; and are now, lastly, to take into consideration those which in a more peculiar manner affect and injure *individuals* or private subjects.

Were these injuries indeed confined to individuals only, and did they affect none but their immediate objects, they would fall absolutely under the notion of private wrongs, for which a satisfaction would be due only to the party injured, the manner of obtaining which was the subject of our inquiries in the preceding book. But the wrongs which we are now to treat of are of a much more extensive consequence: 1. Because it is impossible they can be committed without a violation of the laws of nature,—of the moral as well as political rules of right: 2. Because they include in them almost always a breach of the public peace: 3. Because by their example and evil tendency they threaten and endanger the subversion of all civil society. Upon these accounts it is *177] *that, besides the private satisfaction due and given in many cases to the individual by action for the private wrong, the government also calls upon the offender to submit to public punishment for the public crime. And the prosecution of these offences is always at the suit and in the name of the king, in whom, by the texture of our constitution, the *jus gladii*, or executory power of the law, entirely resides. Thus, too, in the old Gothic constitution there was a threefold punishment inflicted on all delinquents; first, for the private wrong to the party injured; secondly, for the offence against the king by disobedience to the laws; and, thirdly, for the crime against the public by their evil example.(a) Of which we may trace the groundwork in what Tacitus tells us of his Germans,(b) that, whatever offenders were fined, "*pars multæ regi, vel civitati, pars ipsi, qui vindicatur vel propinquis ejus, exsolvitur.*"

These crimes and misdemeanours against private subjects are principally of three kinds: against their *persons*, their *habitations*, and their *property*.

Of crimes injurious to the *persons* of private subjects, the most principal and important is the offence of taking away that life which is the immediate gift of the great Creator, and of which, therefore, no man can be entitled to deprive himself or another but in some manner either expressly commanded in or evidently deducible from those laws which the Creator has given us; the divine laws, I mean, of either nature or revelation. The subject, therefore, of the present chapter, will be the offence of *homicide*, or destroying the life of man, in its several stages of guilt, arising from the particular circumstances of mitigation or aggravation which attend it.

Now, homicide, or the killing of any human creature, is of three kinds: *justifiable, excusable*, and *felonious*. The first has no share of guilt at all; the *178] second very little; but the *third is the highest crime against the law of nature that man is capable of committing.

I. Justifiable homicide is of divers kinds.

1. Such as is owing to some unavoidable *necessity*, without any will, intention,

(a) Stiernhook, *l.* 1, c. 5. (b) *De Mor. Germ.* c. 12.

almost entirely altered. The necessity of any qualification for killing game was abolished, and it is enacted that every certificated person may kill game, subject to the law of trespass; and the sale of game by licensed persons and under certain restrictions is legalized.—Stewart.

or desire, and without any inadvertence or negligence, in the party killing, and therefore without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death who had forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty, and therefore not only justifiable, but commendable, where the law requires it. But the law must *require* it, otherwise it is not justifiable: therefore, wantonly to kill the greatest of malefactors, a felon or a traitor, attainted or outlawed, deliberately, uncompelled and extrajudicially, is murder.(*c*) For, as Bracton(*d*) very justly observes, "*istud homicidium, si fit ex livore, vel delectatione effundendi humanum sanguinem, licet justè occidatur iste, tamen occisor peccat mortaliter, propter intentionem corruptam.*" And, further, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder.(*e*) And upon this account Sir Matthew Hale himself, though he accepted the place of a judge of the common pleas under Cromwell's government, (since it is necessary to decide the disputes of civil property in the worst of times,) yet declined to sit on the crown side at the assizes and try prisoners, having very strong objections to the legality of the usurper's commission;(*f*) a distinction perhaps rather too refined, since the punishment of crimes is at least as necessary to society as maintaining the boundaries of property. Also, such judgment, when legal, must be executed by the proper officer or his appointed deputy; for no one else is *required* by law to do it, which requisition it is that justifies the homicide. If another *person doth it of his own head, it is held to be [*179 murder,(*g*) even though it be the judge himself.(*h*) It must, further, be executed *servato juris ordine;* it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice versa*, it is murder,(*i*) for he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law; but if a sheriff changes one kind of death for another, he then acts by his own authority, which extends not to the commission of homicide, and, besides, this license might occasion a very gross abuse of his power. The king, indeed, may remit part of a sentence, as in the case of treason, all but the beheading; but this is no change, no introduction of a new punishment: and in the case of felony, where the judgment is *to be hanged*, the king (it hath been said) cannot legally order even a peer to be beheaded.(*k*) But this doctrine will be more fully considered in a subsequent chapter.

Again: in some cases homicide is justifiable rather by the *permission* than by the absolute *command* of the law, either for the *advancement* of public *justice*, which without such indemnification would never be carried on with proper vigour; or, in such instances where it is committed for the *prevention* of some atrocious *crime* which cannot otherwise be avoided.

2. Homicides committed for the *advancement* of public *justice* are:—1. Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him.(*l*) 2. If an officer, or any private person, attempts to take a man charged with felony, and is resisted, and in the endeavour to take him kills him.(*m*) This is similar to the old Gothic constitutions; which (Stiernhook informs us)(*n*) "*furem, si aliter capi non posset, occidere *permittunt.*" 3. In case of a riot, or rebellious assembly, the officers [*180 endeavouring to disperse the mob are justifiable in killing them, both at common law,(*o*) and by the riot act 1 Geo. I. c. 5. 4. Where the prisoners in a gaol, or going to a gaol, assault the gaoler or officer, and he in his defence kills any of them, it is justifiable for the sake of preventing an escape.(*p*) 5. If trespassers in forests, parks, chases, or warrens will not surrender themselves to the keepers, they may be slain, by virtue of the statute 21 Edw. I. st. 2, *de*

(*c*) 1 Hal. P. C. 497.
(*d*) Fol. 120.
(*e*) 1 Hawk. P. C. 70. 1 Hal. P. C. 497.
(*f*) Burnet, in his Life.
(*g*) 1 Hal. P. C. 501. 1 Hawk. P. C. 70.
(*h*) Dalt. Just. c. 150.
(*i*) Finch, L. 31. 3 Inst. 52. 1 Hal. P. C. 501.
(*k*) 3 Inst. 52, 212.
(*l*) 1 Hal. P. C. 494. 1 Hawk. P. C. 71.
(*m*) 1 Hal. P. C. 494.
(*n*) *De jure Goth. l.* 3, c. 5.
(*o*) 1 Hal. P. C. 495. 1 Hawk. P. C 161.
(*p*) 1 Hal. P. C. 496.

malefactoribus in parcis, and 3 & 4 W. and M. c. 10.[1] But in all these cases there must be an apparent necessity on the officer's side, viz., that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, the deer-stealers could not but escape, unless such homicide were committed; otherwise, without such absolute necessity, it is not justifiable.[2] 6. If the champions in a trial by battle killed either of them the other, such homicide was justifiable, and was imputed to the just judgment of God, who was thereby presumed to have decided in favour of the truth.(*q*)[3]

In the next place, such homicide as is committed for the *prevention* of any forcible and atrocious *crime* is justifiable by the law of nature;(*r*) and also by the law of England, as it stood so early as the time of Bracton,(*s*) and as it is since declared in statute 24 Hen. VIII. c. 5.[4] If any person attempts a robbery or murder of another, or attempts to break open a house, *in the night-time*, (which extends also to an attempt to burn it,)(*t*) and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to any crime unaccompanied with force, as picking of pockets, or to the breaking open of any house *in the daytime*, unless it carries with it the attempt of robbery also. So the Jewish law, which punished no theft with death, makes homicide only justifiable in case of *nocturnal* house-breaking: if a thief be found breaking up, and he be "smitten that *he die, no blood shall be shed for him; but if the sun be risen upon him, there shall blood be shed for him; for he should have made full restitution."(*u*) At Athens, if any theft was committed by night, it was lawful to kill the criminal if taken in the fact:(*w*) and by the Roman law of the twelve tables, a thief might be slain by night with impunity; or even by day, if he armed himself with any dangerous weapon:(*x*) which amounts to nearly the same as is permitted by our own constitutions.

*181]

The Roman law also justifies homicide when committed in defence of the chastity either of one's self or relations;(*y*) and so also, according to Selden,(*z*) stood the law in the Jewish republic. The English law likewise justifies a woman killing one who attempts to ravish her:(*a*) and so too the husband or father may justify killing a man who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other.(*b*) And I make no doubt but the forcibly attempting a crime of a still more detestable nature may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own and all other laws seems to be this,—that where a crime,

(*q*) 1 Hawk. P. C. 71.
(*r*) Puff. L. of N. *l.* 2, c. 5.
(*s*) Fol. 155.
(*t*) 1 Hal. P. C. 488.
(*u*) Exod. xxii. 2.
(*w*) Pott. Antiq. b. i. c. 24.
(*x*) Cic. *pro Milone*, 3. *Ff.* 9, 2, 4.
(*y*) "*Divus Hadrianus rescripsit eum qui stuprum sibi vel suis inferentem occidit dimittendum.*" *Ff.* 48, 8, 1.
(*z*) *De legib. Hebræor. l.* 4, c. 3.
(*a*) Bac. Elem. 64. 1 Hawk. P. C. 71.
(*b*) 1 Hal. P. C. 485, 486.

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[1] 21 Edw. I. stat. 2 is repealed, by 7 & 8 Geo. IV. c. 27, and 3 & 4 W. and M. c. 10, by 16 Geo. III. c. 30,—which latter is also repealed, by 7 & 8 Geo. IV. c. 27.—Chitty.

[2] If a person commits felony, and flies, or resists those who attempt to apprehend him, or is indicted of felony, and flies, or is arrested by warrant or process of law, and escapes, or is being conveyed to prison, and escapes,—in any of these cases, if he cannot be taken alive, and is killed in the act of resistance, the homicide is justifiable. 1 Hale, P. C. 489. 1 East, P. C. 298. So if an officer has a warrant against A., *by name*, for felony, or if A. is indicted of felony, or if the hue and cry is levied against him, *by name*, in any of these cases if A., though innocent, flies or resists, and is killed by the officer or any other person aiding him during flight or resistance, the person so killing him is indemnified. Fost. 318. 1 East, P. C. 300. And the officer, it seems, would be equally indemnified though he had no warrant, if he acted on a charge of felony, and on reasonable suspicion, even though it should appear in the result that no felony had been committed. Samuel *vs.* Payne, Doug. 359. Guppy *vs.* Brittlebank, 5 Price, 525.—Chitty.

[3] The trial by battle is abolished, by 59 Geo. III. c. 46. See further upon that subject, *post*, 346.—Chitty.

[4] Repealed, by 9 Geo. IV. c. 31, sect. 10 of which enacts that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner, without felony.—Chitty.

in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. But we must not carry this doctrine to the same visionary length that Mr. Locke does, who holds(c) "that all manner of force without right upon a man's person puts him in a state of war with the aggressor; and, of consequence, that, being in such state of war, he may lawfully kill him that puts him under this unnatural restraint." However just this conclusion may be in a state of uncivilized nature, yet the law of England, like that of every other *well-regulated community, is too tender of the public peace, too careful of the lives of the subjects, to [*182 adopt so contentious a system; nor will suffer with impunity any crime to be *prevented* by death, unless the same, if committed, would also be *punished* by death.

In these instances of *justifiable* homicide, it may be observed that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame. But that is not quite the case in *excusable* homicide, the very name whereof imports some fault, some error or omission; so trivial, however, that the law excuses it from the guilt of felony, though in strictness it judges it deserving of some little degree of punishment.

II. Excusable homicide is of two sorts; either *per infortunium*, by misadventure; or *se defendendo*, upon a principle of self-preservation. We will first see wherein these two species of homicide are distinct, and then wherein they agree.

1. Homicide *per infortunium* or *misadventure* is where a man, doing a lawful act without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off and kills a stander-by; or where a person qualified to keep a gun is shooting at a mark and undesignedly kills a man:(d) for the act is lawful, and the effect is merely accidental.[5] So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure; for the act of correction is lawful; but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder;(e) for the act of immoderate correction is unlawful. *Thus, by an edict of the emperor Constantine,(f) [*183 when the rigour of the Roman law with regard to slaves began to relax and soften, a master was allowed to chastise his slave with rods and imprisonment, and if death accidentally ensued, he was guilty of no crime; but if he struck him with a club or a stone, and thereby occasioned his death, or if in any other yet grosser manner, "*immoderate suo jure utatur, tunc reus homicidii sit.*"

But to proceed: A tilt or tournament, the martial diversion of our ancestors, was however an unlawful act: and so are boxing and sword-playing, the succeeding amusement of their posterity; and therefore if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony or manslaughter. But if the knight command or permit such diversion, it is said to be only misadventure; for then the act is lawful.(g) In the like manner as, by the laws both of Athens and Rome, he who killed another in the *pancratium*, or public games authorized or permitted by the state, was not held to be guilty of homicide.(h)

(c) Ess. on Govt. p. 2, c. 5.
(d) 1 Hawk. P. C. 73, 74.
(e) 1 Hal. P. C. 473, 474.
(f) *Cod. l.* 9, *t.* 14.
(g) 1 Hal. P. C. 473. 1 Hawk. P. C. 74.
(h) Plato, *de LL. lib.* 7. *Ff.* 9, 2, 7.

[5] If a person driving a carriage happen to kill another, if he saw or had timely notice of the mischief likely to ensue, and yet wilfully drove on, it will be murder; if he *might* have seen the danger, but did not look before him, it will be manslaughter; but if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death and excusable homicide. 1 East, P. C. 263. Where, on a false alarm of thieves, the master of the house killed one of the family by mistake, who had concealed himself in a closet, this was holden homicide by misfortune. Cro. Car. 538. Where an unqualified person by accident shoots another in sporting, it is no greater offence than in a qualified person. 1 East, P. C. 260, 269.—CHITTY.

Likewise to whip another's horse whereby he runs over a child and kills him, is held to be accidental in the rider, for he had done nothing unlawful; but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness of inevitably dangerous consequence.(*i*)[6] And in general if death ensues in consequence of an idle, dangerous, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing, in these and similar cases the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts.(*k*)

2. Homicide in *self-defence* or *se defendendo*, upon a sudden affray, is also excusable, rather than justifiable, by the English law. This species of self-defence must be distinguished from that just now mentioned as calculated to *hinder the perpetration of a capital crime; which is not only a matter of excuse but of justification. But the self-defence which we are now speaking of is that whereby a man may protect himself from an assault or the like, in the course of a sudden broil or quarrel, by killing him who assaults him. And this is what the law expresses by the word *chance-medley*, or (as some rather choose to write it) *chaud-medley*, the former of which in its etymology signifies a *casual* affray, the latter an affray in the *heat* of blood or passion; both of them of pretty much the same import: but the former is in common speech too often erroneously applied to any manner of homicide or misadventure; whereas it appears, by the statute 24 Hen. VIII. c. 5, and our antient books,(*l*) that it is properly applied to such killing as happens in self-defence upon a sudden rencounter.(*m*) This right of natural defence does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence but in sudden and violent cases, when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or at least probable) means of escaping from his assailant.[7]

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It is frequently difficult to distinguish this species of homicide (upon *chance-*

(*i*) 1 Hawk. P. C. 73.
(*k*) Ibid. 74. 1 Hal. P. C. 472. Fost. 261.
(*l*) Staundf. P. C. 16.
(*m*) 3 Inst. 55, 57. Fost. 275, 276.

[6] Whenever death is the consequence of idle, dangerous, and unlawful sports, or of heedless, wanton, and indiscreet acts, without a felonious intent, the party causing the death is guilty of manslaughter. As if a man rides an unruly horse among a crowd of people, (1 East, P. C. 231;) or throws a stone or shoots an arrow over a wall into a public and frequented street, (1 Hale P. C. 475;) or discharges his pistols in a public street upon alighting from his carriage, (1 Stra. 481;) or throws a stone at a horse which strikes a man, (1 Hale, P. C. 39:) in any of these cases, though the party may be perfectly innocent of any mischievous intent, still, if death ensues, he is guilty of manslaughter. So, if the owner suffers to be at large any animal which he knows to be vicious and mischievous, and it kills a man, it has been thought by some that he may be indicted for manslaughter; but it is well agreed that he is guilty of a high misdemeanour, (2 Hawk. P. C. c. 13, § 8:) and, in a very recent case of that kind, *Best, C. J.*, laid it down as law "that if a person thinks proper to keep an animal of this description, [a bull,] knowing its vicious nature, and another person is killed by it, it will be manslaughter in the owner, *if nothing more:* at all events, it will be an *aggravated* species of manslaughter." Blackman *vs.* Simmons, 3 C. & P. 140. If workmen, in the ordinary course of their business, throw rubbish from a house in a direction in which persons are likely to pass, and any one passing is killed, this is manslaughter. 1 East, P. C. 262. Killing a person in a prize-fight is manslaughter, *Ward's case*, 1 East, P. C. 270. As to what are lawful sports, see *Pulton*, title Riot.—Chitty.

[7] The general principle seems to be this:—If a man is attacked in such a manner that there is no possibility of his escaping without killing his assailant, he is justified in doing so, after having done his utmost to retreat. Fost. 278. Kel. 128. But no assault, however violent, will justify killing the assailant under the plea of necessity unless there is a clear manifestation of a felonious intent. 1 East, P. C. 277. 1 Russell, 551. And an officer who kills one who resists him in the execution of his office, and even a private person that kills one who feloniously assaults him in the highway, may justify the fact without retreating at all. 1 Hawk. P. C. c. 29, s. 16. 1 Hale, P. C. 41. 3 Inst. 56. Crom. 28, a.—Chitty.

medley in self-defence) from that of manslaughter, in the proper legal sense of the word.(*n*) But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter: but if the slayer has not begun the fight, or (having begun) endeavours to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence.(*o*) For which reason the law requires that the person who kills another in his own defence *should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that not factitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy, yet between two fellow-subjects the law countenances no such point of honour, because the king and his courts are the *judices injuriarum*, and will give to the party wronged all the satisfaction he deserves.(*p*) In this the civil law also agrees with ours, or perhaps goes rather further: "*qui cum aliter tueri se non possunt, damni culpam dederint, innoxii sunt.*"(*q*) The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him,(*r*) for it may be so fierce as not to allow him to yield a step without manifest danger of his life or enormous bodily harm, and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice(*s*) as well as of the municipal law. [*185

And as the *manner* of the defence, so is also the *time* to be considered; for, if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge, and not defence. Neither, under the colour of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder; for if two persons, A. and B., agree to fight a duel, and A. gives the first onset, and B. retreats as far as he safely can and then kills A., this is murder, because of the previous malice and concerted design.(*t*) But if A., upon a sudden quarrel, assaults B. first, and upon B.'s returning the assault A. really and *bona fide* flees, and, being driven to the wall, turns again upon B. and kills him, this may be *se defendendo* according to some of our writers,(*u*) *though others (*w*) have thought this opinion too favourable, inasmuch as the necessity to which he is at last reduced originally arose from his own fault. Under this excuse of self-defence the principal civil and natural relations are comprehended: therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself.(*x*) [*186

There is one species of homicide *se defendendo* where the party slain is equally innocent as he who occasions his death; and yet this homicide is also excusable, from the great universal principle of self-preservation which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish. As, among others, in that case mentioned by lord Bacon,(*y*) where two persons, being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expense of another man's is excusable through unavoidable necessity and the principle of self-defence, since their both remaining on the same weak plank is a mutual though innocent attempt upon and an endangering of each other's life.

Let us next take a view of those circumstances wherein these two species of homicide by misadventure and self-defence agree; and those are in their blame and punishment. For the law sets so high a value upon the life of a man that it always intends some misbehaviour in the person who takes it away, unless

(*n*) 3 Inst. 55.
(*o*) Fost. 277.
(*p*) 1 Hal. P. C. 481, 483.
(*q*) *Ff.* 9, 2, 45.
(*r*) 1 Hal. P. C. 483.
(*s*) Puff. b. ii. c. 5, § 13.
(*t*) 1 Hal. P. C. 479.
(*u*) Ibid. 428.
(*w*) 1 Hawk. P. C. 75.
(*x*) 1 Hal. P. C. 448.
(*y*) Elem. c. 5. See also 1 Hawk. P. C. 73.

by the command or express permission of the law. In the case of misadventure it presumes negligence, or at least a want of sufficient caution, in him who was so unfortunate as to commit it, who therefore is not altogether faultless.(z)

*187] And as to the necessity which excuses a man who *kills another *se defendendo*, lord Bacon(a) entitles it *necessitas culpabilis*, and thereby distinguishes it from the former necessity of killing a thief or a malefactor. For the law intends that the quarrel or assault arose from some unknown wrong, or some provocation either in word or deed; and since, in quarrels, both parties may be, and usually are, in some fault, and it scarce can be tried who was originally in the wrong, the law will not hold the survivor entirely guiltless. But it is clear, in the other case, that where I kill a thief that breaks into my house, the original default can never be upon my side. The law, besides, may have a further view: to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment, by ordaining that he who slays his neighbour, without an express warrant from the law so to do, shall in no case be absolutely free from guilt.

Nor is the law of England singular in this respect. Even the slaughter of enemies required a solemn purgation among the Jews; which implies that the death of a man, however it happens, will leave some stain behind it. And the Mosaical law(b) appointed certain cities of refuge for him "who killed his neighbour unawares; as, if a man goeth into the wood with his neighbour to hew wood, and his hand fetcheth a stroke with the axe to cut down a tree, and the head slippeth from the helve and lighteth upon his neighbour that he die, he shall flee unto one of these cities and live." But it seems he was not held wholly blameless any more than in the English law, since the avenger of blood might slay him before he reached his asylum, or if he afterwards stirred out of it till the death of the high-priest. In the imperial law, likewise,(c) casual homicide was excused by the indulgence of the emperor, signed with his own sign-manual, "*annotatione principis;*" otherwise the death of a man, however committed, was in some degree punishable. Among the Greeks,(d) homicide

*188] by misfortune was expiated by voluntary *banishment for a year.(e) In Saxony a fine is paid to the kindred of the slain; which also, among the Western Goths, was little inferior to that of voluntary homicide:(f) and in France(g) no person is ever absolved, in cases of this nature, without a largess to the poor, and the charge of certain masses for the soul of the party killed.

The penalty inflicted by our laws is said by Sir Edward Coke to have been antiently no less than death;(h) which, however, is with reason denied by later and more accurate writers.(i) It seems rather to have consisted in a forfeiture, some say of all the goods and chattels, others of only part of them, by way of fine or *weregild*:(k) which was probably disposed of, as in France, *in pios usus*, according to the humane superstition of the times, for the benefit of *his* soul who was thus suddenly sent to his account with all his imperfections on his head. But that reason having long ceased, and the penalty (especially if a total forfeiture) growing more severe than was intended in proportion as personal property has become more considerable, the delinquent has now, and has had as early as our records will reach,(l) a pardon and writ of restitution of his goods as a matter of course and right, only paying for suing out the same.(m) And, indeed, to prevent this expense, in cases where the death has notoriously happened by misadventure or in self-defence, the judges will usually permit (if not direct) a general verdict of acquittal.(n)

III. Felonious homicide is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self, or another man.

(z) 1 Hawk. P. C. 72.
(a) Elem. c. 5.
(b) Numb. xxxv. and Deut. xix.
(c) *Cod.* 9, 16, 5.
(d) Plato, *de Leg. lib.* 9.
(e) To this expiation by banishment the spirit of Patroclus in Homer may be thought to allude when he reminds Achilles, in the twenty-third Iliad, that when a child he was obliged to flee his country for casually killing his playfellow: "νηπιος οὐκ ἐθελων."
(f) Stiernh. *de jure Goth. l.* 3, c. 4.
(g) De Morney, on the Digest.
(h) 2 Inst. 148, 315.
(i) 1 Hal. P. C. 425. 1 Hawk. P. C. 75. Fost. 282, &c.
(k) Fost. 287.
(l) Ibid. 283.
(m) 2 Hawk. P. C. 381.
(n) Fost. 238.

*Self-murder, the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure, though the attempting it seems to be countenanced by the civil law,(o) yet was punished by the Athenian law with cutting off the hand which committed the desperate deed.(p) And also the law of England wisely and religiously considers that no man hath a power to destroy life but by commission from God, the author of it; and, as the suicide is guilty of a double offence: one spiritual, in invading the prerogative of the Almighty and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self. And this admits of accessories before the fact, as well as other felonies; for if one persuades another to kill himself, and he does so, the adviser is guilty of murder.(q) A *felo de se*, therefore, is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death: as if, attempting to kill another, he runs upon his antagonist's sword; or, shooting at another, the gun bursts and kills himself.(r)[8] The party must be of years of discretion and in his senses, else it is no crime. But this excuse ought not to be strained to that length to which our coroner's juries are apt to carry it, viz., that the very act of suicide is an evidence of insanity; as if every man who acts contrary to reason had no reason at all: for the same argument would prove every other criminal *non compos*, as well as the self-murderer. The law very rationally judges that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong; which is necessary, as was observed in a former chapter,(s) to *form a legal excuse. And, therefore, if a real lunatic kills himself in a lucid interval, he is a *felo de se* as much as another man.(t) [*190

But now the question follows,—What punishment can human laws inflict on one who has withdrawn himself from their reach? They can only act upon what he has left behind him, his reputation and fortune; on the former by an ignominious burial in the highway, with a stake driven through his body;[9] on the latter by a forfeiture of all his goods and chattels to the king; hoping that his care for either his own reputation or the welfare of his family would be some motive to restrain him from so desperate and wicked an act. And it is observable that this forfeiture has relation to the time of the act done in the felon's lifetime, which was the cause of his death. As if husband and wife be possessed jointly of a term of years in land, and the husband drowns him-

(o) "*Si quis impatientia doloris, aut tædio vitæ, aut morbo, aut furore, aut pudore, mori maluit, non animadvertatur in eum.*" *Ff.* 49, 16, 6.
(p) Pott. Antiq. b. i. c. 26.
(q) Keilw. 136.
(r) 1 Hawk. P. C. 68. 1 Hal. P. C. 413.
(s) See page 24.
(t) 1 Hal. P. C. 412.

[8] He who kills another upon his desire or command is in the judgment of the law as much a murderer as if he had done it merely of his own head: and the person killed is not looked upon as a *felo de se*, inasmuch as his assent was merely void, being against the law of God and man. 1 Hawk. P. C. c. 27, s. 6. Keilw. 136. Moor. 754. And see Rex *vs.* Sawyer, 1 Russell, 424. Rex *vs.* Evans, id. 426.—CHITTY.

[9] But now, by 4 Geo. IV. c. 52, s. 1, it shall not be lawful for any coroner, or other officer having authority to hold inquests, to issue any warrant or other process directing the interment of the remains of persons against whom a finding of *felo de se* shall be had in any public highway; but such coroner or other officer shall give directions for the private interment of the remains of such person *felo de se*, without any stake being driven through the body of such person, in the churchyard or other burial-ground of the parish or place in which the remains of such person might by the laws or customs of England be interred if the verdict of *felo de se* had not been found against such person, such interment to be made within twenty-four hours from the finding of the inquisition, and to take place between the hours of nine and twelve at night. Proviso, (s. 2,) not to authorize the performing of any of the rites of Christian burial on the interment of the remains of any such person, nor to alter the laws or usages relating to the burial of such person, except so far as relates to the interment of such remains in such yard or burial-ground at such time and in such manner.—CHITTY.

self, the land shall be forfeited to the king, and the wife shall not have it by survivorship. For by the act of casting himself into the water he forfeits the term; which gives a title to the king prior to the wife's title by survivorship, which could not accrue till the instant of her husband's death.(*u*) And though it must be owned that the letter of the law herein borders a little upon severity, yet it is some alleviation that the power of mitigation is left in the breast of the sovereign, who upon this, as on all other occasions, is reminded by the oath of his office to execute judgment in mercy.[10]

The other species of criminal homicide is that of killing another man. But in this there are also degrees of guilt which divide the offence into *manslaughter* and *murder*, the difference between which may be partly collected from what has been incidentally mentioned in the preceding articles, and principally consists in this,—that manslaughter, when voluntary, arises from the sudden heat of the passions, murder from the wickedness of the heart.

*191] *1. Manslaughter is therefore thus defined:(*v*) the unlawful killing of another without malice, either express or implied; which may be either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act. These were called, in the Gothic constitutions, "*homicidia vulgaria; quæ aut casu, aut etiam sponte committuntur, sed in subitaneo quodam iracundiæ calore et impetu.*"(*w*) And hence it follows that in manslaughter there can be no accessories before the fact, because it must be done without premeditation.

As to the first, or *voluntary* branch: if, upon a sudden quarrel, two persons fight, and one of them kills the other, this is manslaughter; and so it is if they, upon such an occasion, go out and fight in a field, for this is one continued act of passion,(*x*) and the law pays that regard to human frailty as not to put a hasty and a deliberate act upon the same footing with regard to guilt. So, also, if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself, yet neither is it murder, for there is no previous malice, but it is manslaughter.(*y*) But in this and in every other case of homicide upon provocation, if there be a sufficient cooling-time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder.(*z*) So, if a man takes another in the act of adultery with his wife and kills him directly upon the spot, though this was allowed by the laws of Solon,(*a*) as likewise by the Roman civil law, (if the adulterer was found in the husband's own house,)(*b*) and also among the

(*u*) Finch, L. 216.
(*v*) 1 Hal. P. C. 466.
(*w*) Stiernh. *de jure Goth. l.* 3, c. 4.
(*x*) 1 Hawk. P. C. 82.
(*y*) Kelyng. 135.
(*z*) Fost. 296.
(*a*) Plutarch, *in vit. Solon.*
(*b*) *Ff.* 48, 5, 24.

[10] As to *what* a *felo de se* shall forfeit, it seems clear that he shall forfeit all chattels real or personal which he has in his own right; and also all chattels real whereof he is possessed, either jointly with his wife, or in her right; and also all bonds and other personal things in action belonging solely to himself; and also all personal things in action, and, as some say, entire chattels in possession, to which he was entitled jointly with another, or any account, except that of merchandise. But it is said that he shall forfeit a moiety only of such joint chattels as may be severed, and nothing at all of what he was possessed of as executor or administrator. 1 Hawk. P. C. c. 27, s. 7. The blood of a *felo de se* is not corrupted, nor his lands of inheritance forfeited, nor his wife barred of her dower. 1 Hawk. P. C. c. 27, s. 8. Plowd. 261, b., 262, a. 1 Hale, P. C. 413. The will of a *felo de se* therefore becomes void as to his personal property, but not as to his real estate. Plowd. 261. No part of the personal estate of a *felo de se* vests in the king before the self-murder is found by some inquisition, and consequently the forfeiture thereof is saved by a pardon of the offence before such finding. 5 Co. Rep. 110, b. 3 Inst. 54. 1 Saund. 362. 1 Sid. 150, 162. But if there be no such pardon, the whole is forfeited immediately after such inquisition, from the time of the act done by which the death was caused, and all intermediate alienations and titles are avoided. Plowd. 260. 1 Hale, P. C. 29. 5 Co. Rep. 110. Finch, L. 216. See also, upon this subject, Lambert *vs.* Taylor, 6 D. & R. 188, 4 B. & C. 138.—Chitty.

antient Goths,(c) yet in England it is not absolutely ranked in the class of justifiable homicide, as in case of a forcible rape, *but it is manslaughter.(d) It is, however, the lowest degree of it; and therefore in such a case the [*192 court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation.(e) Manslaughter, therefore, on a sudden provocation, differs from excusable homicide *se defendendo* in this,—that in one case there is an apparent necessity for self-preservation to kill the aggressor, in the other no necessity at all, being only a sudden act of revenge.

The second branch, or *involuntary* manslaughter, differs also from homicide excusable by misadventure in this,—that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As, if two persons play at sword and buckler, unless by the king's command, and one of them kills the other, this is manslaughter, because the original act was unlawful, but it is not murder, for the one had no intent to do the other any personal mischief.(f) So, where a person does an act lawful in itself, but in an unlawful manner, and without due caution and circumspection, as when a workman flings down a stone or piece of timber into the street and kills a man, this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning,(g) and murder if he knows of their passing and gives no warning at all, for then it is malice against all mankind.(h) And in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter,(i) according to the nature of the act which occasioned it. If it be in prosecution of a felonious *intent, or in its consequences naturally [*193 tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter.(j)

Next, as to the *punishment* of this degree of homicide: the crime of manslaughter amounts to felony, but within the benefit of clergy; and the offender shall be burned in the hand and forfeit all his goods and chattels.[11]

But there is one species of manslaughter which is punished as murder, the benefit of clergy being taken away from it by statute, namely, the offence of mortally *stabbing* another, though done upon sudden provocation. For, by statute 1 Jac. I. c. 8, when one thrusts or stabs another not then having a weapon drawn, or who hath not then first stricken the party stabbing, so that he dies thereof within six months after, the offender shall not have the benefit of clergy, though he did it not of malice aforethought. This statute was made on account of the frequent quarrels and stabbings with short daggers between the Scotch and the English at the accession of James the First,(k) and being, therefore, of a temporary nature, ought to have expired with the mischief which it meant to remedy. For, in point of solid and substantial justice, it cannot be said that the mode of killing, whether by stabbing, strangling, or shooting, can either extenuate or enhance the guilt, unless where, as in the case of poisoning, it carries with it an internal evidence of cool and deliberate malice. But the benignity of the law hath construed the statute so favourably in behalf of the subject, and so strictly when against him, that the offence of stabbing now stands almost upon the same

(c) Stiernh. *de jure Goth.* l. 3, c. 2.
(d) 1 Hal. P. C. 486.
(e) Sir T. Raym. 212.
(f) 3 Inst. 56.
(g) Kes. 40.
(h) 3 Inst. 57.
(i) Our statute-law has severely animadverted on one species of criminal negligence whereby the death of a man is occasioned. For, by statute 10 Geo. II. c. 31, if any waterman between Gravesend and Windsor receives into his boat or barge a greater number of persons than the act allows, and any passenger shall then be drowned, such waterman is guilty (not of manslaughter, but) of felony, and shall be transported as a felon.
(j) Foster, 258. 1 Hawk. P. C. 84.
(k) Lord Raym. 140.

[11] By 9 Geo. IV. c. 31, s. 9, (repealing all former enactments on this subject,) every person convicted of manslaughter shall be liable, at the discretion of the court, to be transported for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding four years, or to pay such fine as the court shall award.—CHITTY.

footing as it did at the common law.(*l*) Thus, (not to repeat the cases before mentioned of stabbing an adulteress, &c., which are barely manslaughter, as at common law,) in the construction of this statute it hath been doubted whether, if the deceased had struck at all before the mortal blow given, this does not take it out of the statute, though in the preceding quarrel the stabber had given the first blow; and *it seems to be the better opinion that this is not within the statute.(*m*) Also, it hath been resolved that the killing a man by throwing a hammer or other blunt weapon is not within the statute; and whether a shot with a pistol be so or not, it is doubted.(*n*) But if the party slain had a cudgel in his hand, or had thrown a pot or bottle or discharged a pistol at the party stabbing, this is a sufficient having a weapon drawn on his side within the words of the statute.(*o*)[12]

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2. We are next to consider the crime of deliberate and wilful *murder;* a crime at which human nature starts, and which is, I believe, punished almost universally throughout the world with death. The words of the Mosaical law (over and above the general precept to Noah,(*p*) that "whoso sheddeth man's blood, by man shall his blood be shed") are very emphatical in prohibiting the pardon of murderers.(*q*) "Moreover, ye shall take no satisfaction for the life of a mur-

(*l*) Fost. 299, 300.
(*m*) Ibid. 301. 1 Hawk. P. C. 77.
(*n*) 1 Hal. P. C. 470.
(*o*) 1 Hawk. P. C. 77.
(*p*) Gen. ix. 6.
(*q*) Numb. xxxv. 31,

[12] The 1 Jac. I. c. 8, together with the 43 Geo. III. c. 58 (lord Ellenborough's Act) and the 1 Geo. IV. c. 90, relating to the same subject, is repealed, by 9 Geo. IV. c. 31, by sect. 11 of which it is enacted that if any person unlawfully and maliciously shall administer or attempt to administer to any person, or shall cause to be taken by any person, any poison or other destructive thing, or shall unlawfully and maliciously attempt to drown, suffocate, or strangle any person, or shall unlawfully and maliciously shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to murder such person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon. And, by sect. 12, it is enacted that if any person unlawfully and maliciously shall shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detainer of the party so offending, or of any of his accomplices, for any offence for which he or they may respectively be liable by law to be apprehended or detained, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon: provided that in case it shall appear on the trial of any person indicted for any of the offences above specified that such acts of shooting, or of attempting to discharge loaded arms, or of stabbing, cutting, or wounding, as aforesaid, were committed under such circumstances that if death had ensued therefrom the same would not in law have amounted to the crime of murder, in every such case the person so indicted shall be acquitted of felony. There are two novelties in this act of parliament: first, the provisions in section 11, respecting *drowning, suffocating,* and *strangling;* and, secondly, the introduction, in both sections 11 and 12, of the word *wound* after the words *stab* and *cut.* The latter is an improvement which had long been a desideratum, many indictments under the former statute having failed merely for the want of some such general term where the injury inflicted did not fall strictly within the definition either of a stab or a cut. The new act also places attempts to murder and attempts to maim under two distinct clauses. It does not, however, make those offences distinct in their *nature:* it follows therefore that both may be charged in the same indictment. An indictment under this statute must describe with accuracy the *mode* in which the injury is inflicted; for where the indictment under 43 Geo. III. c. 58 was for *cutting,* and the evidence was that the wounds were inflicted by *stabbing,* the judges held the conviction wrong. Rex *vs.* McDermot, R. & R. C. C. 356. It may be observed, generally, that where the injury is inflicted with intent to prevent a lawful apprehension, it must be shown that the offender had notice of the purpose for which he was apprehended; for otherwise, in case of death ensuing, the offence would be manslaughter, and the prisoner would be entitled to the benefit of the proviso in section 12. See Rickett's case, 1 Russ. 599. With respect to offences of this and of other descriptions committed upon the high seas, see *post,* 268.—Chitty.

derer who is guilty of death, but he shall surely be put to death; for the land cannot be cleansed of the blood that is shed therein but by the blood of him that shed it." And therefore our law has provided one course of prosecution, (that by appeal, of which hereafter,) wherein the king himself is excluded the power of pardoning murder; so that, were the king of England so inclined, he could not imitate that Polish monarch mentioned by Puffendorf:(r) who thought proper to remit the penalties of murder to all the nobility in an edict with this arrogant preamble, "*nos, divini juris rigorem moderantes, &c.*" But let us now consider the definition of this great offence.

The name of *murder* (as a crime) was antiently applied only to the secret killing of another,(s) (which the word *moerda* *signifies in the Teutonic language;)(t) and it was defined, "*homicidium quod nullo vidente, nullo sciente, clam perpetratur;*"(u) for which the vill wherein it was committed, or (if that were too poor) the whole hundred, was liable to a heavy amercement; which amercement itself was also denominated *murdrum.*(w) This was an antient usage among the Goths in Sweden and Denmark; who supposed the neighbourhood, unless they produced the murderer, to have perpetrated or at least connived at the murder,(x) and, according to Bracton,(y) was introduced into this kingdom by king Canute to prevent his countrymen, the Danes, from being privily murdered by the English; and was afterwards continued by William the Conqueror, for the like security to his own Normans.(z) And therefore if, upon inquisition had, it appeared that the person found slain was an Englishman, (the presentment whereof was denominated *englescherie,*)(a) the country seems to have been excused from this burthen. But, this difference being totally abolished by statute 14 Edw. III. c. 4, we must now (as is observed by Staundforde)(b) define murder in quite another manner, without regarding whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction. [*195

Murder is, therefore, now thus defined or rather described by Sir Edward Coke:(c) "when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied." The best way of examining the nature of this crime will be by considering the several branches of this definition.

First, it must be committed by a *person of sound memory and discretion;* for lunatics or infants, as was formerly observed, are incapable of committing any crime; unless in such cases where they show a consciousness of doing wrong, and of course a discretion or discernment between good and evil.[13]

Next, it happens when a person of such sound discretion *unlawfully killeth.* The unlawfulness arises from the killing without *warrant or excuse; and there must also be an actual killing to constitute murder; for a bare assault, with intent to kill, is only a great misdemeanour, though formerly it was held to be murder.(d) The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death by which human nature may be overcome. And if a person be indicted for one species of killing, as by *poison-* [*196

(r) L. of N. b. viii. c. 3.
(s) *Dial. de Scacch. l.* 1, c. 10.
(t) Stiernh. *de jure Sueon. l.* 3, c. 3. The word *murdre* in our old statutes also signified any kind of concealment or stifling. So in the statute of Exeter, (14 Edw. I.,) "*je riens ne celerai, ne sufferia estre celé ne murdré;*" which is thus translated in Fleta, *l.* 1, c. 18, § 4:—"*Nullam veritatem celabo, nec celari permittam nec murdari.*" And the words "*pur murdre le droit,*" in the articles of that statute, are rendered in Fleta, (ibid. § 8,) "*pro jure alicujus murdriendo.*"
(u) Glanv. *l.* 14, c. 3.
(w) Bract. *l.* 3, *tr.* 2, c. 15, § 7. Stat. Marl. c. 26. Fost. 281.
(x) Stiernh. *l.* 3, c. 4.
(y) *L.* 3, *tr.* 2, c. 15.
(z) 1 Hal. P. C. 447.
(a) Bract. *ubi supra.*
(b) P. C. *l.* 1, c. 10.
(c) 3 Inst. 47.
(d) 1 Hal. P. C. 425.

[13] See *ante,* 23, as to infants. In the case of lunacy, where there is only such a partial derangement as leaves the person free to act or to forbear in the particular case in question, or where he is guilty of the crime during a lucid interval, he will be equally liable to punishment with those who are perfectly sane. Earl Ferrer's case, 10 Harg. St. Tr. 478. Where, however, the mind labours under such a delusion that, though it discerns some objects clearly, it is totally deranged as to the objects of its attack, the party will be entitled to an acquittal. See Erskine's Speeches, vol. v. 1, Ridgway's ed. 1812. How far drunkenness excuses a crime, see *ante,* 25, 26.—CHITTY.

ing, he cannot be convicted by evidence of a totally different species of death, as by *shooting* with a pistol, or *starving*. But where they only differ in circumstance, as if a *wound* be alleged to be given with a sword and it proves to have arisen from a staff, an axe, or a hatchet, this difference is immaterial.(*e*)[14] Of all species of deaths the most detestable is that of poison; because it can, of all others, be the least prevented either by manhood or forethought.(*f*) And, therefore, by the statute 22 Hen. VIII. c. 2, it was made treason, and a more grievous and lingering kind of death was inflicted on it than the common law allowed; namely, boiling to death;[15] but this act did not live long, being repealed by 1 Edw. VI. c. 12. There was also, by the antient common law, one species of killing held to be murder which may be dubious at this day; as there hath not been an instance wherein it has been held to be murder for many ages past:(*g*) I mean by bearing false witness against another, with an express premeditated design to take away his life, so as the innocent person be condemned

(*e*) 3 Inst. 319. 2 Hal. P. C. 185.
(*f*) 3 Inst. 48.
(*g*) Fost. 132. In the case of Macdaniel and Berry, reported by Sir Michael Foster, though the then attorney-general declined to argue this point of law, I have good grounds to believe it was not from any apprehension of his that the point was not maintainable, but from other prudential reasons. Nothing therefore should be concluded from the waiving of that prosecution.

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[14] See 1 East, P. C. 341, and Sharwin's case there cited, in which it was held that an averment of an assault with a *wooden staff* was satisfied by proof of an assault with a *stone*,—the effect being the same. See Rex *vs.* Dale, 13 Price, 172. 9 J. B. Moore, 19. A *stroke* must be expressly averred; and an indictment stating that the prisoner murdered, or gave a mortal wound, without saying that he *struck*, is bad. Rex *vs.* Long, 5 Co. Rep. 122, a. 1 East, P. C. 342. It must also be stated upon what part of the body the deceased was struck, (2 Hale, P. C. 185:) and the length and depth of the wound must be shown. Id. 186. Haydon's case, 4 Co. Rep. 42, a. Where there are several wounds, the length and breadth of each need not be stated. Rex *vs.* Mosley, R. & N. C. C. 97. And see Young's case, 4 Co. Rep. 40, Walker's case, id. 41. Rex *vs.* Lorkin, 1 Bulst. 124. 2 Hale, P. C. 184, Rex *vs.* Dale, R. & M. C. C. 5, as to the wound, cause of death, &c. Where the death proceeded from suffocation from the swelling up of the passage of the throat and such swelling proceeded from wounds occasioned by forcing something into the throat, it was held sufficient to state in the indictment that the things were forced into the throat and the person thereby suffocated, and that the process immediately causing the suffocation, namely, the swelling, need not be stated. Rex *vs.* Tye, R. & R. C. C. 345. The death, *by the means stated*, must be positively averred, and cannot be inferred, (1 East, P. C. 343;) and where the death is occasioned by a stroke, it must be further alleged that the prisoner gave the deceased a *mortal* wound, &c. whereof he died. 2 Hale, P. C. 186. Kel. 125. Lad's case, Leach, 96. The time and place both of the wound and of the death must be stated, in order to show that the deceased died within a year and a day from the cause of the death; in computing which, the day of the act done is reckoned the first; though a precise statement of the day is immaterial, if the party is proved to have died within the limited period. 2 Inst. 318. 2 East, P. C. 344. The word *murdered* is absolutely necessary in the indictment. 2 Hale, P. C. 187. The allegations, "not having the fear of God," &c. "*vi et armis*," and "being in the peace of God," &c. are not *necessary*. 2 Stark. C. P. 385. Where the stroke is given in one county and the death happens in another, the venue may be laid in either. As to laying the venue, where the stroke is given at sea, see 9 Geo. IV. c. 31, § 8. Where the name of the deceased is not known, he may be described as a certain person to the jurors unknown; but a bastard child cannot be described by his mother's name unless he has acquired that name by reputation. Rex *vs.* Clark, R. & R. C. C. 358; and see Rex *vs.* Sheen, 2 C. & P. 655.—Chitty.

[15] This extraordinary punishment seems to have been adopted by the legislature from the peculiar circumstances of the crime which gave rise to it; for the preamble of the statute informs us that John Roose, a cook, had been lately convicted of throwing poison into a large pot of broth prepared for the bishop of Rochester's family and for the poor of the parish; and the said John Roose was, by a retrospective clause of the same statute, ordered to be boiled to death. Lord Coke mentions several instances of persons suffering this horrid punishment. 3 Inst. 48. Murder of malice prepense was made high treason in Ireland by 10 Hen. VII. c. 21, Irish Statutes. By the 43 Geo. III. c. 58, it is enacted, that if any person shall wilfully and maliciously administer to, or cause to be administered to or taken by, any of his majesty's subjects any deadly poison with intent to murder, he, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy. So the attempt to murder by poison, which by the common law was only a misdemeanour, is now made a capital crime.—Christian.

and executed.(*h*) The Gothic laws punished, in this case, both the judge, the witnesses, and the prosecutor: "*peculiari pœna judicem puniunt; peculiari testes, quorum fides judicem seduxit; peculiari denique et maxima auctorem, ut homicidam.*"(*i*) And, among the Romans, the *lex Cornelia, de sicariis*, punished the false witness with death, as being guilty of a species of assassination.(*k*) And there is no doubt but this is equally murder in *foro conscientiæ* as killing with a *sword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their own lives) has not yet punished it as such.[16] If a man, however, does such an act of which the probable consequence may be, and eventually is, death; such killing may be murder, although no stroke be struck by himself and no killing be primarily intended: as was the case of the unnatural son who exposed his sick father to the air, against his will, by reason whereof he died;(*l*) of the harlot who laid her child under leaves in an orchard, where a kite struck it and killed it;(*m*) and of the parish officers who shifted a child from parish to parish till it died for want of care and sustenance.(*n*)[17] So too if a man hath a beast that is used to do mischief, and he, knowing it, *suffers* it to go abroad, and it kills a man, even this is manslaughter in the owner: but if he had purposely *turned it loose*, though barely to frighten people and make what is called sport, it is with us (as in the Jewish law) as much murder as if he had incited a bear or dog to worry them.(*o*) If a physician or surgeon gives his patient a portion or plaister to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance:(*p*)[18] but it hath been holden that if it be not a *regular* physician or surgeon who administers the medicine or performs the operation, it is manslaughter at the least.(*q*) Yet Sir Matthew Hale very justly questions the law of this determination.(*r*)[19] In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which the whole day upon which the hurt was done shall be reckoned the first.(*s*)

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(*h*) Mirror, c. 1, § 9. Britt. c. 52. Bract. *l.* 3, c. 4.
(*i*) Stiernh. *de jure Goth. l.* 3, c. 3.
(*k*) *Ff.* 48, 8, 1.
(*l*) 1 Hawk. P. C. 78.
(*m*) 1 Hal. P. C. 452.
(*n*) Palm. 545.
(*o*) Ibid. 431.
(*p*) Mirr. c. 4. § 16. See book iii. page 122.
(*q*) Britt. c. 5. 4 Inst. 251.
(*r*) 1 Hal. P. C. 430.
(*s*) 1 Hawk. P. C. 79.

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[16] The guilt of him who takes away the life of an innocent man by a false oath is much more atrocious than that of an assassin who murders by a dagger or by poison. He who destroys by perjury adds to the privation of life public ignominy, the most excruciating of tortures to an honourable mind, and reduces an innocent family to ruin and infamy; but notwithstanding this is the most horrid of all crimes, yet there is no modern authority to induce us to think that it is murder by the law of England: lord Coke says expressly, "it is not holden for murder at this day." 3 Inst. 48. See also Fost. 132. Such a distinction in perjury would be more dangerous to society, and more repugnant to principles of sound policy, than in this instance the apparent want of severity in the law. Few honest witnesses would venture to give evidence against a prisoner tried for his life, if thereby they made themselves liable to be prosecuted as murderers.—CHRISTIAN.

[17] Or if a master refuse his apprentice necessary food or sustenance, or treat him with such continued harshness and severity as his death is occasioned thereby, the law will imply malice and the offence will be murder. Leach, 127. 2 Camp. 650; and see 1 Russ. 621.—CHRISTIAN.

If a prisoner die by the cruelty or neglect of the gaoler, or, in legal language, by duress of imprisonment, the party actually offending is criminal in this degree. Fost. 321; and see 2 Stra. 856. 2 Lord Raym. 1578. Fost. 322. Laying noisome and poisonous filth at a man's door, which kills him by corrupting the air which he breathes, will be murder. 1 Hale, 432.—CHITTY.

[18] Such persons are clearly still liable to a civil action where gross negligence or ignorance can be proved, (Slater *vs.* Baker, 2 Wils. 359. Seare *vs.* Prentice, 8 East, 348:) and it would also be a good defence to an action by an apothecary on his bill that he had treated his patient ignorantly or improperly. Kannea *vs.* M'Mullen, Peake, 59.—CHITTY.

[19] It is not murder to work on the imagination so that death ensues, or to call the feelings into so strong an exercise as to produce a fatal malady,—though such acts, if not

Further, the person killed must be "*a reasonable creature in being, and under the king's peace,*" at the time of the *killing. Therefore to kill an alien, a Jew, or an outlaw, who are all under the king's peace and protection, is as much murder as to kill the most regular-born Englishman; except he be an alien enemy in time of war.(*t*) To kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them.(*u*) But as there is one case where it is difficult to prove the child's being born alive, namely, in the case of the murder of bastard children by the unnatural mother, it is enacted, by statute 21 Jac. I. c. 27, that if any woman be delivered of a child which if born alive should by law be a bastard, and endeavours privately to conceal its death by burying the child or the like, the mother so offending shall suffer death as in the case of murder, unless she can prove, by one witness at least, that the child was actually born dead. This law, which savours pretty strongly of severity, in making the concealment of the death almost conclusive evidence of the child's being murdered by the mother, is nevertheless to be also met with in the criminal codes of many other nations of Europe; as the Danes, the Swedes, and the French.(*v*) But I apprehend it has of late years been usual with us in England, upon trials for this offence, to require some sort of presumptive evidence that the child was born alive before the other constrained presumption (that the child whose death is concealed was therefore killed by his parent) is admitted to convict the prisoner.[20]

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(*t*) 3 Inst. 50. 1 Hal. P. C. 433.
(*u*) 3 Inst. 50. 1 Hawk. P. C. 80. But see 1 Hal. P. C. 433.
(*v*) See Barrington on the Statutes, 425.

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malicious, spring from a criminal thoughtlessness. *Post*, 204. 1 Hale, 429. If a wound itself be not mortal, but by improper applications becomes so and terminates fatally, and it can be clearly shown that the medicine and not the wound was the cause of the death, the party who inflicted the wound will not be guilty of murder. 1 Hale, 428. But where the wound was adequate to produce death it will not be an excuse to show that, had proper care been taken, a recovery might have been effected. 1 Hale, 428.—Chitty.

[20] The 21 Jac. I. c. 27 was repealed by the 43 Geo. III. c. 58, which has also recently been repealed, and the law upon this subject is now as follows: By 9 Geo. IV. c. 31, § 13, if any person, with intent to procure the miscarriage of any woman then being quick with child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any poison or other noxious thing, or shall use any instrument or other means whatever with the like intent, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon; and if any person, with intent to procure the miscarriage of any woman not being, or not being proved to be, then quick with child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any medicine or other thing, or shall use any instrument or other means whatever with the like intent, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported for any term not exceeding fourteen and not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years, and, if a male, to be once, twice, or thrice publicly or privately whipped. By § 14, if any woman shall be delivered of a child and shall, by secret burying or otherwise disposing of the dead body of the said child, endeavour to conceal the birth thereof, every such offender shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable to be imprisoned, with or without hard labour, for any term not exceeding two years; and it shall not be necessary to prove whether the child died before, at, or after its birth: provided that, if any woman tried for the murder of her child shall be acquitted thereof, it shall be lawful for the jury, by whose verdict she shall be acquitted, to find, in case it shall so appear in evidence, that she was delivered of a child, and that she did, by secret burying or otherwise disposing of the body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence as if she had been convicted upon an indictment for the concealment of the birth. These enactments are substantially the same as those of the 43 Geo. III. c. 58 upon the same subjects, except that, by sect. 14 of the new act, the concealment of the birth of a child is made an indictable misdemeanour, whereas, before, the prisoner could only be found guilty of the concealment upon an indictment charging her with murder. See Rex *vs.* Parkinson, 1 Russell, 475, n. 1 Chetw. Burn, 334. The rules laid down with respect to indictments for these of

Lastly, the killing must be committed *with malice aforethought*, to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing; and this malice prepense, *malitia præcogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart;(*w*) *un disposition à faire un male chose*;(*x*) and it may be either *express* or *implied* in law. Express *malice is when one, with a sedate deliberate mind and formed design, doth kill another: which formed design is evidenced by external circumstances discovering that inward intention; as laying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm.(*y*) This takes in the case of deliberate duelling, where both parties meet avowedly with an intent to murder; thinking it their duty as gentlemen, and claiming it as their right, to wanton with their own lives and those of their fellow-creatures: without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man; and therefore the law has justly fixed the crime and punishment of murder on them and on their seconds also.(*z*)[21] Yet it requires such a degree of passive valour to combat the dread of even undeserved contempt, arising from the false notions of honour too generally received in Europe, that the strongest prohibitions and penalties of the law will never be entirely effectual to eradicate this unhappy custom, till a method be found out of compelling the original aggressor to make some other satisfaction to the affronted party which the world shall esteem equally reputable as that which is now given at the hazard of life and fortune, as well of the person insulted as of him who hath given the insult.[22] Also, if even upon a sudden provocation one beats another in a cruel and unusual manner so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia*. As when a park-keeper tied a boy that was stealing wood to a horse's tail and dragged him along the park, when a master corrected his servant with an iron bar, and a schoolmaster stamped on his scholar's belly, so that each of the sufferers died, these were justly held to be murders, because, the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of [*199

(*w*) Foster, 256.
(*x*) 2 Roll. Rep. 461.
(*y*) 1 Hal. P. C. 451.
(*z*) 1 Hawk. P. C. 82.

fences under the old statute seem, in other respects, equally applicable to the new act.—CHITTY.

[21] Wherever two persons in cold blood meet and fight, on a precedent quarrel, and one of them is killed, the other is guilty of murder and cannot excuse himself by alleging that he was first struck by the deceased; or that he had often declined to meet him and was prevailed upon to do it by his importunity; or that his only intent was to vindicate his reputation; or that he meant not to kill but only to disarm his adversary: for, as he deliberately engaged in an act in defiance of the law, he must at his peril abide the consequences. 1 Hawk. P. C. c. 31, § 21. 1 Bulst. 86, 87. 2 Bulst. 147. Crom. 22, 26. 1 Rol. Rep. 360. 3 Bulst. 171. 1 Hale, P. C. 48. Therefore if two persons quarrel over night and appoint to fight the next day, or quarrel in the morning and agree to fight in the afternoon, or such a considerable time after by which, in common intendment, it must be presumed that the blood was cooled, and then they meet and fight and one kill the other, he is guilty of murder. 1 Hawk. P. C. c. 31, § 22. 3 Inst. 51. 1 Hale, P. C. 48. Kel. 56. 1 Lev. 180.—CHITTY.

[22] See the law of duelling fully stated, 3 East, Rep. 581; 6 East, 464; 2 Bar. & Ald. 462.—CHITTY.

It is to be observed that it is enacted by stat. 1 Vict. c. 85, §§ 3 & 8 that whosoever shall attempt to poison or shoot at any person, or attempt to drown, or suffocate, with intent to commit murder, shall, although no bodily injury be effected, be guilty of felony, and shall be liable to transportation for life, or for any term not less than fifteen years, or imprisonment for three years; by §§ 4 & 8, the same punishment is awarded to shooting, stabbing, or wounding any person with intent to maim, disfigure, or do any grievous bodily harm to such person, or with intent to resist the lawful apprehension or detainer of any person; and, by § 11, the jury may acquit of these offences and find a verdict of guilty of assault against the person indicted if the evidence warrants such finding.—STEWART.

slaughter.(a)[23] Neither shall he be guilty of a less crime who kills another *in consequence of such a wilful act as shows him to be an enemy to
*200] all mankind in general; as going deliberately, and with an intent to do mischief,(b) upon a horse used to strike, or coolly discharging a gun among a multitude of people.(c) So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. And if two or more come together to do an unlawful act against the king's peace, of which the probable consequence might be bloodshed, as to beat a man, to commit a riot, or to rob a park, and one of them kills a man; it is murder in them all, because of the unlawful act, the *malitia præcogitata*, or evil intended beforehand.(d)[24]

Also in many cases where no malice is expressed the law will imply it, as, where a man wilfully poisons another: in such a deliberate act the law presumes malice, though no particular enmity can be proved.(e) And if a man

(a) 1 Hal. P. C. 454, 473, 474.
(b) Lord Raym. 143.
(c) 1 Hawk. P. C. 74.
(d) Ibid. 84.
(e) 1 Hal. P. C. 455.

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[23] Homicide may be and is often extenuated by the circumstance of a mutual contest arising from the spur of the occasion, where no undue advantage is either sought or taken by either of the parties. See 5 Burr, 2793, and cases cited 1 East, P. C. 241 to 246. And in this case it is of no consequence from whom the first provocation arises. 1 Hale, 456. But if one with his sword drawn makes a pass at another whose sword is undrawn, and a combat ensues, if the former be killed it will only be manslaughter in the latter, but if the latter fall it will be murder in the former; for by making the pass before his adversary's sword was drawn he evinced an intention not to fight with but to destroy him. Kel. 61. Hawk. c. 31, s. 33, 34, a. And where a man, upon occasion of some angry words, threw a bottle at the head of his opponent and immediately drew, and when his adversary returned the bottle stabbed him, this was holden to be murder in him, because he drew previous to the first aggression. Kel. 119. 2 Ld. Raym. 1489. So, if two bailiffs arrest a man, and he abuse and threaten and strike them, and bring pistols, declaring that he will not be forced from his house, and on high words arising between them and on the bailiffs being struck and provoked they fall on him and kill him, they will be guilty of manslaughter only. 6 Harg. St. Tr. 195. Fost. 292, 293, 294. And where, on an affray in a street, a soldier ran to the combatants, and in his way a woman struck him in the face with an iron patten and drew a great deal of blood, on which he struck her on the breast with the pommel of his sword, and on her running away immediately followed and stabbed her in the back, he was holden to be guilty simply of felonious homicide, (Fost. 292; see 5 Burr. 2793;) and where, after mutual blows between the prisoner and the deceased, the prisoner knocked down the deceased, and after he was upon the ground stamped upon his stomach and belly with great force, it was held manslaughter only. Russ. & Ry. C. C. 166. On a quarrel between a party of keelmen and soldiers, one of the latter drew his sword to protect himself and his comrades from the assaults of the mob, and killed a person dressed like one of the former, whom he mistook for one of the keelmen; and this was held to be no more than manslaughter. Brown's case, 1 Leach, 148. If A. stands with an offensive weapon in the doorway of a room wrongfully to prevent T. S. from leaving it and others from entering, and C., who has a right to the room, struggles with him to get his weapon from him, upon which D., a comrade of A.'s, stabs C., it will be murder in D. if C. dies. Russ. & Ry. C. C. 228. See a late case where the judges, entertaining doubts as to whether the prisoner who killed another in an affray was guilty of murder, recommended him to a pardon. Russ. & Ry. C. C. 43. Where, after mutual provocation, the deceased and his opponent struggled, and in the course of the contest the former received his mortal wounds from a knife which the latter had previously in his hand in use, though the jury found the prisoner guilty of murder, the judges held the conviction wrong, and recommended him for a pardon. 1 Leach, 151. But in no case will previous provocation avail, if it was sought for by the act of the slayer, to afford him a pretence for gratifying his own malice. Nor will it alter the case that blows had previously been given, if they evidently left traces of a deadly revenge which seeks an opportunity of indulging itself by provoking a second contest to cover and excuse a deliberate attempt on the life of its object. 1 East, P. C. 239, 240.—Chitty.

[24] And see cases in 3 Chit. C. L. 729, 2d ed. Where, in an act which is not *malum in se* but *malum prohibitum*, (it being prohibited, except to persons of a certain description,) as shooting at game, an unqualified person will not be more guilty, if, in shooting, he accidentally kills a human being, than one who is qualified. 1 Hale, 475. Fost. 259.—Chitty.

kills another suddenly, without any or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. No affront by words or gestures only is a sufficient provocation so as to excuse or extenuate such acts of violence as manifestly endanger the life of another.(*f*) But if the person so provoked had unfortunately killed the other by beating him in such a manner as showed only an intent to chastise and not to kill him, the law so far considers the provocation of contumelious behaviour as to adjudge it only manslaughter, and not murder.(*g*) In like manner, if one kills an officer of justice, either civil or criminal, in the execution of his duty, or any of his assistants endeavouring to conserve the peace, or any private person endeavouring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the killer shall be guilty of murder.(*h*)[25] And if one intends to do another felony, *and undesignedly kills a man, this is also murder.(*i*) Thus, if one shoots at A. and misses *him*, but kills [*201 B., this is murder, because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A., and B., against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder.(*j*) So also if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman; this is murder in the person who gave it.(*k*) It were endless to go through all the cases of homicide which have been adjudged either expressly or impliedly malicious: these, therefore, may suffice as a specimen; and we may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where *justified* by the command or permission of the law, *excused* on the account of accident or self-preservation, or *alleviated* into manslaughter by being either the involuntary consequence of some act not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out to the satisfaction of the court and jury, the latter of whom are to decide whether the circumstances alleged are proved to have actually existed, the former how far they extend to take away or mitigate guilt. For all homicide is presumed to be malicious until the contrary appeareth upon evidence.(*l*)[26]

(*f*) 1 Hawk. P. C. 82. 1 Hal. P. C. 455, 456.
(*g*) Fost. 291.
(*h*) 1 Hal. P. C. 457. Fost. 308, &c.
(*i*) 1 Hal. P. C. 465.
(*j*) Ibid. 466.
(*k*) Ibid. 429.
(*l*) Fost. 255.

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[25] It is murder to kill a constable, though he has no warrant and does not witness the felony committed, but takes the party upon a charge only, and that even though the charge be in itself defective to constitute a felony. Rex *vs.* Ford, R. & R. C. C. 329.—CHITTY.

[26] Francis Smith was indicted for murder at the Old Bailey, January 13, 1804. The neighbourhood of Hammersmith had been alarmed by what was supposed to be a ghost. The prisoner went out with a loaded gun with intent to apprehend the person who personated the ghost: he met the deceased, who was dressed in white, and immediately discharged his gun and killed him. Chief Baron Macdonald, Mr. J. Rooke, and Mr. J. Lawrence were unanimously of opinion that the facts amounted to the crime of murder. For the person who represented the ghost was only guilty of a misdemeanour, (a nuisance,) and no one would have had a right to have killed him, even if he could not otherwise have been taken. The jury brought in a verdict of manslaughter, but the court said they could not receive that verdict: if the jury believed the witnesses, the prisoner was guilty of murder; if they did not believe them, they must acquit. Upon this they found a verdict of guilty. Sentence of death was pronounced; but the prisoner was reprieved.—CHRISTIAN.

In many of the United States a distinction has been made in cases of murder, and the crime divided into two degrees.

Murder in the first degree is in general wilful and deliberate killing, or where the homicide is committed in the attempt to commit certain crimes, such as rape, robbery, burglary, or arson.

Murder in the second degree is all other homicide which would be murder at the common law.

The punishment of murder and that of manslaughter was formerly one and the same, both having the benefit of clergy; so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime.(*m*) But now, by several statutes,(*n*) the benefit of clergy is taken away from murderers through malice prepense, their abettors, procurers, and counsellors. In atrocious cases it was frequently usual for the court to direct the murderer, after execution, to be hung upon a gibbet in chains near the place *where the fact was committed: but this was no part of the legal judgment; and the like is still sometimes practised in the case of notorious thieves. This, being quite contrary to the express command of the Mosaical law,(*o*) seems to have been borrowed from the civil law, which, besides the terror of the example, gives also another reason for this practice, viz., that it is a comfortable sight to the relations and friends of the deceased.(*p*) But now, in England it is enacted, by statute 25 Geo. II. c. 37, that the judge before whom any person is found guilty of wilful murder shall pronounce sentence immediately after conviction, unless he sees cause to postpone it, and shall, in passing sentence, direct him to be executed on the next day but one, (unless the same shall be Sunday, and then on the Monday following,)[27] and that his body be delivered to the surgeons to be dissected and anatomized;(*q*) and that the judge may direct his body to be afterwards hung in chains,[28] but in no wise to be buried without dissection. And during the short but awful interval between sentence and execution the prisoner shall be kept alone, and sustained with only bread and water. But a

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(*m*) 1 Hal. P. C. 450.

(*n*) 23 Hen. VIII. c. 1. 1 Edw. VI. c. 12. 4 & 5 Ph. and M. c. 4.

(*o*) "The body of a malefactor shall not remain all night upon the tree, but thou shalt in any wise bury him that day, that the land be not defiled." Deut. xxi. 23.

(*p*) "*Famosos latrones, in his locis, ubi grassati sunt, furca figendos placuit: ut, et conspectu deterreantur alii, et solatio sit cognatis interemptorum eodem loco pœna reddita, in quo latrones homicidia fecissent.*" *Ff.* 48, 19, 28, § 15.

(*q*) Fost. 107.

At common law every homicide is *prima facie* murder. The circumstances which may justify, excuse, or reduce the offence to manslaughter must be shown by the prisoner. Where the statutory offence of murder in the first degree exists, it is incumbent upon the State or commonwealth to show by affirmative evidence that the crime belongs to the higher grade. In other words, every homicide is still *prima facie* murder, but not murder in the first degree. To constitute wilful and deliberate killing, there must be an intent not merely to do bodily harm, but to take life; and that intent most commonly appears by the deadly character of the means or weapon. Where such intent plainly appears, it is not necessary that time should intervene to give the offence the character of deliberation. Wharton's Amer. Crim. Law, 490.—Sharswood.

[27] William Wyatt was convicted before Chambre, J., at Cornwall Lent Assizes, 1812, upon an indictment for murder. The day of the week on which the trial took place was Thursday, but by mistake it was supposed to be Friday; and, in passing sentence, the execution was directed to be on the following Monday instead of Saturday. Immediately after sentence the court was adjourned *till the next morning*, without the intervention of any other business, and, the error being discovered soon after the adjournment, the prisoner was directed to be brought up at the sitting of the court in the morning, which was accordingly done; and the sentence was given before any other business was entered upon, to be executed on the Saturday. An order was then made, pursuant to the authority given by the 4th and 7th sections of stat. 25 Geo. II. c. 37, to stay the execution and relax the restraints imposed by the act, in order to take the opinion of the judges upon the following questions:—1st. Whether the statute, so far as it requires the time of the execution to be expressed in pronouncing the sentence, is not to be considered as directory only, without invalidating the judgment when omitted, or preventing the entry of the proper judgment and record, specifying the time of execution. 2d. Whether, supposing the specification of time to be a necessary act in pronouncing sentence, the error was not legally corrected by what was done in open court the next morning, the court not having proceeded to any other business whatever in the intermediate time. The judges, on conference, held that the stat. 25 Geo. II. c. 37 is directory only so far as it requires the time of the execution to be expressed in pronouncing the sentence, and therefore the error in this case was rightly and legally corrected by the proceedings on the following morning, no other business having intervened between the conviction and pronouncing sentence. The prisoner was accordingly executed. 2 Burn, J. 24th ed. 1044.—Chitty.

[28] The judge, if he thinks it advisable, may afterwards direct the hanging in chains, by a special order to the sheriff; but it does not form any part of the judgment. Fost. 107.—Christian.

power is allowed to the judge, upon good and sufficient cause, to respite the execution and relax the other restraints of this act.[29]

By the Roman law, *parricide*, or the murder of one's parents or children, was punished in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leathern sack with a live dog, a cock, a viper, and an ape, and so cast into the sea (*r*) Solon, it is true, in his laws, made none against parricide, apprehending it impossible that any one should be guilty of so unnatural a barbarity.(*s*) And the Persians, according to Herodotus, entertained the same notion when they adjudged all persons who killed their reputed parents to be bastards. And upon some such reason as this we must account for *the omission of an exemplary punishment for this crime in our English laws, which treat it no otherwise than as [*203 simple murder, unless the child was also the servant of his parent.(*t*)

For, though the breach of natural relation is unobserved, yet the breach of civil or ecclesiastical connections, when coupled with murder, denominates it a new offence, no less than a species of treason, called *parva proditio*, or *petit treason*: which, however, is nothing else but an aggravated degree of murder;(*u*) although, on account of the violation of private allegiance, it is stigmatized as an inferior species of treason.(*v*) And thus, in the antient Gothic constitutions, we find the breach both of natural and civil relations ranked in the same class with crimes against the state and the sovereign.(*w*)

Petit treason,[30] according to the statute 25 Edw. III. c. 2, may happen three ways: by a servant killing his master, a wife her husband, or an ecclesiastical person (either secular or regular) his superior, to whom he owes faith and obedience. A servant who kills his master, whom he has left, upon a grudge conceived against him during his service, is guilty of petit treason; for the traitorous intention was hatched while the relation subsisted between them, and this is only an execution of that intention.(*x*) So, if a wife be divorced *a mensa et thoro*, still the *vinculum matrimonii* subsists; and if she kills such divorced husband she is a traitress.(*y*) And a clergyman is understood to owe canonical obedience to the bishop who ordained him, to him in whose diocese he is beneficed, and also to the metropolitan of such suffragan or diocesan bishop; and, therefore, to kill any of these is petit treason.(*z*) As to the rest, whatever has been said, or remains to be observed hereafter, with respect to wilful murder, is also applicable to the crime of petit treason, which is no other than murder in *its [*204 most odious degree, except that the trial shall be as in cases of high treason, before the improvements therein made by the statutes of William III.(*a*) But a person indicted of petit treason may be acquitted thereof and found guilty of manslaughter or murder;(*b*) and in such case it should seem that *two* witnesses are not necessary, as in case of petit treason they are.[31] Which crime is also distinguished from murder in its punishment.

(*r*) *Ff.* 41, 9, 9.
(*s*) Cic. *pro S. Roscio*, § 25.
(*t*) 1 Hal. P. C. 380.
(*u*) Foster, 107, 324, 336.
(*v*) See page 75.
(*w*) "*Omnium gravissima censetur vis facta ab incolis in patriam, subditis in regem, liberis in parentes, maritis in uxores, (et vice versa,) servis in dominos, aut etiam ab homine in semet ipsum.*" Stiernh. *de jure Goth. l.* 3, c. 3.
(*x*) 1 Hawk. P. C. 89. 1 Hal. P. C. 380.
(*y*) 1 Hal. P. C. 381.
(*z*) Ibid.
(*a*) Fost. 337.
(*b*) Foster, 106. 1 Hal. P. C. 378. 2 Hal. P. C. 184.

[29] The stat. 25 Geo. II. c. 37 was repealed, but re-enacted, in almost all its provisions, by stat. 9 Geo. IV. c. 31. By stat. 2 & 3 W. IV. c. 75, s. 16, however, the enactment of this last statute as to dissection is repealed, and the court must direct that the prisoner shall be either hung in chains or buried within the precincts of the prison. But, by stat. 4 & 5 W. IV. c. 26, s. 1, so much of the stat. 2 & 3 W. IV. c. 75, s. 16 as authorizes the hanging the body of a murderer in chains is repealed; and, by stat. 6 & 7 W. IV. c. 30, the enactment as to the time of execution is also repealed, and sentence may be pronounced as in other capital offences. And under this last statute sentence of death may be recorded.—STEWART.

[30] The distinction between petit treason and murder is now entirely abolished. 9 Geo. IV. c. 31, s. 2.—STEWART.

[31] It has been determined that a person indicted for petit treason may upon the evidence of one witness be convicted of murder, though acquitted of the petit treason. Radbourne's case, Leach, 363.—CHRISTIAN.

The punishment of petit treason in a man is, to be drawn and hanged, and in a woman to be drawn and burned;(c) the idea of which latter punishment seems to have been handed down to us by the laws of the antient Druids, which condemned a woman to be burned for murdering her husband.(d) and it is now the usual punishment for all sorts of treasons committed by those of the female sex.(e)[32] Persons guilty of petit treason were first debarred the benefit of clergy by statute 12 Hen. VII. c. 7, which has been since extended to their aiders, abettors, and counsellors, by statute 23 Hen. VIII. c. 1 and 4 & 5 P. and M. c. 4.

CHAPTER XV.

OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

*205] *Having in the preceding chapter considered the principal crime or public wrong that can be committed against a private subject, namely, by destroying his life, I proceed now to inquire into such other crimes and misdemeanours as more peculiarly affect the security of his person while living.

Of these some are felonies, and in their nature capital; others are simple misdemeanours, and punishable with a lighter animadversion. Of the felonies, the first is that of *mayhem*.

1. Mayhem, *mayhemium*, was in part considered, in the preceding book,(a) as a civil injury; but it is also looked upon in a criminal light by the law, being an atrocious breach of the king's peace, and an offence tending to deprive him of the aid and assistance of his subjects. For mayhem is properly defined to be, as we may remember, the violently depriving another of the use of such of his members as may render him the less able, in fighting, either to defend himself or to annoy his adversary.(b) And, therefore, the cutting off or disabling or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which in all animals abates their courage, are held to be mayhems. But the cutting off his ear or nose, or the like, are not held to be mayhems at common law, because they do not weaken but only disfigure him.

*206] *By the antient law of England, he that maimed any man whereby he lost any part of his body was sentenced to lose the like part, *membrum pro membro*;(c) which is still the law in Sweden.(d) But this went afterwards out of use, partly because the law of retaliation, as was formerly shown,(e) is at best an inadequate rule of punishment, and partly because upon a repetition of the offence the punishment could not be repeated. So that, by the common law as it for a long time stood, mayhem was only punishable with fine and imprisonment,(f) unless perhaps the offence of mayhem by castration, which all our old writers held to be felony: "*et sequitur aliquando pœna capitalis, ali-*

(a) 1 Hal. P. C. 382. 3 Inst. 311.
(d) Cæsar *de Bell. Gall. l.* 6, c. 18.
(e) See page 93.
(a) See book iii. page 121.
(b) Britt. *l.* 1, c. 25. 1 Hawk. P. C. 111.
(c) 3 Inst. 118. *Mes, si la pleynte soit faite de femme qu'avera tolle a home ses membres, en tiel case perdra le feme la une meyn par jugement, come le membre dount ele avera trespasse.* Brit. c. 25.
(d) Stiernh. *de jure Sueon. l.* 3, *t.* 3.
(e) See page 12.
(f) 1 Hawk. P. C. 112.

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[32] By the 30 Geo. III. c. 48, women shall no longer be sentenced to be burned; but in all cases of high and petit treason they shall be condemned to be drawn and hanged; and in petit treason they shall be subject besides to the same judgment with regard to dissection and the time of execution as is directed by the 25 Geo. II. c. 37 in cases of murder. Soon after the passing of the 25 Geo. II. c. 37, the majority of the judges agreed that in the case of men convicted of petit treason the judgment introduced by that statute should be added to the common-law judgment for petit treason. Fost. 107. —Christian.

quando perpetuum exilium, cum omnium bonorum ademptione."(*g*) And this although the mayhem was committed upon the highest provocation.(*h*)

But subsequent statutes have put the crime and punishment of mayhem more out of doubt. For, first, by statute 5 Hen. IV. c. 5, to remedy a mischief that then prevailed of beating, wounding, or robbing a man and then cutting out his *tongue* or putting out his *eyes* to prevent him from being an evidence against them, this offence is declared to be felony, if done of malice prepense; that is, as Sir Edward Coke(*i*) explains it, voluntarily and of set purpose, though done upon a sudden occasion. Next in order of time is the statute 37 Hen. VIII. c. 6, which directs that if a man shall maliciously and unlawfully cut off the *ear* of any of the *king's subjects, he shall not only forfeit treble damages [*207 to the party grieved, to be recovered by action of trespass at common law as a civil satisfaction, but also 10*l.* by way of fine to the king, which was his criminal amercement. The last statute, but by far the most severe and effectual of all, is that of 22 & 23 Car. II. c. 1, called the Coventry act, being occasioned by an assault on Sir John Coventry in the street, and slitting his nose, in revenge (as was supposed) for some obnoxious words uttered by him in parliament. By this statute it is enacted that if any person shall of malice aforethought and by lying in wait unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member, of any other person, *with intent to maim or disfigure him*, such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy.(*k*)[1]

Thus much for the felony of mayhem: to which may be added the offence of

(*g*) Bract. fol. 144.

(*h*) Sir Edward Coke (3 Inst. 62) has transcribed a record of Henry the Third's time. (*Claus.* 13 *Hen. III.* m. 9.) by which a gentleman of Somersetshire and his wife appear to have been apprehended and committed to prison, being indicted for dealing thus with John the monk, who was caught in adultery with the wife.

(*i*) 3 Inst. 62.

(*k*) On this statute Mr. Coke, a gentleman of Suffolk, and one Woodburn, a labourer, were indicted in 1792, — Coke for hiring and abetting Woodburn, and Woodburn for the actual fact of slitting the nose of Mr. Crispe, Coke's brother-in-law. The case was somewhat singular. The murder of Crispe was intended, and he was left for dead, being terribly hacked and disfigured with a hedge-bill; but he recovered. Now, the bare intent to murder is no felony; but to disfigure with an intent to disfigure is made so by this statute,—on which they were therefore indicted. And Coke, who was a disgrace to the profession of the law, had the effrontery to rest his defence upon this point,—that the assault was not committed with an intent to disfigure, but with an intent to murder, and therefore not within the statute. But the court held that if a man attacks another to murder him with such an instrument as a hedge-bill, which cannot but endanger the disfiguring him, and in such attack happens not to kill but only to disfigure him, he may be indicted on this statute; and it shall be left to the jury to determine whether it were not a design to murder by disfiguring, and consequently a malicious intent to disfigure as well as to murder. Accordingly the jury found them guilty of such previous intent to disfigure in order to effect the principal intent to murder, and they were both condemned and executed. State Trials, vi. 212.

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[1] These statutes are now all repealed. "So much of the 5 Hen. IV. c. 5 as relates to cutting the tongues or putting out the eyes of any of the king's liege people, and to any assault upon the servant of a knight of the shire in parliament," by the 9 Geo. IV. c. 31; the 37 Hen. VIII. c. 6 wholly, by the 7 & 8 Geo. IV. c. 27; and the 22 & 23 Geo. II. c. 1 wholly, by the 9 Geo. IV. c. 31; and the old law with respect to mayhem is now merged in the last-mentioned statute, sects. 11 and 12 of which provide ample remedies for that offence. There are, however, two species of maiming not included in the 9 Geo. IV. c. 31, it having been previously found necessary to make them the subjects of distinct enactments,—namely, injuries done to the persons of individuals by means of wanton or furious driving, and by means of spring-guns and man-traps.

By the 1 Geo. IV. c. 4, it is enacted that if any person whatever shall be *maimed* or *otherwise injured* by reason of the wanton and furious driving or racing, or by the wilful misconduct of any coachman or other person having the charge of any stage-coach or public carriage, such wanton or furious driving or racing, or wilful misconduct, of such coachman or other person, shall be, and the same is thereby declared to be, a misdemeanour, and punishable as such by fine or imprisonment. Proviso, not to extend to hackney-coaches drawn by two horses only and not plying for hire as stage-coaches. This, it will be observed, applies only to cases where some injury short of death is inflicted. Where death ensues from the negligence or misconduct, of such persons, the offence amounts either to murder or manslaughter. See Rex *vs.* Walker, 1 C. & P. 320.

By the 7 & 8 Geo. IV. c. 18, s. 1, it is enacted that if any person shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same, or whereby the same, may destroy or inflict grievous bodily harm upon a trespasser, or other person coming in contact therewith, the person so setting or placing, or causing to be so set or placed, such gun, trap, or engine as aforesaid, shall be guilty of a misdemeanour.—

wilfully and maliciously shooting at any person in any dwelling-house or other place; an offence of which the probable consequence may be either killing or maiming him. This, though no such evil consequence *ensues, is made felony without benefit of clergy by statute 9 Geo. I. c. 22; and thereupon one Arnold was convicted in 1723 for shooting at lord Onslow, but, being half a madman, was never executed, but confined in prison, where he died about thirty years after.[2]

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II. The second offence, more immediately affecting the personal security of individuals, relates to the female part of his majesty's subjects; being that of their *forcible abduction* and *marriage;* which is vulgarly called *stealing an heiress.* For, by statute 3 Hen. VII. c. 2, it is enacted that if any person shall for lucre take any woman, being maid, widow, or wife, and having substance either in goods or lands, being heir-apparent to her ancestors, contrary to her will, and afterwards she be married to such misdoer, or by his consent to another, or defiled; such person, his procurers and abettors, and such as knowingly receive such woman, shall be deemed principal felons; and, by statute 39 Eliz. c. 9, the benefit of clergy is taken away from all such felons, who shall be principals, procurers, or accessories *before* the fact.[3]

In the construction of this statute it hath been determined,—1. That the indictment must allege that the taking was for lucre; for such are the words of the statute.(*l*) 2. In order to show this, it must appear that the woman has substance, either real or personal, or is an heir-apparent.(*m*) 3. It must appear that she was taken away against her will. 4. It must also appear that she was afterwards married or defiled. And though possibly the marriage or defilement might be by her subsequent consent, being won thereto by flatteries after the taking, yet this is felony, if the first taking were against her will;(*n*)[4]

(*l*) 1 Hawk. P. C. 110.
(*m*) 1 Hal. P. C. 660. 1 Hawk. P. C. 109.
(*n*) 1 Hal. P. C. 660.

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[2] All the previous statutes were repealed, so far as they extended to offences relating to the person, by statute 1 Vict. c. 85, by s. 2 of which the administering poison, or stabbing, cutting, or wounding, or causing bodily injury to, any person dangerous to life, with intent to commit murder, is felony punishable with death: and the following crimes are felony punishable with transportation for life or fifteen years,—and now to penal servitude, or imprisonment for three years,—viz., the attempting to administer poison, &c. or shooting at any person, or drawing a trigger or attempting to discharge loaded arms at any person, or to drown, suffocate, or strangle, with intent to murder, though no bodily injury be effected, (s. 3;) the attempting by any such means to maim, disfigure, or disable any person, (s. 5;) the sending explosive substances, or throwing destructive matter, with intent to harm, maim, or disfigure any person, (s. 5;) and the trying to procure abortion by poison or otherwise. S. 6. And the malicious stabbing or wounding any person, without the intent to murder, is a misdemeanour. 14 & 15 Vict. c. 19. And now also, by stat 9 & 10 Vict. c. 25, any mayhem occasioned by maliciously causing gunpowder or other substance to explode, or the causing or delivering to, or causing to be taken by, any person any dangerous thing, or the casting at or applying to any person any corrosive fluid or dangerous substance with intent to maim, is a felony, and punishable with transportation for life, or for any term not exceeding three years, with or without hard labour and solitary confinement. Also the administering chloroform, laudanum, or other stupefying drug, with intent to enable the offender to commit a felony, is a felony itself, and punishable with transportation for life or not less than seven years, or imprisonment for three years, (14 & 15 Vict. c. 19, s. 3,) and now with penal servitude. 16 & 17 Vict. c. 99.—Stewart.

[3] These statutes are both wholly repealed, by the 9 Geo. IV. c. 31, by sect. 19 of which it is enacted that where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress presumptive, or next of kin to any one having such interest,—if any person shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall be liable to be transported for life or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding four years.—Chitty.

[4] But if the forcible abduction is confined to one county, and the marriage be solemn-

and so *vice versa*, if the woman be originally taken away by her own consent, yet if she afterwards refuse to continue with the offender, and be forced against her will, she may from that time as properly *be said to be taken against her will as if she never had given any consent at all; for till the force was put upon her she was in her own power.(o) It is held that a woman thus taken away and married may be sworn and give evidence against the offender, though he is her husband *de facto*, contrary to the general rule of law, because he is no husband *de jure*, in case the actual marriage was also against her will.(p) In cases indeed where the actual marriage is good by the consent of the inveigled woman obtained after her forcible abduction, Sir Matthew Hale seems to question how far her evidence should be allowed; but other authorities(q) seem to agree that it should even then be admitted; esteeming it absurd that the offender should thus take advantage of his own wrong, and that the very act of marriage, which is a principal ingredient of his crime, should (by a forced construction of law) be made use of to stop the mouth of the most material witness against him.[5] [*209

An inferior degree of the same kind of offence, but not attended with force, is punished by the statutes 4 & 5 Ph. and Mar. c. 8, which enacts that if any person above the age of fourteen unlawfully shall convey or *take away any woman child unmarried*, (which is held(r) to extend to bastards as well as to legitimate children,) within the age of sixteen years, from the possession and against the will of the father, mother, guardians, or governors, he shall be imprisoned two years, or fined at the discretion of the justices; and if he deflowers such maid or woman child, or without the consent of parents contracts matrimony with her, *he* shall be imprisoned five years, or fined at the discretion of the justices, and *she* shall forfeit all her lands to her next of kin during the life of her said husband.[6] So that as these stolen marriages, under the age of

(o) 1 Hawk. P. C. 110.
(p) 1 Hal. P. C. 661.
(q) Cro. Car. 488. 3 Keb. 193. State Trials, v. 455.
(r) Stra. 1162.

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ized by consent in another, the defendant cannot be indicted in either, though had the force been continued into the county where the marriage took place, no subsequent consent would avail. Cro. Car. 488. Hob. 183. Hawk. b. ii. c. 25, s. 40. 1 Russ. 820, 821. 1 East, P. C. 453. Where the female is under no restraint at the time of marriage, those who are present, but who are ignorant of the previous circumstances, will not share in the guilt of the abduction. Cro. Car. 489, 493. As to accessories after the fact, see 1 East, P. C. 453. 3 Chitt. Crim. L. 818.—CHITTY.

[5] It seems to be well agreed, and indeed to be beyond all doubt, that where a woman is *taken away and married by force* she is a competent witness against her husband on an indictment for that offence. See Phil. Ev. 3d ed. 70, and the authorities there cited. But the proposition that where she consents to the marriage after a forcible abduction her evidence is equally admissible, seems to admit of some doubt. In the last case of this kind (Wakefield's) both the abduction and the marriage were in fact voluntary, the lady's consent to both having been obtained by fraud; but it was held that the fraud in law amounted to *force*, and the lady was upon that ground, it is conceived, admitted as a witness against the husband. A doubt afterwards arose whether the marriage in that case was valid or not, which led to the bringing in a bill to annul it, though the prevailing opinion among the profession seemed to be that the marriage was *ipso facto* void, as a marriage procured by force: in which view of the case, the admission of the wife's evidence would not be an authority upon the question one way or the other. One account of that trial states that Hullock, B., declared that, even assuming the marriage to be valid, he would admit the wife's evidence, for there were cases in which the evidence of wives was admissible against their husbands, and he considered that to be one of them. And, upon the principle that a woman may give evidence against her husband in the case of a personal wrong done to herself, it does seem that the wife would be a competent witness in a prosecution for abduction, even though the marriage was valid.—CHITTY.

[6] This act of 4 & 5 P. and M. c. 8 is wholly repealed by the 9 Geo. IV. c. 31; sect. 20 of which enacts, that if any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother or any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable to suffer such punishment, by fine or imprisonment, or by both, as the court

sixteen, were usually upon mercenary views, this act, besides punishing the seducer, wisely removed the temptation. But this latter part of the act is now rendered *almost useless by provisions of a very different kind, which make the marriage totally void,(s) in the statute 26 Geo. II. c. 33.[7]

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III. A third offence, against the female part also of his majesty's subjects, but attended with greater aggravation than that of forcible marriage, is the crime of *rape, raptus mulierum*, or the carnal knowledge of a woman forcibly and against her will. This, by the Jewish law,(t) was punished with death in case the damsel was betrothed to another man; and in case she was not betrothed, then a heavy fine of fifty shekels was to be paid to the damsel's father, and she was to be the wife of the ravisher all the days of his life, without that power of divorce which was in general permitted by the Mosaic law.

The civil law(u) punishes the crime of ravishment with death and confiscation of goods; under which it includes both the offence of forcible abduction, or taking away a woman from her friends, of which we last spoke; and also the present offence of forcibly dishonouring them; either of which without the other is in that law sufficient to constitute a capital crime. Also, the stealing away a woman from her parents or guardians, and debauching her, is equally penal by the emperor's edict, whether she consent or is forced: "*sive volentibus, sive nolentibus mulieribus, tale facinus fuerit perpetratum.*" And this, in order to take away from women every opportunity of offending in this way; whom the Roman law supposes never to go astray without the seduction and art of the other sex: and therefore, by restraining and making so highly penal the solicitations of the men, they meant to secure effectually the honour of the women. "*Si enim ipsi raptores metu, vel atrocitate pœnæ, ab hujusmodi facinore se temperaverint, nulli mulieri, sive volenti, sive nolenti, peccandi locus relinquetur; quia hoc ipsum* velle *mulierum, ab insidiis nequissimi hominis, qui meditatur rapinam, inducitur. *Nisi etenim eam solicitaverit, nisi odiosis artibus circumvenerit, non faciet eam velle in tantum dedecus sese prodere.*" But our English law does not entertain quite such sublime ideas of the honour of either sex as to lay the blame of a mutual fault upon one of the transgressors only; and therefore makes it a necessary ingredient in the crime of rape that it must be against the woman's will.

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Rape was punished by the Saxon laws, particularly those of king Athelstan,(w) with death; which was also agreeable to the old Gothic or Scandinavian constitution.(x) But this was afterwards thought too hard; and in its stead another severe but not capital punishment was inflicted by William the Conqueror, viz., castration and loss of eyes;(y) which continued till after Bracton wrote, in the reign of Henry the Third. But, in order to prevent malicious accusations, it was then the law (and, it seems, still continues to be so in appeals of rape)(z) that the woman should immediately after, "*dum recens fuerit male-*

(s) See book i. page 437, &c.
(t) Deut. xxii. 25.
(u) *Cod.* 9, tit. 13.
(w) Bracton, *l.* 3, c. 28.
(x) Stiernh. *de jure Sueon. l.* 3, c. 2.
(y) *LL. Gull. Conq.* c. 19.
(z) 1 Hal. P. C. 631.

shall award. This clause was framed for the purpose of meeting such a case as that of *Wakefield*.—Chitty.

[7] Such a marriage, if voluntary on the part of the female, that is, not procured by force or fraud, would not now be void,—it having been held, after much doubt entertained upon the point among the profession, (see Doe *vs.* Price, 1 M. & R. 683,) that the 4 Geo. IV. c. 76 legalizes marriages which would otherwise have been void, under the 26 Geo. II. c. 33, on account of the minority of the parties and the non-consent of parents. See Rex *vs.* Birmingham, 2 M. & R., 8 B. & C. 29, and the judgment of lord *Tenterden* therein. The new act, however, provides (sect. 23) that if any valid marriage solemnized by license shall be procured by a party to such marriage to be solemnized between persons one or both of whom shall be under age, by means of false swearing to any matter to which such party is required personally to depose, all the property accruing from the marriage shall be forfeited; and shall be secured for the benefit of the innocent party *or the issue of the marriage*. The latter words clearly show the intention of the legislature *not* to render the marriage void; for the words "issue of the marriage" in an Act of Parliament must mean *lawful* issue, which they could not be if the marriage was void.—Chitty.

ficium," go to the next town, and there make discovery to some credible person of the injury she has suffered, and afterwards should acquaint the high constable of the hundred, the coroners, and the sheriff with the outrage.(*a*) This seems to correspond in some degree with the laws of Scotland and Aragon,(*b*) which require that complaint must be made within twenty-four hours; though afterwards, by statute Westm. 1, c. 13, the time of limitation in England was extended to forty days. At present there is no time of limitation fixed; for as it is usually now punished by indictment at the suit of the king, the maxim of law takes place that *nullum tempus occurrit regi;* but the jury will rarely give credit to a stale complaint. During the former period also it was held for law(*c*) that the woman (by consent of the judge and her parents) might redeem the offender from the execution of his sentence by accepting him for her husband, if he also was willing to agree to the exchange, but not otherwise.

*In the 3 Edw. I., by the statute Westm. 1, c. 13, the punishment of rape was much mitigated; the offence itself of ravishing a damsel within [*212 age, (that is, *twelve* years old,) either with her consent or without, or of any other woman against her will, being reduced to a trespass, if not prosecuted by appeal within forty days, and subjecting the offender only to two years' imprisonment and a fine at the king's will. But, this lenity being productive of the most terrible consequences, it was in ten years afterwards, 13 Edw. I., found necessary to make the offence of forcible rape felony, by statute Westm. 2, c. 34. And by statute 18 Eliz. c. 7, it is made felony without benefit of clergy; as is also the abominable wickedness of carnally knowing and abusing any woman child under the age of ten years; in which case the consent or non-consent is immaterial, as by reason of her tender years she is incapable of judgment and discretion. Sir Matthew Hale is indeed of opinion that such profligate actions committed on an infant under the age of *twelve* years, the age of female discretion by the common law, either with or without consent, amount to rape and felony, as well since as before the statute of queen Elizabeth;(*d*) but that law has in general been held only to extend to infants under *ten*, though it should seem that damsels between *ten* and *twelve* are still under the protection of the statute Westm. 1, the law with respect to their seduction not having been altered by either of the subsequent statutes.[8]

A male infant under the age of fourteen years is presumed by law incapable to commit a rape, and therefore, it seems, cannot be found guilty of it. For though in other felonies *malitia supplet ætatem*, as has in some cases been shown, yet, as to this particular species of felony, the law supposes an imbecility of body as well as mind.(*e*)[9]

The civil law seems to suppose a prostitute or common harlot incapable of any injuries of this kind;(*f*) not allowing *any punishment for vio- [*213 lating the chastity of her who hath indeed no chastity at all, or at least hath no regard to it. But the law of England does not judge so hardly of offenders as to cut off all opportunity of retreat even from common strumpets, and to treat them as never capable of amendment. It therefore holds it to be felony to force even a concubine or harlot; because the woman may have forsaken that unlawful course of life;(*g*) for, as Bracton well observes,(*h*) "*licet meretrix fuerit antea, certe tunc temporis non fuit, cum reclamando nequitiæ ejus consentire noluit.*"

As to the material facts requisite to be given in evidence and proved upon an indictment of rape, they are of such a nature that, though necessary to be

(*a*) Glanv. *l.* 14, c. 6. Bract. *l.* 3, c. 28.
(*b*) Barrington, 142.
(*c*) Glanv. *l.* 14, c. 6. Bract. *l.* 3, c. 28.
(*d*) 1 Hal. P. C. 631.
(*e*) Ibid.
(*f*) *Cod.* 9, 9, 22. *Ff.* 47, 2, 39.
(*g*) 1 Hal. P. C. 629. 1 Hawk. P. C. 108.
(*h*) Fol. 147.

[8] But now, by stat. 4 & 5 Vict. c. 56, s. 3, the punishment of death is repealed, and transportation for life is substituted for both the offences of rape and carnal knowledge of a girl under ten years of age, for which penal servitude may now be substituted.—STEWART.

[9] But an infant under fourteen may be guilty as an abettor if shown to possess a mischievous discretion. 1 Hale, 630.—CHITTY.

known and settled for the conviction of the guilty and preservation of the innocent, and therefore are to be found in such criminal treatises as discourse of these matters in detail, yet they are highly improper to be publicly discussed, except only in a court of justice. I shall therefore merely add upon this head a few remarks from Sir Matthew Hale, with regard to the competency and credibility of witnesses; which may, *salvo pudore,* be considered.

And, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance: if the witness be of good fame; if she presently discovered the offence and made search for the offender; if the party accused fled for it; these, and the like, are concurring circumstances which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to be committed, was where it was possible she *214] might have been heard, and she made no outcry; these and the *like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned.[10]

Moreover, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness if she hath sense and understanding to know the nature and obligations of an oath, or even to be sensible of the wickedness of telling a deliberate lie.[11] Nay, though she hath not, it is thought by Sir Matthew Hale(*i*) that she ought to be heard without oath, to give the court information; and others have held that what the child told her mother or other relations may be given in evidence, since the nature of the case admits frequently of no better proof. But it is now settled [Brazier's case, before the twelve judges, P. 19, Geo. III.] that no hearsay evidence can be given of the declaration of a child who hath not capacity to be sworn, nor can such child be examined in court without oath; and that there is no determinate age at which the oath of a child ought either to be admitted or rejected. Yet, where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. There may be, therefore, in many cases of this nature, witnesses who are competent, that is, who may be admitted to be heard, and yet, after being heard, may prove not to be credible or such as the jury is bound to believe. For one excellence of the trial by jury is, that the jury are triers of the credit of the witnesses, as well as of the truth of the fact.

(i) 1 Hal. P. C. 634.

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[10] But the rule respecting the time that elapses before the prosecutrix complains will not apply where there is a good reason for the delay, as that she was under the control or influenced by fear of her ravisher. 1 East, P. C. 445. And so all other general rules, as they are deduced from circumstances, must yield when they appear to be unsafe guides to the discovery of truth. The state and appearance of the prosecutrix, marks of violence upon her person, and the torn and disordered state of her dress recently after the transaction, at the time of complaint, are material circumstances, which are always admissible in evidence. See 2 Stark. 241. If the prosecutrix be an infant of tender years, the *whole* of her account recently given seems to be admissible, for it is of the highest importance to ascertain the *accuracy* of her recollection, (East, P. C. 443. Stark. on Evidence, part iv. 1268;) but, in 2 Stark. Rep. 241, upon an indictment for an attempt to commit a rape upon an adult, Holroyd, J., held that the *particulars* of the complaint made by the prosecutrix recently after the injury were not admissible in evidence. In the case of the death of the prosecutrix, her depositions, taken before a magistrate, are admissible, though not authenticated by her signature. 2 Leach, 854, 996.

[11] When the child does not sufficiently understand the nature and obligation of an oath, the judge will put off the trial, for the child to be instructed in the mean time. Bac. Abr. Evid. a. Leach, 439, n.—Chitty.

"It is true," says this learned judge,(*j*) "that rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent." He then relates two very extraordinary cases of malicious prosecution for this crime that had happened within his own observation, and concludes thus:—"I mention these instances that we may be the more cautious upon trials of offences of this nature, wherein the court and jury may with so much ease be imposed upon, without great care and vigilance, the heinousness of the offence many times transporting the judge and jury with so much indignation that they are over-hastily carried on to the conviction of the person accused thereof by the confident testimony of sometimes false and malicious witnesses." [*215

IV. What has been here observed, especially with regard to the manner of proof, which ought to be more clear in proportion as the crime is the more detestable, may be applied to another offence of a still deeper malignity,—the infamous *crime against nature*, committed either with man or beast; a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out; for if false, it deserves a punishment inferior only to that of the crime itself.

I will not act so disagreeable a part, to my readers as well as myself, as to dwell any longer upon a subject the very mention of which is a disgrace to human nature. It will be more eligible to imitate, in this respect, the delicacy of our English law, which treats it in its very indictments as a crime not fit to be named: "*peccatum illud horribile, inter Christianos non nominandum.*"(*k*) A taciturnity observed likewise by the edict of Constantius and Constans:(*l*) "*ubi scelus est id, quod non proficit scire, jubemus insurgere leges, armari jura *gladio ultore, ut exquisitis pœnis subdantur infames, qui sunt, vel qui futuri sunt rei.*" [*216 Which leads me to add a word concerning its punishment.

This the voice of nature and of reason and the express law of God(*m*) determined to be capital. Of which we have a signal instance long before the Jewish dispensation by the destruction of two cities by fire from heaven; so that this is a universal, not merely a provincial, precept. And our antient law in some degree imitated this punishment, by commanding such miscreants to be burned to death,(*n*) though Fleta(*o*) says they should be buried alive; either of which punishments was indifferently used for this crime among the antient Goths.(*p*) But now the general punishment of all felonies is the same, namely, by hanging; and this offence (being in the times of popery only subject to ecclesiastical censures) was made felony without benefit of clergy by statute 25 Hen. VIII. c. 6, revived and confirmed by 5 Eliz. c. 17. And the rule of law herein is, that if both are arrived at years of discretion, *agentes et consentientes pari pœna plectantur.*(*q*)

These are all the felonious offences more immediately against the personal security of the subject. The inferior offences or misdemeanours that fall under this head are *assaults, batteries, wounding, false imprisonment*, and *kidnapping*.

V. VI. VII. With regard to the nature of the three first of these offences in general, I have nothing further to add to what has already been observed in the preceding book of these commentaries,(*r*) when we consider them as private wrongs or civil injuries, for which a satisfaction or remedy is given to the party aggrieved. But, taken in a public light, as a breach of the king's peace, an affront to his government, and a damage done to his subjects, they are also indictable and punishable with fines and imprisonment, or with other ignominious corporal penalties, where they are committed with any very atrocious design;(*s*) as in case of an assault with an intent to murder, or with an intent

(*j*) 1 Hal. P. C. 635.
(*k*) See in *Rot. Parl.* (50 Edw. III. n. 58) a complaint that a Lombard did commit the sin "that was not to be named." 12 Rep. 37.
(*l*) *Cod.* 9, 9, 31.
(*m*) Levit. xx. 13, 15.
(*n*) Britt. c. 9.
(*o*) *L.* 1, c. 37.
(*p*) Stiernh. *de jure Goth. l.* 3, c. 2.
(*q*) 3 Inst. 50.
(*r*) See book iii. p. 120.
(*s*) 1 Hawk. P. C. 65.

*217] to commit either of the *crimes last spoken of; for which intentional assaults, in the two last cases, indictments are much more usual than for the absolute perpetration of the facts themselves, on account of the difficulty of proof; or, when both parties are consenting to an unnatural attempt, it is usual not to charge any *assault*, but that one of them laid hands on the other with intent to commit, and that the other permitted the same with intent to suffer, the commission of the abominable crime before mentioned. And in all these cases, besides heavy fine and imprisonment, it is usual to award judgment of the pillory.[12]

There is also one species of battery more atrocious and penal than the rest which is the beating of a clerk in orders or clergyman, on account of the respect and reverence due to his sacred character as the minister and ambassador of peace. Accordingly, it is enacted, by the statute called *articuli cleri*, 9 Edw. II. c. 3,[13] that if any person lay violent hands upon a clerk, the amends for the peace broken shall be before the king, that is, by indictment in the king's courts; and the assailant may also be sued before the bishop, that excommunication or bodily penance may be imposed, which if the offender will redeem by money, to be given to the bishop or the party aggrieved, it may be sued for before the bishop: whereas, otherwise, to sue in any spiritual court for civil damages for the battery falls within the danger of *præmunire*.(*t*) But suits are, and always were, allowable in the spiritual court for money agreed to be given as a commutation for penance.(*u*) So that upon the whole it appears that a person guilty of such brutal behaviour to a clergyman is subject to three kinds of prosecution, all of which may be pursued for one and the same offence: an indictment for the breach of the king's peace by such assault and battery; a civil action for *218] the special damage sustained by the party injured; and a suit *in the ecclesiastical court, first *pro correctione et salute animæ*, by *enjoining* penance, and then again for such sum of money as shall be agreed on for *taking off* the penance enjoined; it being usual in those courts to exchange their spiritual censures for a round compensation in money,(*v*) perhaps because poverty is generally esteemed by the moralists the best medicine *pro salute animæ*.

VIII. The two remaining crimes and offences against the persons of his majesty's subjects are infringements of their natural liberty; concerning the first of which, *false imprisonment*, its nature and incidents, I must content myself with referring the student to what was observed in the preceding volume,(*w*) when we considered it as a mere civil injury. But, besides the private satisfaction given

(*t*) 2 Inst. 492, 620.
(*u*) *Artic. Cler. Edw. II.* c. 4, F. N. B. 53.
(*v*) 2 Roll. Rep. 384.
(*w*) See book iii. p. 127.

[12] The punishment of pillory is now taken away by the 56 Geo. III. c. 138. In cases of assaults of a very aggravated nature, the punishment of whipping has been inflicted in addition to that of imprisonment and finding sureties for good behaviour. 1 Burn, J. 24th ed. 231. 1 East, P. C. 406. The 3 Geo. IV. c. 114 inflicts a severer punishment on persons guilty of assaults therein particularly described. In cases where the offence more immediately affects the individual, the defendant is sometimes permitted by the court, even after conviction, to speak with the prosecutor before any judgment is pronounced, and a trivial punishment (generally a fine of a shilling) is inflicted, if the prosecutor declares himself satisfied. *Post*, 363, 364. And where, in a case of indictment for ill-treating a parish apprentice, a security for the fair expenses of the prosecution had been given by the defendant, after conviction, upon an understanding that the court would abate the period of his imprisonment, the security was held to be good, upon the ground that it was given with the sanction of the court, and to be considered as part of the punishment suffered by the defendant in expiation of his offence, in addition to the imprisonment inflicted on him. 11 East, 46.—Chitty.

[13] This act is repealed, so far as relates to laying violent hands on a clerk, by 9 Geo. IV. c. 31; by § 23 of which, if any person shall arrest any clergyman upon any civil process while he shall be performing divine service, or shall, with the knowledge of such person, be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanour, and, being convicted thereof, shall suffer such punishment, by fine or imprisonment or by both, as the court shall award. The 50 Edw. III. c. 5, and 1 Ric. II. c. 15, upon the same subject, are also repealed by the new act. The arrest, if not on a Sunday, would be good in law. Wats. c. 34.—Chitty.

to the individual by action, the law also demands public vengeance for the breach of the king's peace, for the loss which the state sustains by the confinement of one of its members, and for the infringement of the good order of society We have seen before(x) that the most atrocious degree of this offence, that of sending any subject of this realm a prisoner into parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such his captivity, is punished with the pains of *præmunire* and incapacity to hold any office, without any possibility of pardon.(y) And we may also add that, by statute 43 Eliz. c. 13,[14] to carry any one by force out of the four northern counties, or imprison him within the same, in order to ransom him or make spoil of his person or goods, is felony without benefit of clergy in the principals and all accessories before the fact. Inferior degrees of the same offence of false imprisonment are also punishable by indictment, (like assaults and batteries,) and the delinquent may be fined and imprisoned.(z) And, indeed,(a) there can be no doubt but that all kinds of crimes of a public nature, all disturbances of the peace, all oppressions and other misdemeanours whatsoever of a notoriously evil example, may be indicted at the suit of the king.

*IX. The other remaining offence, that of *kidnapping*, being the forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another, was capital by the Jewish law:—"He that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death."(b) So, likewise, in the civil law the offence of spiriting away and stealing men and children, which was called *plagium* and the offenders *plagiarii*, was punished with death.(c) This is unquestionably a very heinous crime, as it robs the king of his subjects, banishes a man from his country, and may in its consequences be productive of the most cruel and disagreeable hardships; and therefore the common law of England has punished it with fine, imprisonment, and pillory.[15] And also the statute 11 & 12 W. III c. 7, though principally intended against pirates, has a clause that extends to prevent the leaving of such persons abroad as are thus kidnapped or spirited away, [*219

(x) See page 116.
(y) Stat. 31 Car. II. c. 2.
(z) West. Symbol. part 2, page 92.
(a) 1 Hawk. P. C. 210.
(b) Exod. xxi. 16.
(c) *Ff.* 48, 15. 1.
(d) Raym. 474. 2 Shew. 221. Skin. 47. Comb. 10.

[14] Repealed by 7 & 8 Geo. IV. c. 27: but see 31 Car. II. c. 2, which prohibits the sending of any British subject to any foreign prison.—CHITTY.

[15] Where a child is stolen for the sake of its clothes, it is the same species of felony as if the clothes were stolen without the child. But it cannot be considered a felony where a child is stolen and not deprived of its clothes. This crime would in general be an aggravated species of false imprisonment; but, without referring it to that class of offences, stealing a child from its parents is an act so shocking and horrid that it would be considered the highest misdemeanour, punishable by fine and imprisonment, upon the same principle on which it was decided to be a misdemeanour to steal a dead body from a grave.—CHRISTIAN.

Stealing children was, by 54 Geo. III. c. 101, punishable as in cases of grand larceny; but that statute is now repealed, by 9 Geo. IV. c. 31; by § 21 of which, "if any person shall maliciously, either by force or fraud, lead or take away, or decoy or entice away, or detain, any child under the age of ten years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; or if any person shall, with any such intent as aforesaid, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained, as herein before mentioned; every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall be liable to be transported for the term of seven years, or to be imprisoned, with or without hard labour, for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit,) in addition to such imprisonment. Provided always, that no person who shall have claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue hereof on account of his getting possession of such child, or taking such child out of the possession of the mother or any other person having the lawful charge thereof."—CHITTY.

by enacting that if any captain of a merchant-vessel shall (during his being abroad) force any person on shore or wilfully leave him behind, or refuse to bring home all such men as he carried out, if able and desirous to return, he shall suffer three months' imprisonment.[16] And thus much for offences that more immediately affect the *persons* of individuals.

CHAPTER XVI.

OF OFFENCES AGAINST THE HABITATIONS OF INDIVIDUALS.

*220] *The only two offences that more immediately affect the *habitations* of individuals or private subjects are those of *arson* and *burglary*.

1. Arson, *ab ardendo*, is the malicious and wilful burning the house or out-house of another man. This is an offence of very great malignity, and much more pernicious to the public than simple theft, because, first, it is an offence against that right of habitation which is acquired by the law of nature as well as by the laws of society; next, because of the terror and confusion that necessarily attend it; and, lastly, because in simple theft the thing stolen only changes its master, but still remains in *esse* for the benefit of the public; whereas by burning the very substance is absolutely destroyed. It is also frequently more destructive than murder itself, of which, too, it is often the cause, since murder, atrocious as it is, seldom extends beyond the felonious act designed, whereas fire too frequently involves in the common calamity persons unknown to the incendiary and not intended to be hurt by him, and friends as well as enemies. For which reason the civil law(*a*) punishes with death such as maliciously set fire to houses in towns and contiguous to others, but is more merciful to such as only fire a cottage or house standing by itself.

*221] *Our English law also distinguishes with much accuracy upon this crime. And therefore we will inquire, first, what is such a house as may be the subject of this offence; next, wherein the offence itself consists, or what amounts to a burning of such house; and, lastly, how the offence is punished.

1. Not only the bare dwelling-house, but all out-houses that are parcel thereof, though not contiguous thereto, nor under the same roof, as barns and stables, may be the subject of arson.(*b*) And this by the common law, which also accounted it felony to burn a single barn in the field, if filled with hay or corn, though not parcel of the dwelling-house.(*c*) The burning of a stack of corn was antiently likewise accounted arson.(*d*)[1] And indeed all the niceties and distinctions which

(*a*) *Ff.* 48, 19, 28, § 12.
(*b*) 1 Hal. P. C. 567.
(*c*) 3 Inst. 69.
(*d*) 1 Hawk. P. C. 105.

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[16] By 9 Geo. IV. c. 31, § 30, if any master of a merchant-vessel shall, during his being abroad, force any man on shore, or wilfully leave him behind in any of his majesty's colonies or elsewhere, or shall refuse to bring home with him again all such of the men whom he carried out with him as are in a condition to return when he shall be ready to proceed on his homeward-bound voyage, every such master shall be guilty of a misdemeanour, and, being lawfully convicted thereof, shall be imprisoned for such term as the court shall award; and all such offences may be prosecuted by indictment or by information, at the suit of his majesty's attorney general, in the court of King's Bench, and may be alleged in the indictment or information to have been committed at Westminster, in the county of Middlesex: and the said court is hereby authorized to issue one or more commissions, if necessary, for the examination of witnesses abroad; and the depositions taken under the same shall be received in evidence on the trial of every such indictment or information. So much of the 11 & 12 W. III. c. 7, and of the 58 Geo. III. c. 38, as related to this subject, is repealed by the 9 Geo. IV. c. 31.—Chitty.

[1] This is declared to be arson, by 7 & 8 Geo. IV. c. 30, § 17, and is made a capital offence: and the setting fire to any crops of corn, grain, or pulse, whether standing or cut down, or to any woods or heaths, is made felony, punishable with transportation for seven

we meet with in our books concerning what shall or shall not amount to arson seem now to be taken away by a variety of statutes, which will be mentioned in the next chapter, and have made the punishment of wilful burning equally extensive as the mischief. The offence of arson (strictly so called) may be committed by wilfully setting fire to one's own house, provided one's neighbour's house is thereby also burned; but if no mischief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's.(*e*) For, by the common law, no intention to commit a felony amounts to the same crime, though it does in some cases, by particular statutes. However, such wilful firing one's own house *in a town* is a high misdemeanour, and punishable by fine, imprisonment, pillory, and perpetual sureties for the good behaviour.(*f*)[2] And if a landlord or reversioner sets fire to his own house, of which another is in possession under a lease from himself or from those whose estate he hath, it shall be accounted arson; for during the lease the house is the property of the tenant.(*g*)[3]

*2. As to what shall be said to be a *burning*, so as to amount to arson, a bare intent, or attempt to do it by actually setting fire to a house, unless it absolutely *burns*, does not fall within the description of *incendit et combussit*, which were words necessary in the days of law-Latin to all indictments of this sort. But the burning and consuming of any part is sufficient, though the fire be afterwards extinguished.(*h*) Also it must be a *malicious* burning; otherwise it is only a trespass; and therefore no negligence or mischance amounts to it.[4] For which reason, though an unqualified person, by shooting [*222

(*e*) Cro. Car. 377. 1 Jon. 351.
(*f*) 1 Hal. P. C. 568. 1 Hawk. P. C. 106.
(*g*) Fost. 15.
(*h*) 1 Hawk. P. C. 106.

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years, or imprisonment not exceeding two years, with shipping to male offenders in addition.—CHITTY.

[2] It has been decided that an attempt, or preparation, by a man to set fire to his own house in a town, though the fire be never kindled, is a misdemeanour; and that every attempt to commit a felony is a misdemeanour; and, in general, an attempt to commit a misdemeanour is an offence of the same nature. Cald. 397. 6 East, 464. 1 Wils. 139. So also an incitement or solicitation to commit a crime is a misdemeanour. Rex *vs.* Higgins, 2 East, 5.

Voluntas reputatur pro facto is still true, both in treason and misdemeanour; but the intention in both must be manifested by an open act. Men cannot be punished by the law for the thoughts of the mind, however wicked they may be: even a resolution to commit high treason, evidenced only by a confession without any attempt to carry it into effect, is not punishable by the law of England. The principle of these cases is well illustrated by lord Coke, who, after treating of single combats and affrays, says, "If any subject challenge another to fight, this is also an offence, before any combat be performed, and punishable by law, for *quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud.*" 3 Inst. 158. And therefore he who carries the challenge, knowing that it is a challenge, is also guilty of a misdemeanour; and he who designedly attempts to provoke another to fight or to send a challenge, is guilty of the same offence.—CHRISTIAN.

[3] It has been expressly determined that if a tenant set fire to the house of his landlord before the tenancy expires, he is not guilty of arson. Leach, 195, 209.—CHRISTIAN.

But these distinctions are now annihilated, by 7 & 8 Geo. IV. c. 30. § 2, which enacts that if any person shall unlawfully and maliciously set fire to any church or chapel, or to any chapel for the religious worship of persons dissenting from the united church of England and Ireland duly registered or recorded, or shall unlawfully and maliciously set fire to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, *whether the same, or any of them respectively, shall then be in the possession of the offender, or in the possession of any other person*, with intent thereby to injure or defraud *any* person, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.—CHITTY.

[4] The term *malice* in this case, as in many others, does not merely imply a design to injure the party who is eventually the sufferer, but an evil and mischievous intention, however general, producing damage to individuals. For if a man has a design to burn one house and by accident the flames destroy another, instead of that against which his contrivance was directed, he will be guilty of maliciously burning the latter. 1 Hale, 569. Hawk. b. i. c. 39, s. 5. The maxim *malitia supplet ætatem* applies to this as well as to other cases; for lord Hale gives an instance of a youth of tender age being convicted

with a gun, happens to set fire to the thatch of a house, this Sir Matthew Hale determines not to be felony, contrary to the opinion of former writers.(*i*) But, by statute 6 Anne, c. 31, any servant negligently setting fire to a house or outhouses shall forfeit 100*l.* or be sent to the house of correction for eighteen months; in the same manner as the Roman law directed, "*eos, qui negligenter ignes apud se habuerint, fustibus vel flagellis cædi.*"(*k*)[5]

3. The *punishment* of arson was death by our antient Saxon laws.(*l*) And in the reign of Edward the First, this sentence was executed by a kind of *lex talionis;* for the incendiaries were burned to death:(*m*) as they were also by the Gothic constitutions.(*n*) The statute 8 Hen. VI. c. 6 made the wilful burning of houses, under some special circumstances therein mentioned, amount to the crime of high treason. But it was again reduced to felony by the general acts of Edward VI. and queen Mary; and now the punishment of all capital felonies is uniform, namely, by hanging. The offence of arson was denied the benefit of clergy by statute 21 Hen. VIII. c. 1, but that statute was repealed by 1 Edw. VI. c. 12, and arson was afterwards held to be ousted of clergy, with respect to the principal offender, only by inference and deduction from the statute 4 & 5 P. and M. c. 4, *which expressly denied it to the accessory before the fact;(*o*) though now it is expressly denied to the principal in all cases within the statute 9 Geo. I. c. 22.

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II. Burglary, or nocturnal housebreaking, *burgi latrocinium*, which by our antient law was called *hamesecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offence; not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation which every individual might acquire even in a state of nature; an invasion which in such a state would be sure to be punished with death, unless the assailant were the stronger. But in civil society the laws also come in to the assistance of the weaker party; and, besides that they leave him this natural right of killing the aggressor if he can, (as was shown in a former chapter,)(*p*) they also protect and avenge him in case the might of the assailant is too powerful.[6] And the law of England has

(*i*) 1 Hal. P. C. 569.
(*k*) *Ff.* 1, 15, 4.
(*l*) *LL. Inæ*, c. 7.
(*m*) Britt. c. 9.
(*n*) Stiernhook, *de jure Goth. l.* 3. c. 6.
(*o*) 11 Rep. 35. 2 Hal. P. C. 346, 347. Fost. 336.
(*p*) See page 180.

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before himself, and executed, for this offence, on circumstances affording strong evidence of a mischievous discretion. 1 Hale, 569, 570. And the *intent to injure* may be always inferred from the wrongful act of setting fire; for a man must be supposed to intend the necessary consequences of his own act. Russ. & Ry. C. C. 207.—Chitty.

[5] The punishment inflicted by 6 Anne, c. 31 was again inflicted by 14 Geo. III. c. 78, s. 84, which appears to be unrepealed.—Chitty.

[6] As the statute law relating to burglary and housebreaking has recently undergone considerable alterations, it is deemed advisable to set out all the enactments in the first instance: their bearings upon the text will be explained in the progress of the chapter.

The 7 & 8 Geo. IV. c. 29, s. 10 enacts that if any person shall break and enter any church or chapel, and steal therein any chattel, or, having stolen any chattel in any church or chapel, shall break out of the same, every such offender, being convicted thereof, shall suffer death as a felon.

Section 11 enacts that every person convicted of burglary shall suffer death as a felon, and declares that if any person shall enter the dwelling-house of another with intent to commit felony, or being in such dwelling-house shall commit any felony, and shall in either case break out of the said dwelling-house in the night-time, such person shall be deemed guilty of burglary.

Section 12 enacts that if any person shall break and enter any dwelling-house, and steal therein any chattel, money, or valuable security to any value whatever, or shall steal any such property to any value whatever in any dwelling-house, any person therein being put in fear, or shall steal in any dwelling-house any chattel, money, or valuable security to the value in the whole of 5*l.* or more, every such offender, being convicted thereof, shall suffer death as a felon.

Section 13 provides and enacts that no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purposes of burglary, or for any of the purposes aforesaid unless

so particular and tender a regard to the immunity of a man's house that it styles it his castle and will never suffer it to be violated with impunity; agreeing herein with the sentiments of antient Rome, as expressed in the words of Tully:(q) "*quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium?*" For this reason, no outward doors can, in general, be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private. Hence also in part arises the animadversion of the law upon eaves-droppers, nuisancers, and incendiaries; and to this principle it must be assigned that a man may assemble people together lawfully, (at least if they do not exceed eleven,) without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house; which he is not permitted to do in any other case.(r)

*The definition of a burglar, as given us by Sir Edward Coke,(s) is "he that by night breaketh and entereth into a mansion-house with intent to commit a felony." In this definition there are four things to be considered: the *time*, the *place*, the *manner*, and the *intent*. [*224

1. The *time* must be by night, and not by day, for in the daytime there is no burglary. We have seen,(t) in the case of justifiable homicide, how much more heinous all laws made an attack by night rather than by day, allowing the party attacked by night to kill the assailant with impunity. As to what is reckoned night and what day, for this purpose, antiently the day was accounted to begin only at sunrising and to end immediately upon sunset; but the better opinion seems to be that if there be daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it is no burglary.(u) But this does not extend to moonlight, for then many midnight burglaries would go unpunished; and, besides, the malignity of the offence does not so properly arise from its being done in the dark as at the dead of night, when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner and rendered his castle defenceless.[7]

2. As to the *place*. It must be, according to Sir Edward Coke's definition, in a *mansion*-house; and therefore, to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes that it is *domus mansionalis Dei*.(v) But it does not seem absolutely necessary that it should in all cases be a mansion-house,[8] for it may also be committed by breaking the

(q) *Pro domo*, 41.
(r) 1 Hal. P. C. 547.
(s) 3 Inst. 63.
(t) See pages 180, 181.
(u) 3 Inst. 63. 1 Hal. P. C. 350. 1 Hawk. P. C. 101.
(v) 3 Inst. 64.

there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other.

Section 14 enacts that if any person shall break and enter any building and steal therein any chattel, money, or valuable security, such building being within the curtilage of a dwelling-house and occupied therewith, but not being part thereof, according to the provision hereinbefore mentioned, every such offender, being convicted thereof, either upon an indictment for the same offence or upon an indictment for burglary, house-breaking, or stealing to the value of 5*l*. in a dwelling-house, containing a separate count for such offence, shall be liable, at the discretion of the court, to be transported for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.

And section 15 enacts that if any person shall break and enter any shop, warehouse, or counting-house, and steal therein any chattel, money, or valuable security, every such offender, being convicted thereof, shall be liable to any of the punishments which the court may award, as hereinbefore last mentioned.—CHITTY.

[7] No difficulty, however, can now arise on this point, as the time in which the crime of burglary can be committed is expressly defined, by stat. 1 Vict. c. 86, s. 4, to commence at nine o'clock in the evening of each day and to conclude at six o'clock in the morning of the next succeeding day.—STEWART.

[8] The new statute does not contain the word *mansion*, which was formerly held to comprehend out-houses, if parcel of the dwelling-house; the consequence of which, and of the new provisions in ss. 13 & 14, is, that no building except a dwelling-house, or a building immediately connected therewith, can now be the subject of burglary either at common law or under the new statute. Where the owner has never, by himself or by any

gates or walls of a *town* in the night;(*w*) though that, perhaps, Sir Edward Coke would have called the mansion-house of the garrison or corporation. Spelman *225] defines burglary to be "*nocturna diruptio alicujus *habitaculi, vel ecclesiæ, etiam murorum portarumve burgi, ad feloniam perpetrandam.*" And there-

(*w*) Spelm. Gloss. tit. *Burglary.* 1 Hawk. P. C. 103.

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of his family, slept in the house, it is not his dwelling-house so as to be the subject of burglary. Rex *vs.* Martin, R. & R. C. C. 108. And see Lyon's case, Leach, 169. Thompson's case, id. 893. Where a servant has part of a house for his occupation, and the rest is reserved by the proprietor for other purposes, the part reserved cannot be deemed part of the servant's dwelling-house; and it will be the same if any other person has part of the house and the rest is reserved. Rex *vs.* Wilson, R. & R. C. C. 115. Where a servant stipulates upon hire for the use of certain rooms in his master's premises for himself and family, the premises may be described as the master's dwelling-house, although the servant is the only person who inhabits them; for he shall be considered as living there as servant, not as holding as tenant. Rex *vs.* Stock, id. 185. Where a shop was rented with some of the apartments of a house, it was held that the shop was still part of the dwelling-house, and that burglary might be committed in it, as the house of the landlord. Gibson's case, Leach, 287. Where it must be laid in the indictment to be the dwelling-house of the landlord, if he break open the apartments of his lodgers and steal their goods, it is not burglary; for a man cannot be guilty of burglary in his own house. Kel. 84.

With respect to the new provisions contained in ss. 13 & 14 of the new statute, it would seem that any building which before the passing of this statute would have been the subject of burglary, by reason of its being within the curtilage, may now be the subject of an indictment under s. 14. The main question in such cases will be, what shall be considered as being within the curtilage, which, in the Termes de la Ley, is defined to be a garden-yard, field, or piece of void ground, lying near, and belonging to, the messuage. Such garden, &c. must be connected with the messuage by one uninterrupted fence or enclosure of some kind; and perhaps such fence may more properly be termed the curtilage than the ground lying within it. An indictment under the new section must aver that the building was within the curtilage of the prosecutor's dwelling-house, and that it was occupied therewith by the prosecutor; but it would seem that it need not aver that the building was one in which burglary could not be committed. See Rex *vs.* Robinson, R. & R. C. C. 321. The other clauses of this statute, namely, s. 10, as to sacrilege, or burglary and stealing in a church or chapel; s. 12, as to housebreaking and stealing in a house; and s. 15, as to robbery in a shop, will be more properly the subjects of consideration and exposition in the succeeding chapter, 17, to which the reader is referred.

As to the residence: from all the cases, it appears that it must be a place of actual *residence.* Thus, a house under repair, in which no one lives, though the owner's property is deposited there, is not a place in which burglary can be committed; for it cannot be deemed his dwelling-house until he has taken possession and begun to inhabit it. 1 Leach, 185. Nor will it make any difference if one of the workmen engaged in the repairs sleep there in order to protect it. 1 Leach, 186, *in notis.* Nor, though the house is ready for the reception of the owner, and he has sent his property into it preparatory to his own removal, will it become for this purpose his mansion. 2 Leach, 771. And where the owner has never, by himself or by any of his family, slept in the house, it is not his dwelling-house so as to make the breaking thereof burglary, though he has used it for his meals and all the purposes of his business. Russ. & Ry. C. C. 138. So, if the landlord of a house purchase the furniture of his out-going tenant, and procure a servant to sleep there in order to guard it, but without any intention of making it his own residence, a breaking into the house will not amount to burglary. 2 Leach, 876. But if the agent of a public company reside at a warehouse belonging to his employers, this crime may be committed by breaking it, and he may be considered as the owner. 2 Leach, 931. And it seems that if a man die in his house, and his executors put servants in it and keep them there at board-wages, burglary may be committed in breaking it, and it may be laid to be the executors' property. 2 East, P. C. 499.

It seems quite settled, as above observed, that the proprietor of the house need not be actually within it at the time the offence is committed, provided it is one of his regular places of abode. For if he leaves it *animo revertendi,* though no person resides there in his absence, it will still be his mansion. As if a man has a house in town and another in the country, and goes to the latter in the summer, the nocturnal breaking into either with a felonious design will be burglarious. Fost. 77. And though a man leaves his house and never means to live in it again, yet if he uses part of it as a shop, and lets a servant and his family live and sleep in another part of it for fear the place should be robbed, and lets the rest to lodgers, the habitation by his servant and family will be a habitation by him, and the shop may still be considered as part of his dwelling-house.

fore we may safely conclude that the requisite of its being *domus mansionalis* is only in the burglary of a private house, which is the most frequent, and in which it is indispensably necessary, to form its guilt, that it must be in a mansion or dwelling-house. For no distant barn, warehouse, or the like are under the same privileges, nor looked upon as a man's castle of defence; nor is a breaking open of houses wherein no man resides, and which therefore for the time-being are not mansion-houses, attended with the same circumstances of midnight terror. A house, however, wherein a man sometimes resides, and which the owner hath only left for a short season, *animo revertendi*, is the object of burglary, though no one be in it at the time of the fact committed.(*x*) And if the barn, stable, or warehouse be parcel of the mansion-house, and within the same common fence,(*y*) though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or home-stall.(*z*) A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is, to all other purposes as well as this, the mansion-house of the owner.(*a*) So also is a room or lodging in any private house the mansion for the time-being of the lodger, if the owner doth not himself dwell in the house, or if he and the lodger enter by different outward doors. But if the owner himself lies in the house, and hath but one outward door, at which he and his lodgers enter, such lodgers seem only to be inmates and all their apartments to be parcel of the one dwelling-house of the owner.(*b*) Thus, too, the house of a corporation inhabited in separate apartments by the officers of the body corporate is the mansion-house of the corporation, and not of the respective officers.(*c*) But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there, it is no dwelling-house, nor can burglary be committed therein, for by the lease *it is severed from the rest of the house, and therefore is not the dwelling-house of him who occupies the other part; neither can I be said to [*226
dwell therein when I never lie there.(*d*) Neither can burglary be committed in a tent or booth erected in a market or fair, though the owner may lodge therein;(*e*) for the law regards thus highly nothing but permanent edifices; a house or church, the wall or gate of a town; and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open than it would be to uncover a tilted wagon in the same circumstances.

3. As to the *manner* of committing burglary: there must be both a breaking and an entry to complete it. But they need not be both done at once; for if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars.(*f*) There must in general be an actual breaking; not a mere legal *clausum fregit*, (by leaping over invisible ideal boundaries, which may constitute a civil trespass,) but a substantial and forcible irruption. As at least by breaking or taking out the glass of, or otherwise opening, a window; picking a lock or opening it with a key; nay, by lifting up the latch of a door,

(*x*) 1 Hal. P. C. 566. Fost. 77.
(*y*) King *vs.* Garland, P. 16 Geo. III. by all the judges.
(*z*) 1 Hal. P. C. 558. 1 Hawk. P. C. 104.
(*a*) 1 Hal. P. C. 556.
(*b*) Kelw. 84. 1 Hal. P. C. 556.
(*c*) Fost. 38, 39.
(*d*) 1 Hal. P. C. 558.
(*e*) 1 Hawk. P. C. 104.
(*f*) 1 Hal. P. C. 553.

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1 Burn, J. 24th ed. 503. Russ. & Ry. C. C. 442, S. C. But in an indictment for larceny from a dwelling-house, where the prosecutor left his house without any intention of living in it again, and intending to use it as a warehouse only, though he had persons (not of his family) to sleep in it to guard the property, it was held it could not be considered the prosecutor's dwelling-house to support the charge. Russ. & Ry. C. C. 187. And if the occupier of a house removes from it with his whole family and takes away so much of his goods as to leave nothing fit for the accommodation of inmates, and has no settled idea of returning to it, but rather intends to let it, the offence will be merely larceny. Fost. 76. And the mere casual use of a tenement will not suffice; and therefore the circumstance of a servant sleeping in a barn, or porter in a warehouse, for particular and temporary purposes, will not so operate as to make a violent entry in the night, in order to steal, a burglary. 1 Hale, 557, 558.—CHITTY.

or unloosing any other fastening which the owner has provided.[9] But if a person leaves his doors or windows open, it is his own folly and negligence, and if a man enters therein it is no burglary; yet, if he afterwards unlocks an inner or chamber door, it is so.(*g*)[10] But to come down a chimney is held a burglarious entry; for that is as much closed as the nature of things will permit.(*h*) So, also, to knock at the door, and upon opening it to rush in with a felonious intent; or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search for traitors, and then to bind the constable and rob the house; all these entries have been *227] adjudged burglarious, though there was *no actual breaking; for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process.(*i*) And so, if a servant opens and enters his master's chamber-door with a felonious design, or if any other person lodging in the same house or in a public inn opens and enters another's door with such evil intent, it is burglary. Nay, if the servant conspires with a robber and lets him into the house by night, this is burglary in both;(*k*) for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt. As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand, is sufficient; as, to step over the threshold, to put a hand or a hook in at a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries.(*l*)[11] The entry may be before the breaking, as well as after:

(*g*) 1 Hal. P. C. 553.
(*h*) 1 Hawk. P. C. 102. 1 Hal. P. C. 552.
(*i*) 1 Hawk. P. C. 102.
(*k*) Stra. 881. 1 Hal. P. C. 553. 1 Hawk. P. C. 103.
(*l*) 1 Hal. P. C. 555. 1 Hawk. P. C. 103. Fost. 108.

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[9] So to push open massive doors which shut by their own weight is burglarious, though there is no actual fastening. 2 East, P. C. 487. Pulling down the sash of a window is a breaking, though it has no fastening and is only kept in its place by the pulley-weight: it is equally a breaking although there is an outer shutter which is not put to. Russ. & Ry. C. C. 451. And where a window opens upon hinges, and is fastened by a wedge, so that pushing against it will open it, forcing it open by pushing against it is sufficient to constitute a breaking. Russ. & Ry. C. C. 355. But where the prisoner broke out of a cellar by lifting up a heavy flap by which the cellar was closed on the outside next the street, (the flap was not bolted, but it had bolts,) six of the learned judges were of opinion that there was a sufficient breaking to constitute burglary; the remaining six were of a contrary opinion. Russ. & Ry. C. C. 157. And it is to be observed that even when the first entry is a mere trespass, being as *per janua aperta*, if the thief afterwards breaks open any inner room, he will be guilty of burglary, (1 Hale, 553;) and this may be done by a servant who sleeps in an adjacent room unlatching his master's door and entering his apartment with intent to kill him. 1 Hale, 554. But lord Hale doubts whether a guest at an inn is guilty of burglary by rising in the night, opening his own door, and stealing goods from other rooms. 1 Hale, 554. And it seems certain that breaking open a chest or trunk is not in itself burglarious, (Fost. 108, 109;) and, according to the better opinion, the same principle applies to cupboards, presses, and other fixtures, which, though attached to the freehold, are intended only the better to supply the place of movable depositories. Fost. 109.—Chitty.

[10] It will be burglary to unlatch an inner door with a felonious intent; and whatever would be a breaking of an outer door will also be a breaking of an inner door to constitute burglary. See 2 East, P. C. 488.

But it does not seem to be a burglary to break the doors of cupboards, presses, and closets. Ibid.—Chitty.

[11] So if the prisoner breaks open a shop-window and with his hand takes out goods, the offence is complete. Fost. 107. Russ. & Ry. C. C. 499, S. P. Introducing the hand between the glass of an outer window and an inner shutter is sufficient entry to constitute burglary. Russ. & Ry. C. C. 341. And where several having broken open a house, and, attempting to enter, are opposed by the owner, and in making a pass at him the hand of one of the party is within the threshold, he will be guilty of burglary. 1 Hale, 553. If, however, an instrument has been thrust into the window, not for the purpose of taking out property, but only calculated to form the aperture, this will not be regarded as an entry, (1 Leach, 406;) or if a house be broken open, and the owner, through the fear occasioned by the circumstance, throw out his money, the burglary will not be completed. 1 Hale, 555. It seems doubtful whether shooting through a window is sufficient by the entry of the shot discharged; but it seems the better opinion that it is, as in this case a felony by killing is as much attempted as in the introduction of an instrument a

for, by statute 12 Anne, c. 7, if a person enters into the dwelling-house of another without breaking in, either by day or by night, with intent to commit felony, or being in such a house shall commit any felony, and shall in the night break out of the same, this is declared to be burglary, there having before been different opinions concerning it, lord Bacon(*m*) holding the affirmative and Sir Matthew Hale(*n*) the negative. But it is universally agreed that there must be both a breaking, either in fact or by implication, and also an entry, in order to complete the burglary.[12]

4. As to the *intent;* it is clear that such breaking and entry must be with a felonious intent, otherwise it is only a trespass. And it is the same whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, *a murder, a rape, or any other felony, is [*228 burglary; whether the thing be actually perpetrated or not. Nor does it make any difference whether the offence were felony at common law, or only created so by statute; since that statute which makes an offence felony gives it incidentally all the properties of a felony at common law.(*o*)[13]

Thus much for the nature of burglary, which is a felony at common law but within the benefit of clergy. The statutes, however, of 1 Edw. VI. c. 12, and 18 Eliz. c. 7, take away clergy from the principals, and that of 3 & 4 W. and M. c. 9, from all abettors and accessories before the fact.(*p*) And, in like manner, the law of Athens, which punished no simple theft with death, made burglary a capital crime.(*q*)[14]

(*m*) Elm. 65.
(*n*) 1 Hal. P. C. 554.
(*o*) 1 Hawk. P. C. 105.
(*p*) Burglary in any house belonging to the Plate-Glass Company, with intent to steal the stock or utensils, is, by stat. 13 Geo. III. c. 38, declared to be single felony, and punished with transportation for seven years.
(*q*) Pott. Antiq. b. i. c. 26.

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felony by stealing is attempted. 1 Hale, 555. Hawk. b. i. c. 38, s. 7. See 4 Camp. 220. 1 Stark. 58.—CHITTY.

[12] The act now in force is 7 & 8 Geo. IV. c. 27.—CHITTY.

[13] But if a servant intrusted by his master to sell goods receives money to his use, conceals it in the house instead of paying it over, and, after his dismissal, breaks the house and steals it, the entry is not burglarious, because there was no felony in the original taking. 1 Show. 53. And even where prisoners were proved to have broken open a house in the night-time, to recover teas seized for want of a legal permit for the use of the person from whom they were taken, an indictment for burglary with intent to steal was holden not to be supported. 2 East, P. C. 510.—CHITTY.

[14] The punishment of this crime now varies according to the circumstances under which it is committed, it being enacted, by stat. 1 Vict. c. 86, s. 2, that whoever shall burglariously break and enter into any dwelling-house, and shall assault with intent to murder any person being therein, or shall stab, cut, wound, beat, or strike such person, shall be guilty of felony punishable with death; but, by s. 3, the simple crime of burglary is punishable only with transportation for life or for not less than ten years, or imprisonment for three years,—and now penal servitude may be substituted. And now, further, by stat. 14 & 15 Vict. c. 19, ss. 1, 2, any person found by night armed with any dangerous weapon, with intent to enter any dwelling and to commit felony therein, or found in the possession, without lawful excuse, of housebreaking instruments, or with his face blackened or disguised, or found by night in any building with intent to commit any felony, shall be guilty of a misdemeanour, punishable with imprisonment, with or without hard labour, not exceeding three years,—and now with penal servitude.—STEWART.

CHAPTER XVII.

OF OFFENCES AGAINST PRIVATE PROPERTY.

*229] *The next and last species of offences against private subjects are such as more immediately affect their property. Of which there are two which are attended with a breach of the peace; *larceny* and *malicious mischief;* and one that is equally injurious to the rights of property, but attended with no act of violence, which is the crime of *forgery*. Of these three in their order.

I. Larceny, or *theft*, by contraction for latrociny, *latrocinium*, is distinguished by the law into two sorts: the one called *simple* larceny, or plain theft unaccompanied with any other atrocious circumstance; and *mixed* or *compound* larceny, which also includes in it the aggravation of a taking from one's house or person.[1]

And, first, of *simple* larceny, which, when it is the stealing of goods above the value of twelve-pence, is called *grand* larceny; when of goods to that value, or under, is *petit* larceny; offences which are considerably distinguished in their punishment, but not otherwise. I shall therefore first consider the nature of simple larceny in general, and then shall observe the different degrees of punishment inflicted on its two several branches.

Simple larceny, then, is "the felonious taking and carrying away of the personal goods of another." This *offence certainly commenced then, *230] whenever it was, that the bounds of property, or laws of *meum* and *tuum*, were established. How far such an offence can exist in a state of nature, where all things are held to be common, is a question that may be solved with very little difficulty. The disturbance of any individual in the occupation of what he has seized to his present use seems to be the only offence of this kind incident to such a state. But, unquestionably, in social communities, when property is established, the necessity whereof we have formerly seen,(a) any violation of that property is subject to be punished by the laws of society; though how far that punishment shall extend is matter of considerable doubt. At present we will examine the nature of theft, or larceny, as laid down in the foregoing definition.

(a) See book ii. p. 8, &c.

[1] By stat. 7 & 8 Geo. IV. c. 29, s. 2, it is enacted "that the distinction between grand and petit larceny shall be abolished, and every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects, as grand larceny was before the commencement of this act; and every court whose power as to the trial of larceny was before the commencement of this act limited to petty larceny shall have power to try every case of larceny the punishment of which cannot exceed the punishment hereinafter mentioned for simple larceny, and also to try all accessories to such larceny."

By sect. 3, every person convicted of simple larceny, or of any felony thereby made punishable like simple larceny, shall (except in the cases thereinafter otherwise provided for) be liable to transportation for seven years, or imprisonment not exceeding two years, and, if a male, to one, two, or three public whippings; and, by sect. 4, where the sentence is imprisonment, the courts have a discretionary power to award hard labour or solitary confinement in addition. This observation has been introduced here that the reader may observe how far the present provisions of the law vary from the text in his progress through this important chapter, and to remind him that the subtle distinctions between grand and petty larceny are now entirely abolished.

By sect. 61, in every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death, or otherwise, in the same manner as the principal in the first degree; and every accessory after the fact (except only a receiver of stolen property) shall on conviction be liable to imprisonment for any term not exceeding two years; and every person aiding, abetting, counselling, or procuring the commission of any misdemeanour punishable under this act, shall be liable to be indicted and punished as a principal offender. As to the venue in cases of larceny, see 7 Geo. IV. c. 64, ss. 12, 13.—Chitty.

I. It must be a *taking*.[2] This implies the consent of the owner to be wanting.

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[2] The cases upon this important requisite of the offence of larceny are so numerous, and the distinctions so subtle, that it will be necessary to go into considerable detail to give a complete view of the law upon the subject. See, in general, 3 Chitt. Crim. L. 2d ed. 917 to 924.

1st. *Where the offender lawfully acquired the possession of the goods, but under a bare charge, the owner still retaining his property in them*, the offender will be guilty of larceny at common law in embezzling them. Thus, in addition to the instances put by the learned author, of the butler, the shepherd, and guest at an inn, if a master deliver property into the hands of a servant for a special purpose, as to leave it at the house of a friend, or to get change, or deposit with a banker, the servant will be guilty of felony in applying it to his own use, for it still remains in the constructive possession of its owner. 2 Leach, 870, 942; and see 2 East, P. C. 563; *sed vide* East, P. C. 562. R. & R. C. C. 215. 4 Taunt. 258, S. C. If a banker's clerk is sent to the money-room to bring cash for a particular purpose, and he takes the opportunity of secreting some for his own use, (1 Leach, 344,) he is guilty of larceny. And see 1 Leach, 251. Kelw. 33. Cowp. 294. And if several persons play together at cards, and deposit money for that purpose, not parting with their property therein, and one sweep it all away and take it to himself, he will be guilty of theft, if the jury find that he acted with a felonious design. 1 Leach, 270. Cald. 295. So if there be a plan to cheat a man of his property, under colour of a bet, and he parts with the *possession only*, to deposit as a stake with one of the confederates, the taking by such confederate is felonious. Russ. & Ry. C. C. 413. And if a bag of wheat be delivered to a warehouseman for safe custody, and he take the wheat out of the bag and dispose of it, it is larceny. Russ. & Ry. C. C. 337. And where a banker's clerk took notes from the till, under colour of a check from a third person, which check he obtained by having entered a fictitious balance in the books in favour of that person, it was held he was guilty of felony, the fraudulent obtaining the check being nothing more than mere machinery to effect his purpose. 4 Taunt. 304. R. & R. C. C. 221, S. C. 2 Leach, C. C. 1083. And where one employed as a clerk in the daytime, but not residing in the house, embezzles a bill of exchange which he received from his master in the usual course of business, with directions to transmit it by the post to a correspondent, it was held larceny. 2 East, P. C. 565; and see 2 Chitt. C. L. 2d ed. 917, b. And where goods have not been *actually* reduced into the owner's possession, yet if he has intrusted another to deliver them to his servant, and they are delivered accordingly, and the servant embezzle them, he will be guilty of larceny; as where a corn-factor, having purchased a cargo of oats on board a ship, sent his servant with his barge to receive part of the oats in loose bulk, and the servant ordered some of them to be put into sacks, which he afterwards embezzled, this was holden larceny. 2 East, P. C. 1798. 2 Leach, 825.

The learned commentator has already noticed the 21 Hen. VIII. c. 7, making the embezzlement of goods above the value of forty shillings felony, when intrusted to a servant by his master. The act extends only to such persons who were servants to the owner of the goods, both at the time of their delivery and when they were stolen. 1 Hawk. c. 33, s. 12. 2 East, P. C. 562. To bring the case within the act, the goods must have been delivered to the servant *to keep* for the master; and the words "kept to the use of the master" imply that they are to be returned to the master. 2 East, P. C. 562. The act does not extend to goods the actual property of which were not in the master at the time; and therefore it is said that if the property be changed, as by melting the money down, or malting corn, and then it be taken away, it is not within the statute. 1 Hawk. c. 33, s. 15. 2 East, P. C. 563; *sed quære*. See 1 Hawk. c. 33, s. 15. The act only extends to where the owner has actually had them in his possession, and not where his servant has merely received them to his use. No wasting or consuming the goods is within the act, however wilful. Hawk. b. i. c. 33, s. 14.

2dly. *Where the offender unlawfully acquired the possession of goods, as by fraud or force, &c., with intent to steal them, the owner still retaining his property in them*, such an offender will be guilty of larceny in embezzling them. Therefore, in addition to the instances mentioned in the text, hiring a horse on pretence of taking a journey, and immediately selling it, is larceny, because the jury found the defendant acted *animo furandi* in making the contract, and the parting with the possession had not changed the nature of the property. 2 East, P. C. 685. 1 Leach, 212; and see 2 Leach, 420. 2 East, P. C. 691. So, obtaining a horse by pretending another person wanted to hire it to go to B., but in truth with intent to steal it, and not going to B., but taking the horse elsewhere and selling it, is larceny. 1 Leach, 409. 2 East, P. C. 689. So where the prisoner, intending to steal the mail-bags from a post-office, procured them to be let down to him by a string from the window of the post-office, under pretence that he was the mail-guard, he was held guilty of larceny. 2 East, P. C. 603. It is larceny for a person hired for the special purpose of driving sheep to a fair to convert them to his own use, he having the intention so to do

Therefore no delivery of the goods from the owner to the offender, upon trust, can ground a larceny. As if A. lends B. a horse, and he rides away with him; or if I send goods by a carrier, and he carries them away; these are no lar-

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at the time of receiving them from the owner. 1 Ry. & M. C. C. 87. And where a man ordered a pair of candlesticks from a silversmith, to be paid for on delivery, to be sent to his lodgings, whither they were sent accordingly, with a bill of parcels, by a servant, and the prisoner, contriving to send the servant back under some pretence, kept the goods, it was holden larceny. Cited in 2 Leach, 420. And if a sale of goods is not completed, and the pretended purchaser absconds with them, and from the first his intention was to defraud, he is guilty of stealing, (1 Leach, 92;) and to obtain money from another by ring-dropping is a similar offence, if there was an original design to steal, (1 Leach, 238; 2 Leach, 572;) and where the owner of goods sends them by a servant, to be delivered to A., and B., pretending to be A., obtains them from him, B. is guilty of larceny. 2 East, P. C. 673. So where the prisoner, pretending to be the servant of a person who had bought a chest of tea deposited at the East India Company's warehouse, got a request-paper and permit for the chest, and took it away with the assent of a person in the company's service who had the charge of it, this was held felony. R. & Ry. C. C. 173. So to obtain a bill of exchange from an endorsee under a pretence of getting it discounted, is felony, if the jury find that the party did not intend to leave the bill in the possession of the defendant previous to receiving the money to be obtained on his credit, and that he undertook to discount with intent to convert it to his own use, (1 Leach, 294;) and it seems that if a person procure possession of a house with an intent to steal the lead affixed to it, he may be indicted, on the 4 Geo. II. c. 32, for the statutable larceny. 2 Leach, 850.

In all these cases the defendant's *original* design in obtaining the goods was felonious, and the owner never parted with his property therein; for where either is not the case there can be no larceny, as will appear from the following instances. Thus, where a house was burning and a neighbour took some of the goods, apparently to save them from the flames, and afterwards converted them to his own use, it was holden no felony, because the jury thought the original design honest. 1 Leach, 411, notes. And it is certain that if the *property* in effects be given voluntarily, whatever false pretence has been used to obtain it, no felony can be committed. 1 Hale P. C. 506. R. & R. C. C. 225, S. P. Thus, obtaining silver on pretence of sending a half-guinea presently in exchange is no felony. 2 East, P. C. 672. So, writing a letter in the name of a third person to borrow money, which he obtains by that fraud, is only a misdemeanour, (2 East, P. C. 673;) and it makes no difference, in these cases, that the credit was obtained by fraudulently using the name of another to whom it was intended to be given, (1 Leach, 303, notes. 2 East, P. C. 673. R. & R. C. C. 225;) and if a horse-dealer delivers a horse to another on his promise to return immediately and pay for it, the party's riding off and not returning is no felony. 1 Leach, 467. 2 East, P. C. 669. So if a tradesman sells goods to a stranger as for ready money, and sends them to him by a servant, who delivers them and takes in payment for them bills which prove to be mere fabrications, this will be no larceny, though the party took his lodgings for the express purpose of obtaining the goods by fraud; because the owner parted with his property. 2 Leach, 614. So fraudulently winning money at gaming, where the injured party really intended to play, is no larceny, though a conspiracy to defraud appear in evidence. 2 Leach, 610. So brokers, bankers, or agents embezzling securities deposited with them for security or any special purpose are not guilty of larceny, (4 Taunt. 258. 2 Leach, 1054. R. & R. C. C. 215, S. C.;) but this decision occasioned the 52 Geo. III. c. 63 to be passed, making it a misdemeanour in brokers, bankers, and others to embezzle securities deposited with them for safe custody or for any special purpose, in violation of good faith and contrary to the special purpose for which they were deposited. Thus, in all cases where a voluntary delivering by the prosecutor is the defence to be relied on, two questions arise: first, whether the property was parted with by the owner; secondly, whether, supposing it was not, the prisoner, at the time he obtained it, conceived a felonious design. In the first case, no fraud or breach of trust can make a conversion larceny; in the second, the complexion of the offence must depend on the felonious design.

3dly. *Where the offender lawfully acquired the possession of and qualified property in goods under colour of bailment, but with the intention of stealing them; or where the bailment has been determined either by the wrongful act of the offender or by the intention of the parties*, if he afterwards embezzle such goods he will be guilty of larceny. For in the first case, after the determination of the special contract by any plain and unequivocal wrongful act of the bailee inconsistent with that contract, the property, as against the bailee, reverts to the owner, although the actual possession remain in the bailee. 2 East, P. C. 691, 627. The most remarkable case of this description is that of a carrier pointed out by the learned commentator. So the conversion of money with a felonious intent, which was found in a bureau delivered to a car-

cenies.(b) But if the carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away part thereof, or if he carries it to the place appointed and afterwards takes away the whole, these are larcenies;(c) for here the

(b) 1 Hal. P. C. 504. (c) 3 Inst. 107.

penter to be repaired, by breaking it open, when there was no necessity for so doing for the purpose of repairs, will amount to a larceny, (8 Ves. 405. 2 Leach, 952. 2 Russ. 1045;) and in the same case it was said that if a pocket-book containing bank-notes were left in the pocket of a coat sent to be mended, and the tailor took the pocket-book out of the pocket and the notes out of the pocket-book with a felonious intent, it would amount to a felony. If the master and owner of a ship steal some of the goods delivered to him to carry, it is not larceny in him, unless he took the goods out of their package; nor, if larceny, would it be an offence within 24 Geo. II. c. 45. R. & R. C. C. 92. And if corn be sent to a miller to grind and he take part of it he will be guilty of felony, (1 Roll. Abr. 73;) but where forty bags of wheat were sent to the prisoner, a warehouseman, for safe custody until sold by the prosecutor, and the prisoner's servant, by direction of the prisoner, emptied four of the bags and mixed their contents with other inferior wheat, and part of the mixture was disposed of by the prisoner and the remainder was placed in the prosecutor's bags which had thus been emptied, and there was no severing of any part of the wheat in any one bag with intent to embezzle that part only which was so severed, the prisoner was held guilty of larceny in taking the wheat out of the bag. R. & R. C. C. 337. And where property which the prosecutors had bought was weighed out in the presence of their clerk and delivered to their carter's servant to cart, who let other persons take away the cart and dispose of the property for his benefit jointly with that of the other persons, it was held that the carter's servant was not guilty of a mere breach of trust, but that he as well as the other persons were guilty of larceny at common law. Russ. & Ry. C. C. 125; and see 2 East, P. C. 568 to 574, 695 to 698. But in all these cases the defendant must have had an *intention of stealing* the property *at the time* it was delivered to him. R. & R. C. C. 441, overruling 2 East, P. C. 690, 694. 2 Russ. 1089, 1090. 1 R. & M. C. C. 87.

4thly. *Where the offender has the qualified property and actual possession of the goods at the time of the embezzlement*, he will not be guilty of larceny at common law. Thus, where a servant or clerk had received property for the use of his master, and the master never had any other possession than such possession by his servant or clerk, it was doubted whether the latter was guilty of felony in stealing such property or was guilty merely of a breach of trust. 2 Leach, 835. Hale, 668. East, P. C. 570, 571. And see 4 Taunt. 258. Russ. & Ry. C. C. 215, S. C. 2 Leach, C. C. 1054. So a cashier of the bank could not be guilty of felony in embezzling an India bond which he had received from the court of chancery and was in his actual as well as constructive possession. 1 Leach, 28. So if a clerk received money of a customer, and without at all putting it in the till converted it to his own use, he was guilty only of a breach of trust; though, had he once deposited it and then taken it again, he would have been guilty of felony. 2 Leach, 835.

Servants and Clerks.—The dangers resulting from this doctrine occasioned the enactment of 39 Geo. III. c. 85 against such embezzlements by servants or clerks, rendering the offence punishable with transportation for fourteen years. This act extends only to such servants as are employed to receive money, and to instances in which they receive money by virtue of their employment. It seems an apprentice, though under the age of eighteen, is within the act, (R. & R. C. C. 80;) so is a female servant. R. & R. C. C. 267. A person employed upon commission to travel for orders and to collect debts is a clerk within the act, though he is employed by many different houses on each journey, and pays his own expenses out of his commission on each journey, and does not live with any of his employers nor act in any of their counting-houses. R. & R. C. C. 198. So a servant in the employment of A. & B., who are partners, is the servant of each, and if he embezzle the private money of one may be charged, under the act, as the servant of that individual partner. 3 Stark. C. N. P. 70. A man is sufficiently a servant within the act although he is only occasionally employed when he has nothing else to do; and it is sufficient if he was employed to receive the money he embezzled, though receiving money may not be in his usual employment, and although it was the only instance in which he was so employed. R. & Ry. C. C. 299. A clerk intrusted to receive money *at home* from out-door collectors received it *abroad* from out-door customers, it was held that such receipt of money may be considered, "by virtue of his employment," within the act, though it is beyond the limits in which he is authorized to receive money from his employers. R. & Ry. C. C. 319. So if a servant, generally employed by his master to receive sums of one description and at one place only, is employed by him in a particular instance to receive a sum of a different description and at a different place, this latter sum is to be considered as received by him by virtue of his employment; for he fills the character of servant, as it is by being employed as servant he receives the money. R. & Ry. C. C. 516. Where the owner of a colliery employed the prisoner as captain of one of his barges, to

animus furandi is manifest; since in the first case he had otherwise no inducement to open the goods, and in the second the trust was determined, the delivery having taken its effect. But bare non-delivery shall not, of course, be intended to arise from a felonious design, since that may happen from a variety of other accidents. Neither by the common law was it larceny in any servant to run away with the goods committed to him to keep, but only a breach of civil trust. But, by statute 33 Hen. VI. c. 1, the servants of persons deceased, accused of embezzling their masters' goods, may, by writ *231] out of chancery (issued by the advice of *the chief justices and chief baron, or any two of them) and proclamation made thereupon, be summoned to appear personally in the court of king's bench to answer their masters' executors in any civil suit for such goods, and shall, on default of

carry out and sell coal, and paid him for his labour by allowing him two-thirds of the price for which he sold the coals, after deducting the price charged at the colliery, he was held a servant within the act, and, having embezzled the price, he was guilty of larceny within the act. R. & R. C. C. 139. So a servant who received money for his master for articles made of his master's materials, which he embezzled, was held within the act, though he made the articles and was to have a given portion of the price for making them. Russ. & Ry. C. C. 145. The act is not confined to clerks and servants of persons in trade: it extends to the clerks and servants employed to receive of all persons whatever. Therefore, where the overseers of a township employed the prisoner as their accountant and treasurer, and he received and paid all the money receivable or payable on their account, he received a sum and embezzled it, he was held a clerk and servant within the act. R. & R. C. C. 349. 2 Stark. C. N. P. 349, S. C. If a servant, immediately on receiving a sum for his masters, enters a smaller in his book, and ultimately account to his master for the smaller sum only, he may be considered as embezzling the difference at the time he made the entry; and it will make no difference though he received other sums for his master on the same day, and in paying them and the smaller sum to his master together he might give his master every piece of money or note he received at the time he made the false entry. R. & R. C. C. 463. 3 Stark. N. P. C. 67, S. C. It seems the act does not apply to cases which were larceny at common law. 2 Leach, C. C. 1033. R. & R. C. C. 160, S. C. Peck's case, cor. Park, J. Staffordshire Sum. Ass. 1817. 3 Stark. Evid. 842. It is questionable, therefore, whether, if a servant receives money from his *master* to pay C., and does not pay it, he can be indicted for embezzlement, (Russ. & Ry. C. C. 267;) but as counts for larceny at common law and for embezzlement under the statute may be joined in the same indictment, any difficulty in this respect may be avoided. See 3 M. & S. 549, 550. Although property has been in the possession of the prisoner's masters, and they only intrust the custody of such property to a third person to try the honesty of their servant, if the servant receives it from such third person and embezzles it, it is an offence within the act. R. & R. C. C. 160. 2 Leach, 1033, S. C.

Party stealing his own Goods, &c.—Besides the cases already mentioned in the text, if a man steals his own goods from his own bailee, though he has no intent to charge the bailee, but his intent is to defraud the king, yet if the bailee had an interest in the possession and could have withheld it from the owner, the taking is a larceny. R. & R. C. C. 470. 3 Burn, J., 24th ed., 240, S. C. And a man may be accessory after the fact to a larceny committed on himself by receiving and harbouring the thief instead of bringing him to justice, (Fost. 123;) but a joint tenant in common of effects cannot be guilty of larceny in appropriating the whole to his own purpose, (1 Hale, 513;) but if a part-owner of property steal it from the person in whose custody it is and who is *responsible for its safety*, he is guilty of larceny. R. & R. C. C. 478. 3 Burn, J., 24th ed., 241, S. C. Nor can a wife commit larceny of her husband's goods, because his custody is in law hers, and they are considered as one person. 1 Hale, 514. On the same ground, no third person can be guilty of larceny by receiving the husband's goods from the wife; and if she keep the key of the place where the property is kept, her privity will be presumed, and the defendant must be acquitted. 1 Leach, 47. See 1 Hale, 45, 516. Kel. 37.

The taking must always be against the will of the owner, (1 Leach, 47;) but if the owner, in order to detect a number of men in the act of stealing, directs a servant to appear to encourage the design and lead them on till the offence is complete, so long as he did not induce the original intent, but only provided for its discovery after it was formed, the criminality of the thieves will not be destroyed. 2 Leach, 913. So if a man be suspected of an intent to steal, and another, to try him, leaves property in his way which he takes, he is guilty of larceny. 2 Leach, 921. And if, on thieves breaking in to plunder a house, a servant, by desire of his master, show them where the plate is kept which they remove, this circumstance will not affect the crime. 2 Leach, 922.—Chitty.

appearance, be attainted of felony. And, by statute 21 Hen. VIII. c. 7, if any servant embezzles his master's goods to the value of forty shillings, it is made felony; except in apprentices, and servants under eighteen years old.[3] But if he had not the possession, but only the care and oversight, of the goods, as the butler of the plate, the shepherd of the sheep, and the like, the embezzling of them is felony at common law.(*d*) So if a guest robs his inn or tavern of a piece of plate, it is larceny; for he hath not the possession delivered to him, but merely the use;(*e*) and so it is declared to be by statutes 3 & 4 W. and M. c. 9 if a lodger runs away with the goods from his ready-furnished lodgings.[4] Under

(*d*) 1 Hal. P. C. 506. (*e*) 1 Hawk. P. C. 90.

[3] The above statutes, with others on the same subject, are repealed, by the 7 & 8 Geo. IV. c. 27; and by the 7 & 8 Geo. IV. c. 29, § 46, any clerk or servant stealing any chattel, money, or valuable security belonging to, or in the possession or power of, his master, is punishable with transportation for any term not exceeding fourteen years and not less than seven, or with imprisonment for any term not exceeding three years, with whippings. S. 47 enacts that any clerk or servant, or person employed as such, receiving or taking, by virtue of such employment, into his possession any chattel, money, or valuable security, for, or in the name or on the account of, his master, and fraudulently embezzling the same or any part thereof, shall be deemed to have feloniously stolen the same from his master, although such chattel, &c. was not received into the master's possession otherwise than by the actual possession of such clerk or servant or other person so employed, and shall be liable to any of the punishments set forth in s. 45. By s. 48, "for preventing the difficulties that have been experienced in the prosecution of the last-mentioned offenders," it is enacted "that it shall be lawful to charge in the indictment, and proceed against the offender for, any number of distinct acts of embezzlement, not exceeding three, which may have been committed by him against the same master within the space of six calendar months from the first to the last of such acts; and in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly." Each act of embezzlement should be set forth in a separate count; and the prosecutor cannot be compelled to elect which he will singly proceed upon. The indictment need not state from whom the money alleged to have been embezzled was received. Rex *vs.* Beacall, 1 C. & P. 454. The day laid is not material. By statute 5 Geo. IV. c. 20, s. 19, persons employed in the post-office embezzling notes, parliamentary proceedings, or newspapers, &c. are guilty of a misdemeanour, and punishable by fine and imprisonment, the offence to be tried either where committed or where the offender is apprehended.

By 7 & 8 Geo. IV. c. 29, s. 49, bankers, merchants, brokers, attorneys, and other agents, embezzling money intrusted to them to be applied to any special purpose, or embezzling any goods or valuable security intrusted to them for safe custody or for any special purpose, are guilty of a misdemeanour, and punishable in any of the modes pointed out in s. 46. S. 50 provides that the act shall not affect trustees or mortgagees, nor bankers, &c. receiving money due on securities, or disposing of securities on which they have a lien. By s. 51, factors pledging for their own use any goods, or documents relating to goods, intrusted to them for the purpose of sale, are guilty of a misdemeanour, and punishable by transportation for fourteen or seven years, or by fine and imprisonment, as the court shall award,—the clause not to extend to cases where the pledge does not exceed the amount of their lien. And, by s. 52, these provisions as to agents shall not lessen any remedy which the party aggrieved previously had at law or in equity. A person intrusted, as a private friend, with a bill to get it discounted, and converting it to his own use, is not an agent within the meaning of the act. Rex *vs.* Prince, 2 C. & P. 517.—CHITTY.

[4] Repealed, by 7 & 8 Geo. IV. c. 27; and, by 7 & 8 Geo. IV. c. 29, s. 45, it is enacted that if any person shall steal any chattel or fixture let to be used by him in or with any house or lodging, he shall be guilty of felony, and be punished as for simple larceny; and the indictment may be preferred in the common form as for larceny, and as if the offender were not a tenant or lodger; and in either case the property may be laid in the owner or person letting to hire. In Healey's case, R. & M. 1, it was considered unnecessary to

some circumstances also a man may be guilty of felony in taking his own goods; as if he steals them from a pawnbroker, or any one to whom he hath delivered and intrusted them, with intent to charge such bailee with the value; or if he robs his own messenger on the road, with an intent to charge the hundred with the loss according to the statute of Winchester.(*f*)

2. There must not only be a taking, but a *carrying away*;[5] *cepit et asportavit* was the old law-Latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation or carrying away. As, if a man be leading another's horse out of a close, and be apprehended in the fact; or if a guest, stealing goods out of an inn, has removed them from his chamber down-stairs; these have been adjudged sufficient carryings away to constitute a larceny.(*g*) Or if a thief, intending to steal plate, takes it out of a chest in which it was and lays it down upon the floor, but is surprised before he can make his escape with it, this is larceny.(*h*)

*232] *3. This taking and carrying away must also be *felonious;* that is, done *animo furandi:* or, as the civil law expresses it, *lucri causa.*(*i*)[6] This re-

(*f*) Fost. 123, 124.
(*g*) 3 Inst. 108, 109.
(*h*) 1 Hawk. P. C. 93.
(*i*) Inst. 4, 1, 1.

state by whom the lodging was let, the judges holding that the letting might be stated either according to the fact or according to the legal operation. The statement as to the *party* by whom the lodging is let would be regulated by this case under the present act.—Chitty.

[5] If a thief cut a belt on which a purse is hung and it drops to the ground where he leaves it, or if he compel a man to lay down goods which he is carrying, and is apprehended before he raises them from the ground, the crime is incomplete. 1 Leach, 322, n. b. 1 Hale, 533. And if goods are tied to a string, which is fastened at one end to a counter, and a person, intending to steal them, takes hold of the other and removes them towards the door as far as the string will permit him, this will be no felony. So where the prosecutor had his keys tied to the strings of his purse in his pocket, which the prisoner endeavoured to take from him and was detected with the purse in his hand, but the strings still hung to the pocket by the keys, this was holden to be no asportation, and therefore no larceny was committed. 1 Leach, 321, n. a. 1 Hale, 508. But a very slight asportation will suffice. Thus, to snatch a diamond from a lady's ear which is instantly dropped among the curls of her hair. (1 Leach, 320. 2 East, P. C. 557;) to remove sheets from a bed and carry them into an adjoining room, (1 Leach, 222, in notes.) —to take plate from a trunk and lay it on the floor with intent to carry it away, (ibid.)— and to remove a package from one part of a wagon to another with a view to steal it, (1 Leach, 236,) have respectively been holden to be felonies; and where the prisoner had lifted up a bag from the bottom of a boot of a coach but was detected before he had got it out, it did not appear that it was entirely removed from the space it at first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that specific part occupied, this was held a complete asportation. 1 Ry. & Moody, C. C. 14. But if the defendant merely change the position of a package from lying endways to lengthways, for the greater convenience of taking out its contents, and cuts the outside of it for that purpose, but is detected before he has taken any thing, there will be no larceny committed. Id. ibid. in notes. Where it is one continuing transaction, though there be several distinct asportations in law by several persons, yet all may be indicted as principals who concur in the felony before the final carrying away of the goods from the virtual custody of the owner. (2 East, P. C. 557;) but two cannot be convicted upon an indictment charging a joint larceny, unless there be evidence to satisfy a jury that they were concerned in a joint taking. 2 Stark. on Evidence, 840. If one steal another man's goods, and afterwards another stealeth from him, the owner may prosecute the first or the second felon at his choice. Dalt. c. 162. There is no occasion that the carrying away be by the hand of the party accused; for if he procured an innocent agent, as a child or a lunatic, to take the property, or if he obtained it from the sheriff by a replevin, without the slightest colour of title, and with a felonious design, he will himself be a principal offender. Hawk. b. 1, c. 33, s. 12.—Chitty.

[6] The felonious quality consists in the *intention* of the prisoner to defraud the owner and to apply the thing stolen to his own use; and it is not necessary that the taking should be done *lucri causa:* taking with an intent to destroy will be sufficient to constitute the offence if done to serve the prisoner or another person, though not in a pecuniary way. R. & R. C. C. 292. In a late singular case it was determined that where a servant clandestinely took his master's corn, though to give it to his master's horses, he was guilty of larceny, the servant in some degree being likely to diminish his labour

quisite, besides excusing those who labour under incapacities of mind or will, (of whom we spoke sufficiently at the entrance of this book,)(*k*) indemnifies also mere trespassers and other petty offenders. As, if a servant takes his master's horse without his knowledge and brings him home again; if a neighbour takes another's plough that is left in the field and uses it upon his own land and then returns it; if, under colour of arrear of rent where none is due, I distrain another's cattle or seize them; all these are misdemeanours and trespasses, but no felonies.(*l*) The ordinary discovery of a felonious intent is where the party doth it clandestinely, or, being charged with the fact, denies it. But this is by no means the only criterion of criminality; for in cases that may amount to larceny the variety of circumstances is so great and the complications thereof so mingled that it is impossible to recount all those which may evidence a felonious intent or *animum furandi;* wherefore they must be left to the due and attentive consideration of the court and jury.

4. This felonious taking and carrying away must be *of the personal goods of another;* for if they are things *real*, or savour of the realty, larceny at the common law cannot be committed of them. Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot in their nature be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larceny could be committed, by the rules of the common law, but the severance of them was, and in many things is still, merely a trespass, which depended on a subtilty in the legal notions of our ancestors. These things were parcel of the real estate, and therefore, while

(*k*) See page 20. (*l*) 1 Hal. P. C. 509.

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thereby. R. & R. C. C. 307. 3 Burn, J., 24th ed. 209. See a late case, Russ. & Ry. C. C. 118, under very particular circumstances. It is sufficient if the prisoner intend to appropriate the value of the chattel and not the chattel itself to his own use, as where the owner of goods steals them from his own servant or bailee in order to charge him with the amount. 7 Hen. VI. f. 43. The intention must exist at the time of the taking; and no subsequent felonious intention will render the previous taking felonious.

We have seen that a taking by finding, and a subsequent conversion, will not amount to a felony. 3 Inst. 108. 1 Hawk. c. 33, s. 2. 2 Russ. 1041. But if the goods are found in the place where they are usually suffered to lie, as a horse on a common, cattle in the owner's fields, or money in a place where it clearly appears the thief knew the owner to have concealed it. (1 Hale, 507, 508. 2 East, P. C. 664.) or if the finder in any way know the owner, or if there be any mark on the goods by which the owner can be ascertained, (see 3 Burn, J., 24th ed., 213,) the taking will be felonious. So if a parcel be left in a hackney-coach, and the driver open it, not merely from curiosity, but with a view to appropriate part of its contents to his own use, or if the prosecutor order him to deliver the package to the servant and he omits so to do, he will be guilty of felony. 2 East, P. C. 664. 1 Leach, 413, 415, and *in notis.*

Where the taking exists, but without fraud, it may amount only to a trespass. This is also a point frequently depending on circumstantial evidence, and to be left for the jury's decision. Thus, where the prisoners entered another's stable at night and took out his horses, and rode them thirty-two miles and left them at an inn, and were afterwards found pursuing their journey on foot, they were held to have committed only a trespass, and not a felony. 2 East, P. C. 662. It depends also on circumstances what offence it is to force a man in the possession of goods to sell them: if the defendant takes them and throws down more than their value, it will be evidence that it was only trespass; if less were offered, it would probably be regarded as felony. 1 East, Rep. 615, 636. And it seems that the taking may be only a trespass where the original assault was felonious. Thus, if a man searches the pockets of another for money and finds none, and afterwards throws the saddle from his horse on the ground and scatters bread from his packages, he will not be guilty of robbery, (2 East, P. C. 662;) though he might certainly have been indicted for feloniously assaulting with intent to steal, for that offence was complete.

The openness and notoriety of the taking, where possession has not been obtained by force or stratagem, is a strong circumstance to rebut the inference of a felonious intention, (1 Hale, 507; East, P. C. 661, 662;) but this alone will not make it the less a felony. Kel. 82. 2 Raym. 276. 2 Vent. 94. A taking by mere accident, or in joke, or mistaking another's property for one's own, is neither legally nor morally a crime. 2 Hale, 507, 509.—CHITTY.

they continued so, could not by any possibility be the subject of theft, being *233] absolutely fixed and immovable.(m) And if they were *severed by violence, so as to be changed into movables, and at the same time by one and the same continued act carried off by the person who severed them, they could never be said to be taken *from* the *proprietor* in this their newly-acquired state of mobility, (which is essential to the nature of larceny,) being never, as such, in the actual or constructive possession of any one but of him who committed the trespass. He could not in strictness be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs them at *one* time, whereby the trespass is completed, and they are converted into personal chattels in the constructive possession of him on whose soil they are left or laid, and come again at *another* time, when they are so turned into personalty, and takes them away, it is larceny; and so it is if the owner or any one else has severed them.(n) And now, by the statute 4 Geo. II. c. 42, to steal or rip, cut or break, with intent to steal, any lead, or iron bar, rail, gate, or palisado fixed to a dwelling-house or out-house, or in any court or garden thereunto belonging, or to any other building, is made felony, liable to transportation for seven years;[7] and to steal, damage, or destroy underwood or hedges, and the like,[8] to rob orchards or gardens of fruit growing therein,[9] to steal or otherwise destroy any turnips, potatoes, cabbages, parsnips, peas, or carrots, or the roots of madder when growing, are(o) punished criminally[10] by whipping, small fines, imprisonment, and satisfaction to the party wronged, according to the nature of the offence. Moreover, the stealing by night of any trees, or of any roots, shrubs, or plants of the value of 5*s.*, is, by statute 6 Geo. III. c. 36, made felony in the principals, aiders, and abettors, and in the purchasers thereof knowing the same to be stolen: and, by statutes 6 Geo. III. c. 48 and 13 Geo. III. c. 33, the stealing *234] of any timber-trees therein specified,(p) and of any root, *shrub, or plant, by day or night, is liable to pecuniary penalties for the two first offences,

(m) See book ii. p. 16.
(n) 3 Inst. 109. 1 Hal. P. C. 510.
(o) Stat. 43 Eliz. c. 7. 15 Car. II. c. 2. 31 Geo. II. c. 35. 6 Geo. III. c. 48. 9 Geo. III. c. 41. 13 Geo. III. c. 32.
(p) Oak, beech, chestnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore, birch, poplar, alder, larch, maple, and hornbeam.

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[7] By statute 7 & 8 Geo. IV. c. 29, s. 44, stealing, ripping, cutting, or breaking with intent to steal, any glass or woodwork belonging to any building, or any utensil or fixture made of metal or other material fixed in or to any building whatsoever, or metal fixtures in land being private property, or for a fence to any house, garden, or area, or in any square, &c., is a felony punishable as in the case of simple larceny.—Chitty.

[8] By statute 7 & 8 Geo. IV. c. 30, s. 19, persons maliciously destroying or damaging any trees, shrubs, or underwood growing in any park, pleasure-ground, garden, orchard, or avenue (in case the injury exceeds the sum of 1*l.*) shall be guilty of felony, and be punished with transportation for seven years, or imprisonment not exceeding two years, with public whipping in addition; and committing the offence on trees, &c. growing elsewhere (where the injury exceeds 5*l.*) is subject to the same punishment. And, by sect. 20, destroying such property, wheresoever growing, of any value above one shilling, renders the offender liable to a fine of 5*l.* for the first offence, to hard labour and imprisonment not exceeding twelve months for the second offence, with whipping in addition, and to transportation or imprisonment as in the last section, as for a felony, for a third offence.—Chitty.

[9] By 7 & 8 Geo. IV. c. 29, s. 42, stealing or destroying any plant, root, fruit, or vegetable production growing in any garden, orchard, nursery-ground, hot-house, greenhouse, or conservatory, is punishable, for a first offence, with imprisonment and hard labour not exceeding six calendar months, or a fine not exceeding 20*l.* over and above the value of the articles stolen; and the second offence is felony, punishable as in the case of simple larceny.—Chitty.

[10] By 7 & 8 Geo. IV. c. 29, s. 43, the first offence is punishable with hard labour and imprisonment not exceeding one month, or with a fine not exceeding 1*l.*, besides the value of the articles stolen; and the second offence with whipping and imprisonment for a term not exceeding six months. The words of the act are stealing or destroying "any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land open or enclosed not being a garden, orchard, or nursery-ground."—Chitty.

and for the third is constituted a felony liable to transportation for seven years.[11] Stealing ore out of mines is also no larceny, upon the same principle of adherence to the freehold, with an exception only to mines of black lead, the stealing of ore out of which, or entering the same with intent to steal, is felony, punishable with imprisonment and whipping, or transportation not exceeding seven years; and to escape from such imprisonment or return from such transportation is felony without benefit of clergy, by statute 25 Geo. II. c. 10.[12] Upon nearly the same principle the stealing of writings relating to a real estate is no felony, but a trespass;(*q*) because they concern the land, or (according to our technical language) *savour* of the *realty*, and are considered as part of it by the law, so that they descend to the heir, together with the land which they concern.[13](*r*)

Bonds, bills, and notes, which concern mere *choses in action*, were also at the common law held not to be such goods whereof larceny might be committed, being of no intrinsic value,(*s*) and not importing any property in *possession* of the person from whom they are taken. But, by the statute 2 Geo. II. c. 25, they are now put upon the same footing, with respect to larcenies, as the money they were meant to secure.[14] By statute 15 Geo. II. c. 13, officers or servants of the bank of England secreting or embezzling any note, bill, warrant, bond, deed, security, money, or effects intrusted with them or with the company, are guilty of felony without benefit of clergy. The same is enacted by statute 24 Geo. II. c. 11 with respect to officers and servants of the South-Sea Company. And, by statute 7 Geo. III. c. 50, if any officer or servant of the post-office shall secrete, embezzle, or destroy any letter or packet containing any bank-note or other valuable paper particularly specified in the act, or shall steal the same out of any letter or *packet, he shall be guilty of felony without benefit of clergy. Or, if he shall destroy any letter or packet with [*235 which he has received money for the postage, or shall advance the rate of post-

(*q*) 1 Hal. P. C. 510. Stra. 1137. (*r*) See book ii. page 438. (*s*) 8 Rep. 33.

[11] By 7 & 8 Geo. IV. c. 29, s. 38, persons stealing, or destroying with intent to steal, any tree, shrub, or underwood growing in any park, pleasure-ground, garden, or near houses, (where the injury exceeds the sum of 1*l.*,) are guilty of felony, and liable to be punished as in cases of simple larceny; and stealing, or damaging with intent to steal, such property elsewhere above the value of 5*l.*, is declared felony, and liable to the same punishment. And, by sect. 39, stealing, or damaging with intent to steal, any trees, shrubs, &c., wheresoever growing, to the value of one shilling, is punishable with a fine of 5*l.* for the first offence; with hard labour, whipping, and imprisonment not exceeding twelve months for the second offence; and the third offence is felony, punishable as in case of simple larceny. There seems to be no punishment if the property stolen or destroyed be under the value of a shilling.—CHITTY.

[12] By 7 & 8 Geo. IV. c. 29, s. 37, stealing, or severing with intent to steal, any ore or other substance from certain mines, is felony, and punishable as in case of simple larceny. The 25 Geo. II. c. 105 is repealed, by 7 & 8 Geo. IV. c. 27.—CHITTY.

[13] By statute 7 & 8 Geo. IV. c. 29, § 23, the stealing any description of writings relating to the title of real estates is punishable with transportation for seven years, or with fine and imprisonment, at the discretion of the court; and, by § 24, these provisions are not to deprive the party aggrieved of the remedies he now has, at law or in equity. This enactment is new. See 3 Inst. 109. 1 Hale, 110.—CHITTY.

[14] Repealed, by 7 & 8 Geo. IV. c. 27; and, by 7 & 8 Geo. IV. c. 29, s. 5, persons stealing any tally, order, or other security, either public or private, relating to this country, or to any foreign state, or any debenture, deed, bond, bill, note, warrant, order, or other security for money, or any order for the delivery of goods, shall be guilty of felony, and punished as though they had stolen any chattel of equal value, according to the interest the parties have in the securities stolen; and all the documents enumerated in the act shall be deemed to be included in the words "valuable security."

A check on a banker, written on unstamped paper, payable to D. F. J. and not made payable to bearer, is not a valuable security within the meaning of the act. Rex *vs.* Yates, Car. C. L. 273, 233.—CHITTY.

But now, by stat. 4 & 5 Vict. c. 56, s. 1, the punishment of death is repealed, and these offences are punishable with transportation for life or for any term not less than seven years, or imprisonment not exceeding three years,—and now penal servitude is substituted.—STEWART.

See also statutes 11 Geo. IV. and 1 W. IV. c. 66, and 1 Vict. c. 90 As to offences by servants in the post-office, see 1 Vict. c. 36.—SHARSWOOD.

age on any letter or packet sent by the post and shall secrete the money received by such advancement, he shall be guilty of single felony.[15] Larceny also could not at common law be committed of treasure-trove or wreck till seized by the king or him who hath the franchise; for till such seizure no one hath a determinate property therein. But, by statute 26 Geo. II. c. 19, plundering or stealing from any ship in distress (whether wreck or no wreck) is felony without benefit of clergy; in like manner as, by the civil law,(s) this inhumanity is punished in the same degree as the most atrocious theft.[16]

Larceny also cannot be committed of such animals in which there is no property either absolute or qualified; as of beasts that are *feræ naturæ* and unreclaimed, such as deer, hares, and coneys in a forest, chase, or warren; fish in an open river or pond; or wild fowls at their natural liberty.(t) But if they are reclaimed or confined and may serve for food, it is otherwise, even at common law; for of deer so enclosed in a park that they may be taken at pleasure, fish in a trunk, and pheasants and partridges in a mew, larceny may be committed.(u) And now, by statute 9 Geo. I. c. 22, to hunt, wound, kill, or steal any deer, to rob a warren, or to steal fish from a river or pond, (being in these cases armed and disguised,) also to hunt, wound, kill, or steal any deer, in the king's forests or chases enclosed, or in any other enclosed place where deer have been usually kept, or by gift or promise of reward to procure any person to join them in such unlawful act; all these are felonies without benefit of clergy.[17] And the statute 16 Geo. III. c. 30 enacts that every unauthorized person, his aiders and abettors, who shall course, hunt, shoot at, or otherwise attempt to kill, wound, or destroy any red or fallow deer in *any* forest, chase, purlieu, or antient walk, or in any *enclosed* park, paddock, wood, or other ground *where deer are usually kept, shall forfeit the sum of 20*l.*, or for every *236] deer actually killed, wounded, destroyed, taken in any toil or snare, or carried away, the sum of 30*l.*, or double those sums in case the offender be a keeper; and upon a second offence (whether of the same or a different species,) shall be guilty of felony, and transportable for seven years. Which latter punishment is likewise inflicted on all persons armed with offensive weapons who shall come into such places with an intent to commit any of the said offences, and shall there unlawfully beat or wound any of the keepers in the execution of their offices, or shall attempt to rescue any person from their custody. Also, by statute 5 Geo. III. c. 14, the penalty of transportation for seven years is inflicted on persons stealing or taking fish in any water within a park, paddock, garden, orchard, or yard, and on the receivers, aiders, and abettors; and the like punishment, or whipping, fine, or imprisonment, is provided for the taking or killing of coneys(v) by night in open warrens; and a forfeiture of five pounds to the owner of the fishery is made payable by persons taking or destroying (or attempting so to do) any fish in any river or other water within any enclosed ground, being private property.[18] Stealing hawks, in disobedience to the rules prescribed by the statute 37 Edw. III. c. 19,

(s) *Cod.* 6, 2, 18.
(t) 1 Hal. P. C. 511. Fost. 366.
(u) 1 Hawk. P. C. 94. 1 Hal. P. C. 511.
(v) See stat. 22 & 23 Car. II. c. 25.

[15] See 5 Geo. III. c. 25, 42 Geo. III. c. 81, and 52 Geo. III. c. 143, with respect to these offences, by the latter of which statutes the provisions of the former are incorporated, and accessories before the fact are ousted of clergy, and may be tried before the principal is convicted. In a case under 7 Geo. III. c. 50, where a person was indicted as charger and sorter, and was acquitted on this special count, it was held that he could not be convicted on a general count as a person employed in the post-office on evidence that he was no otherwise employed than as a sorter. Shaw's case, 2 East, P. C. 580. A bill of exchange may be laid as a *warrant for the payment of money* within that statute. Willoughby's case, 2 East, P. C. 581.—Chitty.

[16] Repealed, by 7 & 8 Geo. IV. c. 27; and, by 7 & 8 Geo. IV. c. 29, s. 17, stealing goods or merchandise from any vessel, barge, or boat, in any port, river, or canal, or from any dock, wharf, or quay adjacent, is punishable with transportation for life or not less than seven years, or imprisonment not exceeding four years, with whipping to male offenders in addition.—Chitty.

[17] Repealed, by 7 & 8 Geo. IV. c. 27.—Chitty.

[18] These are also repealed.—Chitty.

is also felony.(w)[19] It is also said(x) that if swans be lawfully marked it is felony to steal them, though at large in a public river; and that it is likewise felony to steal them, though unmarked, if in any private river or pond; otherwise it is only a trespass. But of all valuable domestic animals, as horses and other beasts of draught, and of all animals *domitæ naturæ*, which serve for food, as neat or other cattle, swine, poultry, and the like, and of their fruit or produce, taken from them while living, as milk or wool,(y) larceny may be committed; and also of the flesh of such as are either *domitæ* or *feræ naturæ*, when killed.(z)[20] **As to those animals which do not serve for food, and which therefore the law holds to have no intrinsic [**235 value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein and maintain a civil action for the loss of them,(a) yet they are not of such estimation as that the crime of stealing them amounts to larceny.(b) But, by statute 10 Geo. III. c. 18, very high pecuniary penalties, or a long imprisonment and whipping in their stead, may be inflicted by two justices of the peace (with a very extraordinary mode of appeal to the quarter sessions) on such as steal, or knowingly harbour a stolen *dog*, or have in their custody the skin of a dog that has been stolen.(c)[21]

Notwithstanding, however, that no larceny can be committed unless there be some property in the thing taken, and an owner, yet, if the owner be unknown, provided there be a property, it is larceny to steal it, and an indictment will lie, for the goods of a person unknown.(d) In like manner as among the Romans the *lex Hostilia de furtis* provided that a prosecution for theft might be carried on without the intervention of the owner.(e) This is the case of stealing a shroud out of a grave; which is the property of those, whoever they were, that buried the deceased; but stealing the corpse itself, which has no owner, (though a matter of great indecency,) is no felony unless some of the grave-clothes be stolen with it.(f) Very different from the law of the Franks, which seems to have respected both as equal offences, when it directed that a person who had dug a corpse out of the ground in order to strip it should be banished from society, and no one suffered to relieve his wants till the relations of the deceased consented to his readmission.(g)

Having thus considered the general nature of simple larceny, I come next to treat of its *punishment*. Theft, by the Jewish law, was only punished with a

(w) 3 Inst. 98.
(x) Dalt. Just. c. 156.
(y) Dalt. 21. Crompt. 36. 1 Hawk. P. C. 93. 1 Hal. P. C. 507. The King *vs.* Martin, by all the judges. P. 17 Geo. III.
(z) 1 Hal. P. C. 511.
(a) See book ii. page 393.
(b) 1 Hal. P. C. 512.
(c) See the remarks in page 4. The statute hath now continued eighteen sessions of parliament unrepealed.
(d) 1 Hal. P. C. 512.
(e) Gravin. *l.* 3, § 106.
(f) See book ii. page 429.
(g) Montesq. Sp. L. b. xxx. c. 19.

[19] Repealed, by 7 & 8 Geo. IV. c. 27.—CHITTY.

[20] By statute 7 & 8 Geo. IV. c. 29, s. 25, it is enacted "that if any person shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, or shall wilfully kill any of such cattle, with intent to steal the carcass, or skin, or any part of the cattle so killed, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon."—CHITTY.

[21] By statute 7 & 8 Geo. IV. c. 29, s. 31, stealing any dog, beast, or bird ordinarily kept in a state of confinement, and not the subject of larceny at common law, is punishable by fine not exceeding 20*l.*, together with the value of the dog, &c. lost, for the first offence, and imprisonment not exceeding twelve months and whipping for the second offence. By sect. 32, persons being found in possession of any stolen dog or beast, or the skin thereof, or any bird, or plumage thereof, shall restore the same to the owners by order of a justice; and persons having them in their possession, knowing them to have been stolen, shall suffer the same punishment for each offence as set forth in sect. 31. And sect. 33 makes the killing, wounding, or taking any housedove or pigeon, under such circumstances as shall not amount to larceny at common law, punishable by fine, on conviction before a justice of the peace.—CHITTY.

These provisions, so far as they relate to dogs, are repealed, by stat. 8 & 9 Vict. c. 47, which enacts that the punishment for dog-stealing shall be imprisonment for six months and a fine over and above the value of the dog of 20*l.* for a first offence, and eighteen months' imprisonment for a second offence; and penalties are imposed for having possession of stolen dogs or their skins.—STEWART.

pecuniary fine, and satisfaction to the party injured.(h) And in the civil law, **till some very late constitutions, we never find the punishment capital. **236] The laws of Draco, at Athens, punished it with death; but his laws were said to be written in blood: and Solon afterwards changed the penalty to a pecuniary mulct. And so the Attic laws in general continued,(h) except that once, in a time of dearth, it was made capital to break into a garden and steal figs; but this law, and the informers against the offence, grew so odious that from them all malicious informers were styled sycophants; a name which we have much perverted from its original meaning. From these examples, as well as the reason of the thing, many learned and scrupulous men have questioned the propriety, if not lawfulness, of inflicting capital punishment for simple theft.(i) And certainly the natural punishment for injuries to property seems to be the loss of the offender's own property; which ought to be universally the case, were all men's fortunes equal. But as those who have no property themselves are generally the most ready to attack the property of others, it has been found necessary instead of a pecuniary to substitute a corporal punishment; yet how far this corporal punishment ought to extend is what has occasioned the doubt. Sir Thomas More,(j) and the marquis Beccaria,(k) at the distance of more than two centuries from each other, have very sensibly proposed that kind of corporal punishment which approaches the nearest to a pecuniary satisfaction, viz., a temporary imprisonment, with an obligation to labour, first for the party robbed, and afterwards for the public, in works of the most slavish kind; in order to oblige the offender to repair, by his industry and diligence, the depredations he has committed upon private *237] property and public order. But, notwithstanding *all the remonstrances of speculative politicians and moralists, the punishment of theft still continues, throughout the greatest part of Europe, to be capital; and Puffendorf,(l) together with Sir Matthew Hale,(m) are of opinion that this must always be referred to the prudence of the legislature, who are to judge, say they, when crimes are become so enormous as to require such sanguinary restrictions.(n) Yet both these writers agree that such punishment should be cautiously inflicted, and never without the utmost necessity.

Our antient Saxon laws nominally punished theft with death, if above the value of twelvepence; but the criminal was permitted to redeem his life by a pecuniary ransom; as among their ancestors, the Germans, by a stated number of cattle.(o) But in the ninth year of Henry the First this power of redemption was taken away, and all persons guilty of larceny above the value of twelvepence were directed to be hanged; which law continues in force to this day.(p) For though the inferior species of theft or petit larceny is only punished by imprisonment or whipping at common law,(q) or, by statute 4 Geo. I. c. 11, may be extended to transportation for seven years, as is also expressly directed in the case of the plate-glass company,(r) yet the punishment of grand larceny, or the stealing above the value of twelvepence, (which sum was the standard in the time of king Athelstan, eight hundred years ago,) is at common law regularly death. Which, considering the great intermediate alteration(s) in the price or denomination of money, is undoubtedly a very rigorous constitution, and made Sir Henry Spelman (above a century since, when money was at twice its present rate) complain that, while every thing

(h) Exod. xxii.

(h) Petit. *LL. Attic. l.* 7, tit. 5.

(i) *Est enim ad vindicanda furta nimis atrox, nec tamen ad refrænanda sufficiens; quippe neque furtum simplex tam ingens facinus est, ut capite debeat plecti; neque ulla pœna est tanta, ut ab latrociniis cohibeat eos, qui nullam aliam artem quærendi victus habent.* Mori *Utopia, edit. Glasg.* 1750, page 21. *Denique, cum lex Mosaica, quanquam inclemens et aspera, tamen pecunia furtum, haud morte, mulctavit; ne putemus Deum, in nova lege clementiæ qua pater imperat filiis majorem indulsisse nobis invicem sæviendi licentiam. Hæc sunt cur non licere putem; quam vero sit absurdum, atque etiam perniciosum reipublicæ, furem atque homicidam ex æquo puniri, nemo est (opinor) qui nesciat.* Ibid. 39.

(j) *Utop.* page 42.

(k) Ch. 22.

(l) L. of N. b. viii. c. 3.

(m) 1 Hal. P. C. 13.

(n) See page 9.

(o) Tac. *de Mor. Germ.* c. 12.

(p) 1 Hal. P. C. 12. 3 Inst. 53.

(q) 3 Inst. 218.

(r) Stat. 13 Geo. III. c. 38.

(s) In the reign of king Henry I. the stated value, at the exchequer, of a pasture-fed ox, was one shilling, (*Dial. de Scacc. l.* 1, § 7,) which, if we should even suppose to mean the *solidus legalis* mentioned by Lyndewode, (Prov. *l.* 3, c. 13. See book ii. page 509,) or the seventy-second part of a pound of gold, is only equal to 13*s.* 4*d.* of the present standard.

else was risen in its nominal value and become dearer, the life of man had continually grown *cheaper.(t) It is true that the mercy of juries will often make them strain a point and bring in larceny to be under the value of [*238 twelvepence when it is really of much greater value; but this, though evidently justifiable and proper when it only reduces the present nominal value of money to the antient standard,(u) is otherwise a kind of pious perjury, and does not at all excuse our common law in this respect from the imputation of severity, but rather strongly confesses the charge. It is likewise true, that by the merciful extensions of the benefit of clergy by our modern statute law, a person who commits a simple larceny to the value of thirteenpence or thirteen hundred pounds, though guilty of a capital offence, shall be excused the pains of death; but this is only for the first offence. And in many cases of simple larceny the benefit of clergy is taken away by statute; as for horse-stealing in the principals and accessories both *before* and *after* the fact;(w) theft by great and notorious thieves in Northumberland and Cumberland;(x) taking woollen cloth from off the tenters,(y) or linens, fustians, calicoes, or cotton goods from the place of manufacture,(z)[22] (which extends, in the last case, to aiders, assisters, procurers, buyers, and receivers;) feloniously driving away or otherwise stealing one or more sheep or other cattle specified in the acts,[23] or killing them with intent to steal the whole or any part of the carcase,(a) or aiding or assisting therein; thefts on navigable rivers above the value of forty shillings,(b) or being present, aiding and assisting, thereat;[24] *plundering vessels in distress, or that have suffered shipwreck;(c) stealing letters sent by the post;(d) and [*239 also stealing deer, fish, hares, and coneys under the peculiar circumstances mentioned in the Waltham black act.[25] Which additional severity is owing to

(t) Gloss. 350.
(u) 2 Inst. 189.
(w) Stat. 1 Edw. VI. c. 12. 2 & 3 Edw. VI. c. 33. 31 Eliz. c. 12.
(x) Stat. 18 Car. II. c. 3.
(y) Stat. 22 Car. II. c. 5. But, as it is sometimes difficult to prove the identity of the goods so stolen, the *onus probandi* with respect to innocence is now, by statute 15 Geo. II. c. 27, thrown on the persons in whose custody such goods are found; the failure whereof is, for the first time, a misdemeanour punishable by the forfeiture of the treble value; for the second, by imprisonment also; and the third time it becomes a felony, punished with transportation for seven years.
(z) Stat. 18 Geo. II. c. 27. Note, in the three last cases an option is given to the judge to transport the offender: for *life* in the first case, for *seven years* in the second, and for *fourteen years* in the third,—in the first and third cases *instead* of sentence of death, in the second *after* sentence is given.
(a) Stat. 14 Geo. II. c. 6. 15 Geo. II. c. 34. See book i. p. 88.
(b) Stat. 24 Geo. II. c. 45.
(c) Stat. 12 Anne, st. 2, c. 18. 26 Geo. II. c. 19.
(d) Stat. 7 Geo. III. c. 50.
(e) Stat. 9 Geo. I. c. 22.

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[22] Clergy is restored by 4 Geo. IV. c. 53, which is now repealed by 7 & 8 Geo. IV. c. 27; and, by 7 & 8 Geo. IV. c. 28, s. 6, it is enacted "that benefit of clergy with respect to persons convicted of felony shall be abolished, but that nothing herein contained shall prevent the joinder, in any indictment, of any counts which might have been joined before the passing of this act."

By statute 7 & 8 Geo. IV. c. 30, s. 3, maliciously cutting or destroying any goods or article of silk, woollen, linen, or cotton, or of any such materials mixed, or of any framework-knitted piece, stocking, hose, or lace, being in any loom or frame, or on any machine or engine, rack, or tenter, or any machinery whatsoever belonging to those manufactures, or entering any manufactory, building, or place with intent to commit such offences, is punishable with transportation for life or not less than seven years, or imprisonment not exceeding four years, with whipping in addition to male offenders. The 4 Geo. IV. c. 46 is repealed by 7 & 8 Geo. IV. c. 27. The former statute repealed the capital felony prescribed by 22 Geo. III. on this subject.

By 7 & 8 Geo. IV. c. 29, s. 16, stealing to the value of 10*s.* any silk, woollen, linen, or cotton, or any mixture of such materials, whilst exposed in any stage of manufacture, in any field, or building, or other place, is punishable with transportation for life or not exceeding fourteen years, or imprisonment not exceeding four years, with private or public whipping.—CHITTY.

[23] Repealed, by 7 & 8 Geo. IV. c. 27.—CHITTY.

[24] Clergy was allowed by statute 4 Geo. IV. c. 54, which is now repealed, by 7 & 8 Geo. IV. c. 27.—CHITTY.

[25] By 7 & 8 Geo. IV. c. 29, s. 18, any person plundering or stealing any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall suffer death as a felon; provided that where articles of small value shall be stranded or cast on shore, and stolen, without cruelty, outrage, or violence, the offender may be prosecuted and

the great malice and mischief of the theft in some of these instances; and, in others, the difficulties men would otherwise lie under to preserve those goods which are so easily carried off. Upon which last principle the Roman law punished more severely than other thieves the *abigei*, or stealers of cattle,(*f*) and the *balnearii*, or such as stole the clothes of persons who were washing in the public baths;(*g*) both which constitutions seem to be borrowed from the laws of Athens.(*h*) And so too the antient Goths punished with unrelenting severity thefts of cattle, or corn that was reaped and left in the field; such kind of property (which no human industry can sufficiently guard) being esteemed under the peculiar custody of heaven.(*i*) And thus much for the offence of *simple* larceny.

Mixed or *compound* larceny is such as has all the properties of the former, but is accompanied with either one or both of the aggravations of a taking from one's *house* or *person*. First, therefore, of larceny from the *house*, and then of larceny from the *person*.

1. Larceny from the *house*, though it seems (from the considerations mentioned in the preceding chapter)(*j*) to have a higher degree of guilt than simple larceny, yet it is not at all distinguished from the other at common law,(*k*) unless where it is accompanied with the circumstance of breaking the house by night, and then we have seen that it falls under another description, viz., that of burglary. But now, by several acts of parliament, (the history of which is very ingeniously deduced by a learned modern writer,(*l*) who hath shown them to have gradually arisen from our *improvements in trade and opulence,) the benefit of clergy is taken from larcenies committed in a house in almost every instance, except that larceny of the stock or utensils of the plate-glass company from any of their houses, &c. is made only a single felony, and liable to transportation for seven years.(*m*) The multiplicity of the general acts is apt to create some confusion; but upon comparing them diligently we may collect that the benefit of clergy is denied upon the following domestic aggravations of larceny, viz.: First, in larcenies *above the value of twelvepence*, committed—1. In a church or chapel, with or without violence or breaking the same:(*n*) 2. In a booth or tent in a market or fair, in the daytime or in the night, by violence or breaking the same, the owner or some of his family being therein:(*o*) 3. By robbing a dwelling-house in the daytime, (which *robbing* implies a breaking,) any person being therein:(*p*) 4. In a dwelling-house by day or by night, without breaking the same, any person being therein and put in fear,(*q*) which amounts in law to a robbery; and in both these last cases the accessory before the fact is also excluded from his clergy.[26] Secondly, in lar-

*240]

(*f*) *Ff.* 47, *t.* 14.
(*g*) Ibid. *t.* 17.
(*h*) Pott. Antiq. b. i. c. 26.
(*i*) Stiernh. *de jure Goth. l.* 3, c. 5.
(*j*) See page 223.
(*k*) 1 Hawk. P. C. 98.
(*l*) Barr, 375, &c.
(*m*) Stat. 13 Geo. III. c. 38.
(*n*) Stat. 23 Hen. VIII. c. 1. 1 Edw. VI. c. 12. 1 Hal. P. C. 518.
(*o*) Stat. 5 & 6 Edw. VI. c. 9. 1 Hal. P. C. 522.
(*p*) 3 & 4 W. and M. c. 9.
(*q*) Ibid.

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punished as for simple larceny; and in either case the offender may be tried in the county in which the offence is committed, or that next adjoining. The 12 Anne, st. 2, c. 18, and 26 Geo. II. c. 19, so far as they relate to the same subject, were repealed, by the 7 & 8 Geo. IV. c. 27.—Chitty.

[26] By 7 & 8 Geo. IV. c. 29, s. 12, it is enacted "that if any person shall break and enter any dwelling-house, and steal therein any chattel, money, or valuable security, to any value whatever, or shall steal any such property to any value whatever in any dwelling-house, any person therein being put in fear, or shall steal in any dwelling-house any chattel, money, or valuable security, to the value, in the whole, of 5*l.* or more, every such offender, being convicted thereof, shall suffer death as a felon."

And, by sect. 14, breaking into any building being within the curtilage of a dwelling-house, *but not part thereof*, and stealing therefrom, is punishable with transportation for life or not less than seven years, or imprisonment not exceeding four years, with private or public whipping to male offenders.

The 23 Hen. VIII. c. 1, s. 3, 1 Edw. VI. c. 12, s. 10, 5 & 6 Edw. VI. c. 9, s. 4, 39 Eliz. c. 15, 3 & 4 W. and M. c. 9, 10 & 11 W. III. c. 23, 12 Anne, st. 1, c. 7, ss. 1, 2, are all repealed, by 7 & 8 Geo. IV. c. 27.—Chitty.

cenies *to the value of five shillings*, committed—1. By breaking any dwelling-house, or any out-house, shop, or warehouse thereunto belonging, in the daytime, although no person be therein;(r) which also now extends to aiders, abettors, and accessories before the fact:(s) 2. By privately stealing goods, wares, or merchandise, in any shop, warehouse,(t) coach-house, or stable, by day or by night, though the same be not broken open, and though no person be therein;(u)[27] which likewise extends to such as assist, hire, or command the offence to be committed. Lastly, in larcenies *to the value of forty shillings*, in a dwelling-house or its out-houses, although the same be not broken, and whether any person be therein or no, unless committed against their masters by apprentices under the age of fifteen.(v) This also extends to those who aid or assist in the commission of any such offence.[28]

*2. Larceny from the *person* is either by *privately* stealing or by open and violent assault, which is usually called *robbery*. [*241

The offence of *privately* stealing from a man's *person*, as by picking his pocket or the like privily without his knowledge, was debarred of the benefit of clergy so early as by the statute 8 Eliz. c. 4.[29] But then it must be such a larceny as stands in need of the benefit of clergy, viz., of above the value of twelvepence, or else the offender shall not have judgment of death. For the statute creates no new offence, but only prevents the prisoner from praying the benefit of clergy, and leaves him to the regular judgment of the antient law.(w) This severity (for a most severe law it certainly is) seems to be owing to the ease with which such offences are committed, the difficulty of guarding against them, and the boldness with which they were practised (even in the queen's court and presence) at the time when this statute was made: besides that this is an infringement of property in the manual occupation or corporal possession of the owner which was an offence even in a state of nature. And therefore the *saccularii* or cut-purses were more severely punished than common thieves by the Roman and Athenian laws.(x)[30]

(r) Stat. 39 Eliz. c. 15.
(s) Stat. 3 & 4 W. and M. c. 9.
(t) See Foster, 78. Barr. 379.
(u) Stat. 10 & 11 W. III. c. 23.
(v) Stat. 12 Anne, st. 1, c. 7.[28]
(w) 1 Hawk. P. C. 98. The like observation will certainly hold in the cases of horse-stealing, (1 Hal. P. C. 531,) thefts in Northumberland and Cumberland, and stealing woollen cloth from the tenters, and possibly in such other cases where it is provided by any statute that simple larceny, under certain circumstances, shall be felony without benefit of clergy.
(x) *Ff.* 47, 11, 7. Pott. Antiq. b. i. c. 26.

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[27] By statute 7 & 8 Geo. IV. c. 29, s. 15, persons breaking and entering any shop, warehouse, or counting-house, and stealing therein any chattel, money, or valuable security, are liable to transportation for life or not less than seven years, or imprisonment not exceeding four years, with private or public whipping for male offenders.—CHITTY.

[28] Repealed, by stat. 7 & 8 Geo. IV. c. 27. The sum mentioned in the text is now raised to five pounds.—CHITTY.

[29] Repealed, by 7 & 8 Geo. IV. c. 27; and see 7 & 8 Geo. IV. c. 28, ss. 6, 7; the former enacting that benefit of clergy, with respect to persons convicted of felony, shall be abolished, and the latter, that no person convicted of felony shall suffer death unless for some felony excluded from benefit of clergy before or on the first day of the then present session of parliament, or made punishable with death by some statute passed after that day.—CHITTY.

[30] By 7 & 8 Geo. IV. c. 29, s. 6, if any person shall rob any other person of any chattel, money, or valuable security, every such offender, being convicted thereof, shall suffer death as a felon; and, if any person shall *steal any such property from the person* of another, or shall assault any other person with intent to rob him, or shall with menaces or by force demand any such property of any other person, with intent to steal the same, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to transportation for life or not less than seven years, or to be imprisoned not exceeding four years, with, if a male, public or private whippings. This statute is nearly a consolidation of 3 W. and M. c. 9, s. 1, respecting robbery, of 48 Geo. III. c. 129, respecting stealing from the person, and of 4 Geo. IV. c. 54, respecting assaults, &c. with intent to rob. The 23 Hen. VIII. c. 1, 3 W. and M. c. 9, and 1 Edw. VI. c. 12, relating to robbery, the 48 Geo. III. c. 129, relating to stealing from the person, and the 4 Geo. IV. c. 54, relating to assaults with intent to rob, are repealed, by the 7 & 8 Geo. IV. c. 27. The *value* of the property is immaterial in all the cases mentioned in the new act.

To constitute a stealing from the person, the thing must be completely removed from

Open and violent larceny from the *person*, or *robbery*, the *rapina* of the civilians, is the felonious and forcible taking from the person of another of goods or money to any value by violence or putting him in fear.(*y*) 1. There must be a taking, otherwise it is no robbery. A mere attempt to rob was indeed held to be felony so late as Henry the Fourth's time,(*z*) but afterwards it was taken to be only a misdemeanour, and punishable with fine and imprisonment, till the *242] *statute 7 Geo. II. c. 21, which makes it a felony (transportable for seven years) unlawfully and maliciously to assault another with any offensive weapon or instrument, or by menaces or by other forcible or violent manner to demand any money or goods, with a felonious intent to rob.[31] If the thief, having once taken a purse, returns it, still it is a robbery; and so it is whether the taking be strictly from the person of another, or in his presence only; as where a robber by menaces and violence puts a man in fear, and drives away his sheep or his cattle before his face.(*a*) But if the taking be not either directly from his person or in his presence, it is no robbery.(*b*) 2. It is immaterial of what value the thing taken is: a penny as well as a pound thus forcibly extorted makes a robbery.(*c*) 3. Lastly, the taking must be by force or a previous putting in fear, which makes the violation of the person more atrocious than privately stealing; for, according to the maxim of the civil law,(*d*) "*qui vi rapuit, fur improbior esse videtur.*" This previous violence or putting in fear is the criterion that distinguishes robbery from other larcenies; for if one privately steals sixpence from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent;(*e*) neither is it capital, as privately stealing, being under the value of twelvepence. Not that it is indeed necessary, though usual, to lay in the indictment that the robbery was committed by *putting in fear:* it is sufficient if laid to be done by *violence.*(*f*) And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed: it is enough that so much force or threatening by word or gesture be used as might create an apprehension of danger, or induce a man to part with his property without or against his consent.(*g*) Thus, if a man be knocked down without previous warning and stripped of his property while senseless, though strictly he cannot be said to be *put in fear*, *yet this is undoubtedly a robbery. Or, if a person with *243] a sword drawn begs an alms, and I give it him through mistrust and

(*y*) 1 Hawk. P. C. 95.
(*z*) 1 Hal. P. C. 532.
(*a*) Ibid. 533.
(*b*) Comyns, 478. Stra. 1015.
(*c*) 1 Hawk. P. C. 97.
(*d*) *Ff.* 4. 2, 14, § 12.
(*e*) 1 Hal. P. C. 534.
(*f*) Trin. 3 Anne, by all the judges.
(*g*) Fost. 128.

the person: removal from the place where it was, if it remain throughout with the person, is not sufficient. Rex *vs.* Thompson, 1 R. & M. C. C. 78.—Chitty.

The punishment for this offence is now awarded by stat. 1 Vict. c. 87, s. 2, which repeals so much of 7 & 8 Geo. IV. c. 29 as relates to these offences, and enacts that whosoever shall rob any person, and, at the time of or immediately before or after such robbery, shall stab, cut, or wound any person, shall be guilty of felony, and be punishable with death; and, by ss. 3 & 10, whoever shall, being armed with any offensive weapon or instrument, rob, or assault with intent to rob, any person, or, together with one or more persons, shall rob any person, and, at the time of or immediately before or after such robbery, shall beat, strike, or use any other personal violence to any person, or, by s. 5, shall rob any person or steal any property from the person of another, shall be guilty of felony, and be liable to transportation for life or for not less than fifteen years, or imprisonment for three years,—for which penal servitude is now substituted. 16 & 17 Vict. c. 99. The assaulting with intent to rob, or obtaining property by menaces, (except where a greater punishment is awarded by the act,) is punishable with imprisonment not exceeding three years.—Stewart.

[31] By 7 & 8 Geo. IV. c. 29, s. 7, if any person shall accuse or threaten to accuse any other person of any infamous crime, as described in s. 9, with a view or intent to extort or gain from him, and shall by intimidating him by such accusation or threat extort or gain from him, any chattel, money, or valuable security, every such offender shall be deemed guilty of robbery, and shall be indicted and punished accordingly.

It is equally a robbery to extort money from a person by threatening to accuse him of an unnatural crime, whether the party so threatened has been guilty of such crime or not. Rex *vs.* Gardner, 1 C. & P. 79.—Chitty.

apprehension of violence, this is a felonious robbery.(*h*) So if, under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him. But it is doubted(*i*) whether the forcing a higgler or other chapman to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery.[32]

(*h*) 1 Hawk. P. C. 96. (*i*) Ibid. 97.

[32] And see R. & R. C. C. 146. 1 Leach, 139, 193, 278. 3 Chit. C. L. 803. Mr. Justice Ashurst says, "The true definition of robbery is the stealing or taking from the person of another, or in the presence of another, property of any amount, with such a degree of *force or terror* as to induce the party *unwillingly* to part with his property; and whether terror arises from real or expected violence to the person, or from a sense of injury to the character, makes no kind of difference; for to most men the idea of losing their fame and reputation is equally if not more terrific than the dread of personal injury. The principal ingredient in robbery is a man's being *forced* to part with his property; and the judges are unanimously of opinion that, upon the principles of law as well as the authority of former decisions, a threat to accuse a man of the greatest of all crimes is a sufficient force to constitute the crime of robbery by putting in fear." 1 Leach, 280. And fear of loss of character and service upon a charge of sodomitical practices is sufficient to constitute robbery, though the party has no fear of being taken into custody or of punishment. R. & R. C. C. 375. But if no actual force was used, and, at the time of parting with the money, the party were under no apprehension, but gave it merely for the purpose of bringing the offenders to justice, they cannot be capitally convicted, though we have seen it is otherwise where personal violence is employed. 1 East, P. C. 734. R. & R. C. C. 408. And the influence exercised over the mind, where the force is merely constructive, must be of such a kind as to disenable the prosecutor to make resistance. 2 Leach, 721. 6 East, 126. So that a threat to take an innocent person before a magistrate, and thence to prison, without charging him with any specific crime, is not sufficient to make the party a robber if he obtain money to induce him to forbear. 2 Leach, 721. Indeed, it has been said that the only instance in which a threat will supply the place of force is an accusation of unnatural practices. 2 Leach, 730, 731. 1 Leach, 139. 2 Russ. 1009. And it has recently been held—contrary, it seems, to the principle of some former decisions—that even in this case the money must be taken immediately on the threat, and not after time has been allowed to the prosecutor to deliberate and advise with friends as to the best course to be pursued, (1 East, P. C. Append. xxi.;) though, as some of the judges dissented, it does not seem to be decisive. Where, on the other hand, there is an immediate threat of injury to the property, as by pulling down a house with a mob in time of riots, which produces great alarm and induces a man to part with his money, this has been holden to be a sufficient putting in fear to constitute robbery. 2 East, P. C. 729, 731. And if a man assaults a woman with intent to commit a rape, and she, in order to prevail on him to desist, offers him money which he takes, but continues his endeavours till prevented by the approach of a third person, he will be guilty of robbery, though his original intent was to ravish. 1 East, P. C. 711. If thieves meet a person and, by menaces of death, make him swear to bring them money, and he, under the continuing influence of fear for his life, complies, this is robbery in them, though it would not be so if he had no personal fear and acted merely from a superstitious regard to an oath so extorted. 1 East, P. C. 714. In the absence of force, to constitute robbery, the fear must arise before and at the time of the property being taken: it is not enough that it arise afterwards; and where the prisoner by stealth took some money out of the prosecutor's pocket, who turned round, saw the prisoner, and demanded the money, but the prisoner threatening him he desisted through fear from making any further demand, it was held no robbery. Roll. Rep. 154. 1 Hale, 534.

To constitute a robbery, where an actual violence is relied on and no putting in fear can be expressly shown, there must be a struggle, or at least a personal outrage. So that to snatch property suddenly from the hand, to seize a parcel carried on the head, to carry away a hat and wig without force, and to take an umbrella of a sudden, have been respectively holden to be mere larcenies. 1 Leach, 290, 291, and in notes. But where a man snatched at the sword of a gentleman hanging at his side, and the latter, perceiving the design, laid hold on the scabbard, on which a contest ensued and the thief succeeded in wresting the weapon from its owner, his offence was holden to be robbery. Id. ibid. Snatching an article from a man will constitute robbery if it is attached to his person or clothes so as to afford resistance; and therefore, where the prosecutor's watch was fastened to a steel chain which went round his neck, and the seal and chain hung from his fob, and the prisoner laid hold of the seal and chain and pulled the watch from his fob but the steel chain still secured it, and by two jerks the prisoner broke the steel chain and made off with the watch, it was held a robbery, for the prisoner did not get the watch at once, but had to overcome the resistance the steel chain made, and actual force

This species of larceny is debarred of the benefit of clergy by statute 23 Hen. VIII. c. 1 and other subsequent statutes, not indeed in general, but only when committed in a dwelling-house or in or near the king's highway. A robbery, therefore, in a distant field, or footpath, was not punished with death,(*k*) but was open to the benefit of clergy, till the statute 3 & 4 W. and M. c. 9, which takes away clergy from both principals and accessories before the fact, in robbery, wheresoever committed.[33]

II. *Malicious mischief*, or damage, is the next species of injury to private property which the law considers as a public crime. This is such as is done, not *animo furandi*, or with an intent of gaining by another's loss, which is some, though a weak, excuse, but either out of a spirit of wanton cruelty or black and diabolical revenge. In which it bears a near relation to the crime of arson; for as that affects the habitation, so this does the other property, of individuals. And therefore any damage arising from this mischievous disposition, though only a trespass at common law, is now by a multitude of statutes made penal in the highest degree. Of these I shall extract the contents in order of time.

And, first, by statute 22 Hen. VIII. c. 11, perversely and maliciously to cut down or destroy the powdike in the fens of Norfolk and Ely is felony.[34] And, in like manner, it is, by many special statutes enacted upon the occasions, made felony to destroy the several sea-banks, river-banks, public navigations, and bridges, erected by virtue of those acts of *parliament. By statute 43 Eliz. c. 13, (for preventing rapine on the northern borders,) to burn any barn or stack of corn or grain; or to imprison or carry away any subject in order to ransom him, or to make prey or spoil of his person or goods upon deadly feud or otherwise, in the four northern counties of Northumberland, Westmoreland, Cumberland, and Durham, or being accessory before the fact to such carrying away or imprisonment; or to give or take any money or contribution, there called *blackmail*, to secure such goods from rapine; is felony without benefit of clergy. By statute 22 & 23 Car. II. c. 7, maliciously, unlawfully, and willingly, in the night-time to burn, or cause to be burned or destroyed, any ricks or stacks of corn, hay, or grain, barns, houses, buildings, or kilns,[35] or to kill any horses, sheep, or other cattle, is felony; but the offender may make his election to be transported for seven years; and to maim or hurt such horses, sheep, or other cattle is a trespass, for which treble damages shall be recovered.[36]

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(*k*) 1 Hal. P. C. 535.

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was used for that purpose. R. & R. C. C. 419. And where a heavy diamond pin, with a corkscrew stalk, which was twisted and strongly fastened in a lady's hair, was snatched out and part of the hair torn away, the judges came to a similar decision. 1 Leach, 335. The case of the man who tore an ear-ring from the ear, and in so doing lacerated the flesh, serves also to confirm this position. 1 Leach, 320. Nor will it excuse the violence that it was done under pretence of law; for where a bailiff handcuffed a prisoner and used her with great cruelty for the purpose of extorting money from her, he was holden to be guilty; as were also a number of men for seizing a wagon under pretence that there was no permit when none was in reality necessary. 1 Leach, 280. 1 East, P. C. 709.—Chitty.

[33] These statutes are repealed, by 7 & 8 Geo. IV. c. 27.—Chitty.

[34] By 15 Car. II. c. 17, s. 13, maliciously to cut down or to destroy any works for conveying the waters of the great Bedford level is subject to the same punishment.—Chitty.

[35] By stat. 7 & 8 Geo. IV. c. 30, s. 17, maliciously setting fire to any stack of corn, grain, pulse, straw, hay, or wood is a capital felony; and setting fire to any crops of corn, grain, or pulse, whether standing or cut down, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever growing, is a felony, punishable with transportation not exceeding seven years, or imprisonment not exceeding two years, with private or public whipping for male offenders. The 43 Eliz. c. 13, 4 W. and M. c. 23, 22 & 33 Car. II. c. 7, 1 Geo. I. s. 2, c. 48, 6 Geo. I. c. 16, 9 Geo. I. c. 22, and 28 Geo. II. c. 19, s. 3, are repealed, by 7 & 8 Geo. IV. c. 27.—Chitty.

[36] By stat. 7 & 8 Geo. IV. c. 30, s. 16, maliciously killing, maiming, or wounding any cattle is a felony, punishable with transportation for life or not less than seven years, or imprisonment not exceeding four years, with private or public whipping. The 22 & 23 Car. II. c. 7, 14 Geo. II. c. 6, and 15 Geo. II. c. 34, on this head, are repealed, by 7 & 8 Geo.

By statute 4 & 5 W. and M. c. 23, to burn on any waste, between Candlemas and Midsummer, any grig, ling, heath, furze, goss, or fern is punishable with whipping and confinement in the house of correction. By statute 1 Anne, st. 2, c. 9, captains and mariners belonging to ships and destroying the same, to the prejudice of the owners, (and, by 4 Geo. I. c. 12, to the prejudice of insurers also,) are guilty of felony without benefit of clergy. And by statute 12 Anne, st. 2, c. 18, making any hole in a ship in distress, or stealing her pumps, or aiding or abetting such offence, or wilfully doing any thing tending to the immediate loss of such ship, is felony without benefit of clergy.[37] By statute 1 Geo. I. c. 48, maliciously to set on fire any underwood, wood, or coppice is made single felony. By statute 6 Geo. I. c. 23, the wilful and malicious tearing, cutting, spoiling, burning, or defacing of the garments or clothes of any person passing in the streets or highways, with intent so to do, is felony. This was occasioned by the insolence of certain weavers and others, who, upon the introduction of some Indian fashions prejudicial to their own manufactures, made it their practice to deface them, either by open outrage, or by privily cutting, or casting *aqua-fortis* *in the streets upon such as wore them.[38] By statute 9 Geo. I. c. 22,[39] commonly called the Waltham black act, [*245 occasioned by the devastations committed near Waltham, in Hampshire, by persons in disguise or with their faces blacked, (who seem to have resembled the Roberdsmen, or followers of Robert Hood, that in the reign of Richard the First committed great outrages on the borders of England and Scotland;)(*l*) by this black act, I say, which has in part been mentioned under the several heads of riots, menaces, mayhem, and larceny,(*m*) it is further enacted that to set fire to any house, barn, or out-house, (which is extended by statute 9 Geo. III. c. 29 to the malicious and wilful burning or setting fire to all kinds of mills,) or to any hovel, cock, mow, or stack of corn, straw, hay, or wood; or unlawfully or maliciously to break down the head of any fish-pond, whereby the fish shall be lost or destroyed; or, in like manner, to kill, maim, or wound any cattle; or cut down or destroy any trees planted in an avenue, or growing in a garden, orchard, or plantation, for ornament, shelter, or profit; all these malicious acts, or procuring by gift or promise of reward any person to join them therein, are felonies without benefit of clergy; and the hundred shall be chargeable for the damages unless the offender be convicted.[40] In like manner,

(*l*) 3 Inst. 197. (*m*) See pages 144, 208, 235, 240.

IV. c. 27. By s. 25, it is provided that malice against the owner of the property destroyed shall not be essential to *any* offence under the act.—CHITTY.

[37] By 7 & 8 Geo. IV. c. 30, s. 9, maliciously setting fire to, or in any wise destroying, any ship or vessel, whether in a finished or unfinished state, is a capital felony. And, by s. 10, maliciously damaging any ship otherwise than by fire is a felony, punishable with transportation for seven years or imprisonment not exceeding two years, with private or public whipping. And, by s. 11, exhibiting false lights or signals to bring any ship or vessel into danger, or tending to its immediate destruction, or destroying the same in distress or when cast on shore, or any of its contents, or preventing any assistance to those on board, is made a capital felony. And, by 1 & 2 Geo. IV. c. 75, s. 11, injuring or concealing any buoys, ropes, or marks belonging to any anchor or cable attached to any ship or vessel whatever, whether in distress or otherwise, is punishable with transportation for any term not exceeding seven years, or imprisonment for any number of years at the discretion of the court.—CHITTY.

[38] This statute was repealed, by 7 Geo. IV. c. 64, and no subsequent enactment on the subject has been made.—CHITTY.

[39] Repealed, by 7 & 8 Geo. IV. c. 27.—CHITTY.

[40] By 7 & 8 Geo. IV. c. 30, s. 15, maliciously breaking down or destroying the dam of any fishpond, or of any water being private property, or in which there is any private right of fishery, with intent to destroy the fish therein, or putting any lime or other noxious ingredient therein with intent to destroy the fish, or breaking down the dam of any mill-pond, is declared to be a misdemeanour, punishable at the discretion of the court with transportation for seven years or imprisonment not exceeding two years, with private or public whipping for male offenders. 5 Eliz. c. 21 and 4 Geo. IV. c. 54 are repealed as they relate to this subject, by 7 & 8 Geo. IV. c. 27, as also the 9 Geo. III. c. 29.

by the Roman law, to cut down trees, and especially vines, was punished in the same degree as robbery.(n) By statutes 6 Geo. II. c. 37, and 10 Geo. II. c. 32, it is also made felony without the benefit of clergy maliciously to cut down any river or sea bank, whereby lands may be overflowed or damaged; or to cut any hop-binds growing in a plantation of hops,[41] or wilfully and maliciously to set on fire, or cause to be set on fire, any mine, pit, or depth of coal.[42] By statute 11 Geo. II. c. 22, to use any violence in order to deter any person from buying corn or grain; to seize any carriage or horse carrying grain or meal to or from any market or seaport; or to use any outrage with such intent; or to scatter, take away, spoil, or damage such grain or meal, is punished *for the first offence with imprisonment and public whipping; and the second offence, or destroying any granary where corn is kept for exportation, or taking away or spoiling any grain or meal in such granary, or in any ship, boat, or vessel intended for exportation, is felony, subject to transportation for seven years.[43] By statute 28 Geo. II. c. 19, to set fire to any goss, furze, or fern

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(n) *Ff.* 47, 7, 2.

By statute 7 & 8 Geo. IV. c. 31, s. 2, it is enacted "that if any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture or branch thereof, or any machinery, whether fixed or movable, prepared for or employed in any manufacture or in any branch thereof, or any steam-engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, wagon-way, or trunk for conveying minerals from any mine, shall be feloniously demolished, pulled down, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together, in every such case the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, by whatever name it shall be denominated, in which any of the said offences shall be committed, shall be liable to yield full compensation to the person or persons damnified by the offence, not only for the damage so done to any of the subjects hereinbefore enumerated, but also for any damage which may at the same time be done by any such offenders to any fixture, furniture, or goods whatever in any such church, chapel, house, or other of the buildings or erections aforesaid."

By sect. 3, persons damnified by the offence, or the servant in whose charge the injured property was intrusted, must within seven days after the offence has been committed go before a justice of the peace residing within the hundred, and state on oath the name of the offender, if known, and submit to an examination touching the offence, and become bound to prosecute the offenders when taken. The action must be commenced within three calendar months after the offence.

By sect. 4, all process in the action must be served on the high constable, who within seven days must give notice thereof to two magistrates of the division, and who may defend or let judgment go by default, as advised.

By sect. 5, any inhabitant of the hundred may be a competent witness. By sect. 6, if the plaintiff recovers, the writ of execution is not to be enforced, but the sheriff on receipt of it is to make his warrant to the county treasurer, who is directed to pay the amount. Sect. 7 directs that the high constable's expenses are to be allowed by two justices and paid by the county treasurer. The whole of such moneys are to be levied on the hundred over and above their share of the county rate.

By sect. 8, where the injury does not exceed 30*l.*, the parties are to give notice to the high constable of their claim for compensation, who is to exhibit the same to two magistrates in the division; and they are to appoint a special petty session between twenty and thirty days afterwards to determine the claim.

By stat. 7 & 8 Geo. IV. c. 27, all prior acts relating to actions against the hundred are repealed; and the hundred is now no longer liable in cases of robbery, but only in cases where the damage is done by a riotous assembly.—Chitty.

[41] Benefit of clergy was restored, by stat. 4 Geo. IV. c. 46, and transportation and imprisonment substituted. This act is now repealed, by 7 & 8 Geo. IV. c. 27, as also th acts mentioned in the text.—Chitty.

[42] By stat. 7 & 8 Geo. IV. c. 30, s. 18, maliciously destroying any hop-binds growing on poles in plantations of hops is a felony, liable to transportation for life or not less than seven years, or imprisonment not exceeding four years, with private or public whipping. And, by sect. 5, setting fire to any coal-mine is a capital felony.—Chitty.

[43] The latter part of this act, relating to the damages to which the hundred is liable, is

growing in any forest or chase is subject to a fine of five pounds.[44] By statutes 6 Geo. III. c. 36 & 48, and 13 Geo. III. c. 33, wilfully to spoil or destroy any timber or other trees, roots, shrubs, or plants is for the two first offences liable to pecuniary penalties; and for the third, if in the daytime, and even for the first, if at night, the offender shall be guilty of felony and liable to transportation for seven years.[45] By statute 9 Geo. III. c. 29, wilfully and maliciously to burn or destroy any engine, or other machines therein specified, belonging to any mine,[46] or any fences for enclosures pursuant to any act of parliament, is made single felony, and punishable with transportation for seven years, in the offender, his advisers and procurers.[47] And, by statute 13 Geo. III. c. 38, the like punishment is inflicted on such as break into any house, &c. belonging to the plate-glass company, with intent to steal, cut, or destroy any of their stock or utensils, or shall wilfully and maliciously cut or destroy the same. And these are the principal punishments of malicious mischief.

III. *Forgery,[48] or the *crimen falsi* is an offence which was punished by the civil law with deportation or banishment, and sometimes with [*247

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repealed, by 7 & 8 Geo. IV. c. 27; and see, as to the offences mentioned in the text, 9 Geo. IV. c. 31, s. 26.—CHITTY.

[44] Repealed.—CHITTY.

[45] The statutes mentioned in the text are repealed.—CHITTY.

[46] By stat. 7 & 8 Geo. IV. c. 27, the above is repealed. And, by 7 & 8 Geo. IV. c. 30, s. 6, maliciously causing any water to be conveyed into any mine with intent to damage it, or obstructing any air-way, water-way, drain, pit, level, or shaft belonging thereto, is punishable as a felony, with transportation for seven years or imprisonment not exceeding two years, with private or public whipping. By sect. 7, maliciously destroying or damaging with such intent any engine or other machines belonging to any mine, or any erections attached thereto, or any bridge, wagon-way, or trunk connected with the same, is a felony, liable to the same punishment as in the last-recited clause.—CHITTY.

[47] By statute 7 & 8 Geo. IV. c. 30, s. 23, maliciously destroying any description of fence whatsoever, or any wall, stile, or gate, is punishable, for the first offence, with fine not exceeding 5*l.* above the value of the injury done, and with imprisonment not exceeding twelve months, with hard labour and private or public whipping for any subsequent offence.

By 7 & 8 Geo. IV. c. 29, s. 40, stealing, or destroying with intent to steal, any live or dead fence, wooden fence, stile, or gate, is subject to a penalty not exceeding 5*l.* above the value of the loss or injury sustained for the first offence, and to hard labour and imprisonment not exceeding twelve months, with whipping, for subsequent offences.

And by the same statute, s. 41, suspected persons found with any tree or shrub, underwood, live or dead fence, post, pale, rail, stile, or gate, of the value of two shillings, and not satisfactorily accounting for it, are liable to a penalty of 2*l.* above the value of the article found.

The following statutes on this head are repealed, by 7 & 8 Geo. IV. c. 27, viz.: 13 Edw. I. s. 1, c. 46; 6 Geo. I. c. 16; 9 Geo. III. c. 29; 16 Geo. III. c. 30.—CHITTY.

[48] FORGERY.—We will endeavour to elucidate the nature of, and what constitutes, this offence, by considering—1st, What false making is sufficient; 2d, With what intent the forgery must be committed; and 3d, How far the instrument forged must appear to be genuine. The consideration of what instruments may be the subjects of forgery will follow. See, in general, 3 Chit. C. L. 2d ed. 1022 to 1044, a.

1. WHAT FALSE MAKING IS SUFFICIENT.—It is not necessary that the whole instrument should be fictitious. Making a fraudulent insertion, alteration, or erasure in any material part of a true document by which another may be defrauded; the fraudulent application of a false signature to a true instrument, or a real signature to a false one; and the alteration of a date of a bill of exchange after acceptance, by which its payment may be accelerated, are forgeries. 1 Hale, 683, 684, 685. 4 T. R. 320. Altering a bill from a lower to a higher sum is forging it; and a person may be indicted, on the 7 Geo. II. c. 22, for *forging* such an instrument, though the statute has the word *alter* as well as forge; and in the same case it was held no ground of defence that before the alteration it had been paid by the drawer and re-issued. R. & R. C. C. 33. 2 East, P. C. 979, S. C. So altering a banker's one-pound note by substituting the word *ten* for the word *one* is a forgery. Russ. & Ry. C. C. 101. See 2 Burn, J., 24th ed. 491, and 2 East, P. C. 986. If a note be made payable at a country banker's, or at their banker's in *London*, who fails, it is forgery to introduce a piece of paper over the names of the London bankers who have so failed, containing the names of another banking-house in London. Russ. & Ry. C. C. 164. 2 Taunt. 328. 2 Leach, 1040, S. C.; and see 2 East, P. C. 856. 2 Burn, J., 24th ed. 492, S.

death.(o) It may with us be defined at common law to be "the fraudulent making or alteration of a writing to the prejudice of another man's right," for

(o) Inst. 4, 18, 7.

C. Expunging an endorsement on a bank-note with a liquor unknown has been holden to be an erasure within 8 & 9 W. III. c. 20. 3 P. Wms. 419. The instrument must in itself be false; for if a man merely pass for another, who is the maker or endorser of a true instrument, it is no forgery, though it may be within the statute of false pretences. 1 Leach, 229. The instrument counterfeited must also bear a resemblance to that for which it is put forth, but need not be perfect or complete: it is sufficient if it is calculated to impose on mankind in general, though an individual skilled in that kind of writings would detect its fallacy. Thus, if it appears that several persons have taken forged bank-notes as good ones, the offender will be deemed guilty of counterfeiting them though a person from the bank should swear that they would never impose on him, being in several respects defective. 2 East, P. C. 950. And it has been holden that a bank-note may be counterfeited though the paper contains no water-mark, and though the word *pounds* is omitted, that word being supplied by the figures in the margin. 1 Leach, 174. For it was said that in forgery there need not be an exact resemblance, but it is sufficient if the instrument counterfeited be *prima facie* fitted to pass for the writing which it represents. 1 Leach, 179. As to how far the instrument should appear genuine, and the forging of fictitious names, see *infra*, Div. III.

II. With what intent the Forgery must be committed.—The very essence of forgery is an intent to defraud; and therefore the mere imitation of another's writing, the assumption of a name, or the alteration of a written instrument, where no person can be injured, does not come within the definition of the offence. Most of the statutes expressly make an intent to defraud a necessary ingredient in the crime: whether it existed or not is a question for the jury to determine. But it is in no case necessary that any actual injury should result from the offence. 2 Stra. 747. 2 Lord Raym. 1461. The question as to the party's intent is for a jury; and such jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although, from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him, and although the object was general, to defraud whoever might take the instrument, and the intention of defrauding in particular the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation. R. & Ry. C. C. 291; and see id. 769.

III. How far the Instrument forged must appear genuine.—It is of no consequence whether the counterfeited instrument be such as if real would be effectual to the purpose it intends, so long as there is a *sufficient resemblance* to impose on those to whom it is uttered. Whether the fraud be effected on the party to whom an instrument is addressed or whose writing is counterfeited, or on a third person who takes it upon the credit it assumes, is immaterial. Thus, to counterfeit a conveyance with a wrong name has been deemed within 5 Eliz. c. 14, though it would have been ineffectual if genuine. 1 Keb. 803. 3 Keb. 51. The fabrication of an order for payment of a sailor's prize-money is forgery, as we have already seen, though it be invalid as wanting the requisites required by statute. 2 Leach, 883. The offence of uttering a forged stamp will be complete though, at the time of uttering, that part which in a genuine stamp would in terms specify the amount of duty is concealed, and in fact cut out, and though that part where the papers were entire did not contain any thing specifying the amount of duty, provided the parts left visible are like a genuine stamp. Russ. & Ry. C. C. 229, 212. We have also seen that the forgery of an instrument, as a last will, comes within the statutes although the supposed testator is living. 1 Leach, 449. And it may be collected from a number of cases that forgery in the name of a person who has no real existence is as much criminal as if there was an intent to defraud an individual whose writing is counterfeited. 1 Leach, 83. Thus, the making of a bill of exchange is within the acts though all the names to it are fictitious. 2 East, P. C. 957. To counterfeit a power of attorney, as by the administratrix and daughter of a seaman who died childless, is capital. Fost. 116. Nor is it necessary that any additional credit should be obtained by using the fictitious name. 1 Leach, 172; and see R. & Ry. C. C. 75, 90, 209, 278. So to put a fictitious name on a bill endorsed in blank, in order to circulate it with secrecy, is a similar offence. 1 Leach, 215. And indeed it seems that it is not necessary to constitute forgery that there should be an intent to defraud any particular person; and a general intent to defraud will suffice. 3 T. R. 176. 1 Leach, 216, 217, *in notis*. But, to support a charge of forgery by subscribing a fictitious name, there must be satisfactory evidence on the part of the prosecutor that it is not the party's real name and that it was assumed for the purpose of fraud in that instance. Russ. & Ry. C. C. 260. Assuming and using a fictitious name, though for purposes of concealment and fraud, will not amount to forgery if it were not for that very fraud, or system of fraud, of which the forgery forms a part. Russ. & Ry. C. C. 260. If there is proof of what is the prisoner's real name, it is for him to prove that

which the offender may suffer fine, imprisonment, and pillory.[49] And also, by a variety of statutes, a more severe punishment is inflicted on the offender in many particular cases, which are so multiplied of late as almost to become general. I shall mention the principal instances.

By statute 5 Eliz. c. 14, to forge or make, or knowingly to publish or give in evidence, any forged deed, court-roll, or will, with intent to affect the right of real property, either freehold or copyhold, is punished by a forfeiture to the party grieved of double costs and damages; by standing in the pillory and having both his ears cut off and his nostrils slit and seared, by forfeiture to the crown of the profits of his lands, and by perpetual imprisonment. For any forgery relating to a term of years, or annuity, bond, obligation, acquittance, release, or discharge of any debt or demand of any personal chattels, the same forfeiture is given to the party grieved; and on the offender is inflicted the pillory, loss of one of his ears, and a year's imprisonment: the second offence in both cases being felony without benefit of clergy.

Besides this general act, a multitude of others, since the revolution, (when paper-credit was first established,) have inflicted capital punishment on the forging, altering, or uttering as true when forged, of any bank bills or notes, or *other securities;(*p*)[50] of bills of credit issued from the exche- [*248

(*p*) Stat. 8 & 9 W. III. c. 20, § 36. 11 Geo. I. c. 9. 12 Geo. I. c. 82. 15 Geo. II. c. 18. 13 Geo. III. c. 79.

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he used the assumed name before the time he had the fraud in view, even in the absence of all proof as to what name he had used for several years before the fraud in question. Russ. & Ry. C. C. 278. And see Russ. & Ry. C. C. 405. 3 Brod. & Bing. 228, S. C. 2 Burn, J., 24th ed. 510. Russ. & Ry. C. C. 463, S. C.

A defect in the stamp will not avail the prisoner, (1 Leach, 257, 258, *in notis*. 2 East, P. C. 955;) and it has even been decided that, if there be no stamp at all on a counterfeit promissory note, it may still be forgery, (2 Leach, 703,)—though this case seems to go too far: for how can a promissory note without the appearance of a stamp have such a similitude to a genuine instrument as is requisite to constitute forgery? But, though the validity of the instrument if real is thus immaterial, it must not appear on its face, so that no one of common understanding would give it credit. Thus, it will not be forgery to fabricate a will for land as attested by only two witnesses. 2 East, P. C. 953. Nor is it felony to counterfeit a bill of exchange for a sum more than twenty shillings and less than five pounds, without mentioning the abode of the payee and being attested by a subscribing witness; as such an instrument is, by 17 Geo. III. c. 30, absolutely void. 1 Leach, 431. These cases will sufficiently explain the law on this subject.—CHITTY.

[49] The punishment of pillory is now taken away, by 56 Geo. III. c. 138.

Besides this punishment, the defendant is holden incapable of being examined as a witness till restored to competence by the king's pardon. Com. Dig. Testmoigne A. 3, 4. And, by 12 Geo. I. c. 29, in case persons convicted of forgery shall afterwards practise as attorneys, solicitors, or law-agents, the court where they practise shall examine the matter in a summary way and order the offender to be transported for seven years.—CHITTY.

[50] As to the further provisions relative to this description of forgery, *vide* 41 Geo. III. c. 39; 45 Geo. III. c. 89; 52 Geo. III. c. 138, and 1 Geo. IV. c. 92, under which last act, relating to bank-notes, by s. 11, persons engraving, cutting, etching, scraping, or by other means marking upon any plate of copper, brass, steel, &c. any engraving, &c. for the purpose of producing a print or impression of all or any part of a *bank*-note, or a blank bank-note of the said governor and company, without their authority, or having unlawfully in their possession any such plate, &c., or wilfully disposing of any such blank bank-note or part of such bank-note as aforesaid, are liable to transportation for fourteen years.

By s. 2, persons unlawfully cutting, etching, &c. or procuring, &c., or assisting in making upon any plate of copper, brass, steel, &c., any line-work, as or for the groundwork of a promissory note or bill of exchange, which shall be intended to resemble the groundwork of a bank-note of the governor and company, or any device, the impression from which shall contain the words "Bank of England" in white letters upon a black or dark ground, with or without white lines therein, or shall contain in any part thereof the numerical sum or amount of such note or bill in black and red register-work, or shall show the reversed contents thereof, or shall contain any words, figures, characters, or patterns intended to resemble the ornaments on such note, or any word, figure, &c. in white on a black ground, intended to resemble the amount in the margin of such note, or using such plate or other instrument intended to represent the whole or part of any such note, or knowingly having in their possession any such plate, &c., or disposing of any such

quer;(q)[51] of South-Sea bonds, &c.;(r) of lottery tickets or orders;(s)[52] of army or navy debentures;(t) of East India bonds;(u) of writings under the seal of the London or royal exchange assurance;(w) of the hand of the receiver of the prefines(x) or of the accountant-general, and certain other officers of the court of

(q) See the several acts for issuing them.
(r) Stat. 9 Anne, c. 21. 6 Geo. I. c. 4 and 11. 12 Geo. I. c. 32.
(s) See the several acts for the lotteries.
(t) Stat. 5 Geo. I. c. 14. 9 Geo. I. c. 5.
(u) Stat. 12 Geo. I. c. 32.
(w) Stat. 6 Geo. I. c. 18.
(x) Stat. 32 Geo. II. c. 14.

paper impressions, or knowingly having such in their custody, are guilty of felony and liable to transportation for fourteen years.

The bank having preferred one indictment for uttering a forged note, and another for having the same in possession, and having elected to proceed on the latter charge, it was held that, although facts sufficient to support the capital charge were made out in proof, an acquittal for the minor offence ought not to be directed, because the whole of the minor charge was proved and did not merge in the larger. R. & R. C. C. 378. On an indictment for forging a bank-note, the cashier who signed "for the governor and company of the bank of England" is a *competent* witness to prove the forgery; for he is not by such a signature personally responsible for the payment of the note. (1 Leach, C. C. 311. R. & R. C. C. 378;) but he is not an *essential* witness, as his handwriting may be disproved by other witnesses. Rex *vs.* Hughes, and Rex *vs.* M'Guire, 2 East, P. C. 1002. 1 Leach, C. C. 311.

What circumstances are sufficient to constitute the offence of uttering, which must be attended with a guilty knowledge, and what proofs required to substantiate it, may be deduced from the following abstract of decided cases which have been selected from among many others. Where a prisoner, charged with uttering a forged note to A. B., knowing it to be forged, gave forged notes to a boy who was not aware of their being forgeries, and directed the boy to pay away the note described in the indictment at A. B.'s for the purchase of goods, and the boy did so and brought back the goods and the change to the prisoner; it was held by the twelve judges an uttering by the prisoner to A. B. Rex *vs.* Giles, Car. C. L. 191. So the delivering a box containing, among other things, forged stamps to the party's own servant, that he might carry them to an inn to be forwarded by a carrier to a customer in the country, is an uttering. And if the delivery be in one county, and the inn to which they are carried by the servant in another, the prisoner may be indicted in the former. The offence of uttering a forged stamp will be complete although, at the time of uttering, certain parts of the stamp are concealed, all the parts that are visible being like those of a genuine stamp. Rex *vs.* Collicott, R. & R. C. C. 212. It is not necessary that a promissory note should be negotiable, in order to be a promissory note within the 2 Geo. II. c. 25, so as to be the subject of an indictment for forging or uttering it. Rex *vs.* Box, id. 300. An indictment, on 45 Geo. III. c. 89, for uttering forged notes, need not state to whom they were disposed: it is sufficient to state that the prisoner disposed of the notes with intent to defraud the bank, he knowing them at the time to be forged, and although the person to whom they were disposed purchased them as and for forged notes, and purchased them on his own solicitation and as agent for the bank, for the purpose of bringing the prisoner to punishment. Rex *vs.* Holden, id. 154. Uttering a forged order for the payment of money under a false representation is evidence of knowing it to be forged. Id. 169. To prove the guilty knowledge of an utterer of a forged bank-note, evidence may be given of the prisoner's having previously uttered other forged notes, knowing them to be forged. Rex *vs.* Whiley, 2 Leach, C. C. 983. So upon an indictment for uttering a forged note, evidence is admissible of the prisoner's having at a former period uttered others of a similar manufacture, and that others of similar fabrication had been discovered on the files of the bank with the prisoner's handwriting on the back of them, in order to show the prisoner's knowledge of the note mentioned in the indictment being a forgery. Rex *vs.* Ball, R. & R. C. C. 132. But in order to show a guilty knowledge on an indictment for uttering forged bank-notes, evidence of another uttering, *subsequent* to the one charged, is inadmissible, except the latter uttering was in some way connected with the principal case, or it can be shown that the notes were of the same manufacture; for only previous or contemporaneous acts can show *quo animo* a thing is done. Rex *vs.* Taverner, Car. C. L. 195.

So, if a second uttering be made the subject of a distinct indictment, it cannot be given in evidence to show a guilty knowledge in a former uttering. Rex *vs.* Smith, 2 C. & P. 633. The person whose name is forged was formerly held to be not a competent witness to prove the forgery, (Rex *vs.* Russell, 1 Leach, C. C. 8;) but he has recently been made competent, by the 9 Geo. IV. c. 32, s. 2.—Chitty.

[51] See also the 48 Geo. III. c. 1. 58 Geo. III. c. 23, s. 38. R. & R. C. C, 67.—Chitty.

[52] This is now a clergyable felony. 4 Geo. IV. c. 60, s. 11.—Chitty.

chancery;(y) of a letter of attorney, or other power to receive or transfer stock or annuities, and on the personating a proprietor thereof to receive or transfer such annuities, stock, or dividends;(z) also on the personating, or procuring to be personated, any seaman or other person entitled to wages or other naval emoluments, or any of his personal representatives; and the taking or procuring to be taken any false oath in order to obtain a probate or letters of administration, in order to receive such payments;[53] and the forging or procuring to be forged, and likewise the uttering or publishing as true, of any counterfeited seaman's will or power;(a)[54] to which may be added, though not strictly reducible to this head, the counterfeiting of Mediterranean passes under the hands of the lords of the admiralty, to protect one from the piratical States of Barbary;(b) the forging or imitating of any stamps to defraud the public revenue,(c)[55] and the forging of any marriage register or license;(d)[56] all which are, by distinct

(y) Stat. 12 Geo. I. c. 32.
(z) Stat. 8 Geo. I. c. 22. 9 Geo. I. c. 12. 31 Geo. II. c. 22, § 77.
(a) Stat. 31 Geo. II. c. 10. 9 Geo. III. c. 30.
(b) Stat. 4 Geo. II. c. 18.
(c) See the several stamp-acts.
(d) Stat. 26 Geo. II. c. 33.

[53] *Vide* also 3 Geo. III. c. 16; 26 Geo. III. c. 23; 32 Geo. III. c. 33; 55 Geo. III. c. 60; 57 Geo. III. c. 127; 4 Geo. IV. c. 46; and 5 Geo. IV. c. 107; by sect. 5 of which latter statute the punishment previously due to these offences is changed to transportation for life or otherwise. Personating a seaman who is dead is within the act; as where a prisoner applied at the Greenwich Hospital for prize-money in the name of J. B., and J. B. was dead, and supposed to be so at the hospital, though the prisoner did not obtain the money, he was convicted of the offence. Rex *vs.* Martin, R. & R. C. C. 324. So where a prisoner personated one "S. Cuff," who was dead, and whose prize-money had been paid to his mother, it was held that it did not vary the prisoner's guilt, and that he might be convicted on the 54 Geo. III. c. 93, s. 89. Rex *vs.* Cramp. id. 327. To constitute the offence of personating the name of a seaman under the 57 Geo. III. c. 127, s. 4, the person entitled, or really supposed to be so, to prize-money, must be personated: personating a man who never had any connection with the ship is not an offence within the act. Rex *vs.* Tannet, id. 351. And, by 59 Geo. III. c. 56, s. 3, persons falsely representing themselves as the next of kin of any seaman, &c., or any agent whose authority is revoked offering to receive wages, pay, prize-money, or other allowance, are guilty of a misdemeanour. By sect. 12, inserting a false date in any order for the payment of prize-money is made a misdemeanour; and, by sect. 17, persons really entitled to prize-money, &c. using false orders or certificates to procure the same are guilty of a misdemeanour.—CHITTY.

[54] See also 55 Geo. III. c. 60, s. 31, and 59 Geo. III. c. 56, by the 18th section of which the falsely personating officers, seamen, marines, supernumeraries, &c. entitled to wages, or their representatives, or forging or uttering any letter of attorney, order, bill, ticket, or other certificate, assignment, last will, or other power whatsoever, in order to obtain any prize-money, &c., or uttering any such letter of attorney, order, bill, &c., knowing the same to be forged, in order to receive any prize-money, &c., or taking a false oath to obtain a probate or letters of administration in order to receive prize-money, &c., or demanding or receiving wages, &c., knowing the will to be forged, or the probate or administration to have been obtained by a false oath with intent to defraud, is made a capital felony. By 1 & 2 Geo. IV. c. 49, s. 3, procuring persons to sign a false petition under this act, or procuring others to demand money due, or supposed to be due, to seamen, &c., under a certificate from the inspector of seamen's wills, is punishable with transportation for seven years; and, by s. 4, procuring others to utter any forged letter of attorney or other document to obtain seamen's wages, &c., or procuring others to demand or receive such wages, &c., is punishable with death. By 7 Geo. IV. c. 16, s. 38, the personating any Chelsea pensioner, &c., or forging any documents, or knowingly uttering such forgeries to obtain any pension, &c., is punishable with transportation for life or otherwise. A bill drawn on the commissioners of the navy for pay may be a bill of exchange, and a person may be indicted for the forgery of it as such, although it is not in the form prescribed by 35 Geo. III. c. 94. Rex *vs.* Chisholm, R. & R. C. C. 297.—CHITTY.

[55] By 6 Geo. IV. c. 106, forging or uttering the drafts or other instrument of the receiver-general or controller-general of the customs is a capital felony. *Vide* also, as to stamps, 37 Geo. III. c. 90; 44 Geo. III. c. 98; 48 Geo. III. c. 149; 52 Geo. III. c. 143; 55 Geo. IV. c. 184 and c. 185; and 6 Geo. IV. c. 119; which makes it a capital felony to forge or utter false stamps to newspapers. See also 9 Geo. IV. c. 18, which makes it a capital felony to forge the stamps of any cards or dice.—CHITTY.

[56] The forgery of documents relating to marriage registers and licenses is punishable now only with transportation for life. 4 Geo. IV. c. 76, s. 29.—CHITTY.

acts of parliament, made felonies without benefit of clergy. By statute 13 Geo. III. c. 52 and 59, forging or counterfeiting any stamp or mark to denote the standard of gold and silver plate, and certain other offences of the like tendency, are punished with transportation for fourteen years.[57] By statute 12 Geo. III. c. 48, certain *frauds on the stamp-duties therein described, principally *249] by using the same stamps more than once, are made single felony, and liable to transportation for seven years. And the same punishment is inflicted, by statute 13 Geo. III. c. 38,[58] on such as counterfeit the common seal of the corporation for manufacturing plate-glass, (thereby erected,) or knowingly demand money of the company by virtue of any writing under such counterfeit seal.

There are also certain other general laws with regard to forgery, of which the first is 2 Geo. II. c. 25, whereby the first offence in forging or procuring to be forged, acting or assisting therein, or uttering or publishing as true, any forged deed, will, bond, writing obligatory, bill of exchange, promissory note, endorsement, or assignment thereof, or any acquittance or receipt for money or goods, with intention to defraud any person, (or corporation,)(e) is made felony without benefit of clergy. And, by statutes 7 Geo. II. c. 22 and 18 Geo. III. c. 18, it is equally penal to forge or cause to be forged or utter as true a counterfeit acceptance of a bill of exchange, or the number or principal sum of any accountable receipt for any note, bill, or any other security for money, or any warrant or order for the payment of money or delivery of goods.[59] So that, I believe, through the number of these general and special provisions, there is now hardly a case possible to be conceived wherein forgery that tends *250] to defraud, *whether in the name of a real or fictitious person,(f) is not made a capital crime.[60]

(e) Stat. 31 Geo. II. c. 22, § 78. (f) Fost. 116, &c.

[57] This is now a capital felony.—Chitty.

[58] Revived, by 33 Geo. III. c. 17, s. 23.—Chitty.

[59] See 45 Geo. III. c. 89, 49 Geo. III. c. 35, and 8 Geo. IV. c. 8, respecting widows' pensions, remittance-bills, the forging of which, or procuring others to forge them, is made a felony punishable with transportation.—Chitty.

[60] It has frequently been determined that drawing, endorsing, or accepting a bill of exchange in a fictitious name is a forgery. Boiland's case, &c., Leach, 78, 159, 192. 1 Hen. Bla. 588. Fost. 116. It is also forgery to fabricate a will by counterfeiting the name of a pretended testator who is still living. Cogan's case, ibid. 355.

If a person puts his own name to an instrument, representing himself to be a different person of that name, with an intent to defraud, he is guilty of forgery. 4 T. R. 28.

But where a bill of exchange is endorsed by a person in his own name, and another represents himself to be that person, he is not guilty of forgery, but it is a misdemeanour. Hevey's case, Leach, 268.

A bill or note may be produced in evidence against a prisoner prosecuted for the forgery of it; and he may be convicted upon the usual evidence of the forgery, though it has never been stamped pursuant to the stamp-acts. Hawkeswood's and Reculist's cases, Leach, 292 and 811. For the forgery in such a case is committed with an intent to defraud; and the legislature meant only to prevent their being given in evidence when they were proceeded upon to recover the value of the money thereby secured. But lord Kenyon has declared that he did not approve of the decision of the majority of the judges in these cases. Peake, 168. It has been declared that the forgery of a bill of exchange in a form which rendered it void under the 17 Geo. III. c. 30 (see 2 book, 467) was not a capital offence, because if real it was not valid or negotiable. Moffat's case. Leach, 483.

Every indictment for forgery must set out the forged instrument in words and figures. Mason's case, 1 East, 182.

But it is sufficient to set forth the receipt at the bottom of an account without setting out the account itself. Testick's case, ibid. 181. The word *purport* in an indictment for forgery signifies the substance of an instrument as it appears on the face of it: *tenor* means an exact copy of it. Ibid. 180. Leach, 753.

The most effectual statute for the prevention of the forgery of bank-notes is the 41 Geo. III. c. 41, which enacts that if any one shall knowingly have in his possession or in his house any forged bank-notes, knowing the same to be forged, without lawful excuse, the proof whereof shall lie upon the person accused, he shall be guilty of felony, and shall be transported for fourteen years.

These are the principal infringements of the rights of property, which were the last species of offences against individuals or private subjects which the method of distribution has led us to consider. We have before examined the nature of all offences against the public or commonwealth; against the king or supreme magistrate, the father and protector of that community; against the universal law of all civilized nations; together with some of the more atrocious offences of publicly pernicious consequence against God and his holy religion And these several heads comprehend the whole circle of crimes and misdemeanours, with the punishment annexed to each, that are cognizable by the laws of England.[61]

CHAPTER XVIII.

OF THE MEANS OF PREVENTING OFFENCES.

*WE are now arrived at the fifth general branch or head under which I proposed to consider the subject of this book of our commentaries, viz., [*251 the means of *preventing* the commission of crimes and misdemeanours. And really it is an honour, and almost a singular one, to our English laws, that they furnish a title of this sort, since *preventive* justice is, upon every principle of reason, of humanity, and of sound policy, preferable in all respects to *punishing* justice,(a) the execution of which, though necessary, and in its consequences a species of mercy to the commonwealth, is always attended with many harsh and disagreeable circumstances.

This preventive justice consists in obliging those persons whom there is a probable ground to suspect of future misbehaviour to stipulate with and to give full assurance to the public that such offence as is apprehended shall not happen, by finding pledges or securities for keeping the peace, or for their good behaviour. This requisition of sureties has been several times mentioned before as part of the penalty inflicted upon such as have been guilty of certain gross misdemeanours; but there also it must be understood rather as a caution against the repetition of the offence than any immediate pain or punishment. And, indeed, if we consider all human *punishments in a large and extended [*252 view, we shall find them all rather calculated to prevent future crimes than to expiate the past; since, as was observed in a former chapter,(b) all punishments inflicted by temporal laws may be classed under three heads: such as tend to the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter others by his example; all of which conduce to one and the same end of preventing future crimes, whether that can be

(a) Beccar. ch. 41. (b) See page 11.

And if any person shall make any plate or instrument for forging bank-notes, or any part of a bank-note, or shall knowingly have them in his possession without authority in writing from the governor and company of the Bank of England, he shall be guilty of felony, and shall be transported for seven years.

But before this statute this must have been an indictable offence as a misdemeanour. See *ante*, 99, note 7.

By the 45 Geo. III. c. 89, the statutes for the punishment of forgery are extended to every part of Great Britain.—CHITTY.

By statute 11 Geo. IV., and 1 W. IV. c. 60, all the statutes making this offence capital, as well those mentioned by Blackstone as all others, were repealed; but some of the statutes not having this effect mentioned by him were left unrepealed. Forgeries are now punished either with transportation for life (which is now the severest punishment which can be awarded to this crime) or for a term of years, or imprisonment for a term of years, according to the nature of the forgery,—and for all these penal servitude may now be substituted.—STEWART.

[61] See a complete collection of the acts of parliament relating to the crime of forgery (too numerous even to abstract here) in Collyer's Crim. Stat. 142, *et seq.*, with the notes thereon.—CHITTY.

effected by amendment, disability, or example. But the caution which we speak of at present is such as is intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion that some crime is intended or likely to happen; and consequently it is not meant as any degree of punishment, unless perhaps for a man's imprudence in giving just ground of apprehension.

By the Saxon constitution, these sureties were always at hand, by means of king Alfred's wise institution of decennaries or frank-pledges, wherein, as has more than once been observed,(c) the whole neighbourhood or tithing of freemen were mutually pledges for each other's good behaviour. But this great and general security being now fallen into disuse and neglected, there hath succeeded to it the method of making suspected persons find particular and special securities for their future conduct; of which we find mention in the laws of king Edward the Confessor,(d) "*tradat fidejussores de pace et legalitate tuenda.*" Let us therefore consider, first, what this security is; next, who may take or demand it; and, lastly, how it may be discharged.

1. This security consists in being bound, with one or more securities, in a recognizance or obligation to the king, entered on record, and taken in some court or by some judicial officer; whereby the parties acknowledge themselves to be indebted to the crown in the sum required, (for instance, 100*l.*,) with condition to be void and of none effect if the *party shall appear in court on such a day, and in the mean time shall keep the peace,[1] either generally towards the king and all his liege people, or particularly, also, with regard to the person who craves the security. Or, if it be for the good behaviour, then on condition that he shall demean and behave himself well, (or be of good behaviour,) either generally or specially, for the time therein limited, as for one or more years, or for life. This recognizance, if taken by a justice of the peace, must be certified to the next sessions,[2] in pursuance of the statute 3 Hen. VII. c. 1; and if the condition of such recognizance be broken by any breach of the peace in the one case, or any misbehaviour in the other, the recognizance becomes forfeited or absolute; and being *estreated* or extracted (taken out from among the other records) and sent up to the exchequer, the party and his sureties, having now become the king's absolute debtors, are sued for the several sums in which they are respectively bound.

*253]

2. Any justices of the peace, by virtue of their commission, or those who are *ex officio* conservators of the peace, as was mentioned in a former volume,(e)[3] may demand such security according to their own discretion; or it may be granted at the request of any subject, upon due cause shown, provided such demandant be under the king's protection; for which reason it has been formerly doubted whether Jews, pagans, or persons convicted of a *præmunire* were entitled thereto.(f) Or, if the justice is averse to act, it may be granted by a mandatory writ, called a *supplicavit*, issuing out of the court of king's bench or chancery; which will compel the justice to act as a ministerial and not as a judicial officer; and he must make a return to such writ, specifying his compliance, under his hand and seal.(g) But this writ is seldom used; for, when application is made to the superior courts, they usually take the recognizances there, under the directions of the statute 21 Jac. I. c. 8. And, indeed, a peer

(c) See book i. p. 114.
(d) Cap. 18.
(e) See book i. p. 350.
(f) 1 Hawk. P. C. 126.
(g) F. N. B. 80. 2 P. Wms. 202.

[1] It is now settled that a justice of the peace is authorized to require surety to keep the peace for a limited time,—as two years,—according to his discretion, and that he need not bind the party over to the next sessions only, (2 B. & A. 278;) but if a recognizance to appear at the sessions be taken, and an order of court for finding sureties applied for, articles of the peace must be exhibited. 5 Burn, J., 24th ed. 304. 1 T. R. 696.—Chitty.

[2] But, by 1 & 2 Ph. and M. c. 13, in cases of felony the recognizances are to be certified to the general gaol-delivery.—Chitty.

[3] A secretary of state or privy-counsellor cannot bind to keep the peace or good behaviour. 11 St. Tr. 317.—Chitty.

or peeress cannot be bound over in any other place than the courts of *king's bench or chancery;[4] though a justice of the peace has a power [*254 to require sureties of any other person, being *compos mentis* and under the degree of nobility, whether he be a fellow-justice or other magistrate, or whether he be merely a private man.(*h*) Wives may demand it against their husbands; or husbands, if necessary, against their wives.(*i*) But feme-coverts and infants under age ought to find security by their friends only, and not to be bound themselves; for they are incapable of engaging themselves to answer any debt; which, as we observed, is the nature of these recognizances or acknowledgments.

3. A recognizance may be discharged either by the demise of the king, to whom the recognizance is made; or by the death of the principal party bound thereby, if not before forfeited; or by order of the court to which such recognizance is certified by the justices, (as the quarter sessions, assizes, or king's bench,) if they see sufficient cause; or in case he at whose request it was granted, if granted upon a private account, will release it, or does not make his appearance to pray that it may be continued.(*k*)

Thus far what has been said is applicable to both species of recognizances, for the *peace*, and for the *good behaviour: de pace, et legalitate, tuenda*, as expressed in the laws of king Edward. But as these two species of securities are in some respects different, especially as to the cause of granting or the means of forfeiting them, I shall now consider them separately; and first, shall show for what cause such a recognizance, with sureties for the *peace*, is grantable; and then, how it may be forfeited.

1. Any justice of the peace may, *ex officio*, bind all those to keep the peace who in his presence make any affray, or threaten to kill or beat another, or contend together with hot and angry words, or go about with unusual weapons *or attendance, to the terror of the people; and all such as he knows [*255 to be common barretors; and such as are brought before him by the constable for a breach of peace in his presence; and all such persons as, having been before bound to the peace, have broken it and forfeited their recognizances.(*l*) Also, wherever any private man hath just cause to fear that another will burn his house, or do him a corporal injury by killing, imprisoning, or beating him, or that he will procure others so to do, he may demand surety of the peace against such person: and every justice of the peace is bound to grant it, if he who demands it will make oath that he is actually under fear of death or bodily harm, and will show that he has just cause to be so by reason of the other's menaces, attempts, or having lain in wait for him, and will also further swear that he does not require such surety out of malice, or for mere vexation.(*m*)[5] This is called *swearing the peace* against another: and if the party does not find such sureties as the justice in his discretion shall require, he may immediately be committed till he does.(*n*)

2. Such recognizance for keeping the peace, when given, may be forfeited by

(*h*) 1 Hawk. P. C. 127.
(*i*) Stra. 1207.
(*k*) 1 Hawk. P. C. 129.
(*l*) Ibid. 126.
(*m*) Ibid. 127.
(*n*) Ibid. 128.

[4] A peeress may demand surety of the peace against her husband. Fost. 359. 2 Stra. 1202. 13 East, 171. N. Cas. *temp.* Hard. 74. 1 Burr. 631, 703. 1 T. R. 696.—CHITTY.

[5] The surety of the peace will not be granted but where there is a fear of some present or future danger, and not merely for a battery or trespass, or for any breach of the peace that is past. Dalt. c. 11.

The articles to entitle a party to have sureties of the peace must be verified by the *oath* of the exhibitant. 1 Stra. 527. 12 Mod. 243. The truth of the allegations therein cannot be controverted by the defendant; and, if no objections arise to the articles exhibited, the court or justice will order securities to be taken immediately. 2 Stra. 1202. 13 East, 171, n. If the articles manifestly appear to contain perjury, the court will refuse the application and even commit the exhibitant. 2 Burr. 806. 3 Burr. 1922. The articles will not be received if the parties live at a distance in the county, unless they have previously made application to a justice in the neighbourhood, (2 Burr. 780;) unless the defendant be very old, &c. 2 Stra. 835. 2 Burr. 1039. 1 Bla. Rep. 233, S. C. —CHITTY.

any actual violence, or even an assault or menace to the person of him who demanded it, if it be a special recognizance; or if the recognizance be general, by any unlawful action, whatsoever, that either is or tends to a breach of the peace; or, more particularly, by any one of the many species of offence which were mentioned as crimes against the public peace in the eleventh chapter of this book; or by any private violence committed against any of his majesty's subjects. But a bare trespass upon the lands or goods of another, which is a ground for a civil action, unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance.(*o*) Neither are mere reproachful words, as calling a man knave or liar, any breach of the peace so as to forfeit one's recognizance, (being *looked upon to be merely the effect of un-
*256] meaning heat and passion,) unless they amount to a challenge to fight.(*p*)

The other species of recognizance with sureties is for the *good abearance* or *good behaviour*. This includes security for the peace, and somewhat more: we will therefore examine it in the same manner as the other.

1. First, then, the justices are empowered, by the statute 34 Edw. III. c. 1, to bind over to the good behaviour towards the king and his people all them *that be not of good fame*, wherever they be found; to the intent that the people be not troubled nor endamaged, nor the peace diminished, nor merchants and others, passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expression, *that be not of good fame*, it is holden that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores*, as well as *contra pacem;* as, for haunting bawdy-houses with women of bad fame, or for keeping such women in his own house; or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night-walkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day and wake in the night; common drunkards; whoremasters; the putative fathers of bastards; cheats; idle vagabonds; and other persons whose misbehaviour may reasonably bring them within the general words of the statutes as persons not of good fame: an expression, it must be owned, of so great a latitude as to leave much to be determined by the discretion of the magistrate himself. But if he commits a man for want of sureties, he must express the cause thereof with convenient certainty, and take care that such cause be a good one.(*q*)

*257] *2. A recognizance for the good behaviour may be forfeited by all the same means as one for the security of the peace may be; and also by some others. As, by going armed with unusual attendance, to the terror of the people; by speaking words tending to sedition; or by committing any of those acts of misbehaviour which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion of that which perhaps may never actually happen:(*r*) for though it is just to compel suspected persons to give security to the public against misbehaviour that is apprehended; yet it would be hard, upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance.[6]

(*o*) 1 Hawk. P. C. 131.
(*p*) Ibid. 130.
(*q*) Ibid. 132.
(*r*) Ibid. 133.

[6] Another mode of preventing offences has been much more recently adopted: it is the regulation and improvement of prisons, which has been of late a fertile source of legislation. The former acts for this purpose were consolidated and amended by stat. 4 Geo. IV. c. 64, amended by stat. 5 Geo. IV. c. 85. The other acts on this subject are stat. 5 & 6 W. IV. c. 38, (by which inspectors of prisons are appointed,) and 6 & 7 W. IV. c. 105, amended by stat. 2 & 3 Vict. c. 56, by which the justices are authorized to make rules for the classification and separation of prisoners, which are to be submitted to a secretary of state, who is to certify their fitness.—Stewart.

CHAPTER XIX.

OF COURTS OF A CRIMINAL JURISDICTION.

*THE sixth, and last, object of our inquiries will be the method of *inflicting* those *punishments* which the law has annexed to particular offences; and which I have constantly subjoined to the description of the crime itself. In the discussion of which I shall pursue much the same general method that I followed in the preceding book with regard to the redress of civil injuries: by, first, pointing out the several *courts* of criminal jurisdiction, wherein offenders may be prosecuted to punishment; and by, secondly, deducing down in their natural order, and explaining, the several *proceedings* therein. [*258

First, then, in reckoning up the several *courts* of criminal jurisdiction, I shall, as in the former case, begin with an account of such as are of a *public* and *general* jurisdiction throughout the whole realm, and afterwards proceed to such as are only of a *private* and *special* jurisdiction, and confined to some particular parts of the kingdom.

I. In our inquiries into the criminal courts of *public* and *general* jurisdiction I must in one respect pursue a different order from that in which I considered the civil tribunals. For there, as the several courts had a gradual subordination to each other, the superior correcting and reforming the errors of the inferior, I thought it best to begin with the lowest, and so ascend gradually to the courts of appeal, or those of *the most extensive powers. But as it is contrary to the genius and spirit of the law of England to suffer any man to be tried twice for the same offence in a criminal way, especially if acquitted upon the first trial, therefore these criminal courts may be said to be all independent of each other, at least so far as that the sentence of the lowest of them can never be controlled or reversed by the highest jurisdiction in the kingdom, unless for error in matter of law apparent upon the face of the record; though sometimes causes may be removed from one to the other before trial. And therefore, as in these courts of criminal cognizance there is not the same chain and dependence as in the others, I shall rank them according to their dignity, and begin with the highest of all; viz.,— [*259

1. The high court of *parliament*, which is the supreme court in the kingdom, not only for the making but also for the execution of laws, by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for acts of parliament to attaint particular persons of treason or felony, or to inflict pains and penalties beyond or contrary to the common law, to serve a special purpose, I speak not of them, being to all intents and purposes new laws, made *pro re nata*, and by no means an execution of such as are already in being. But an impeachment before the lords by the commons of Great Britain, in parliament, is a prosecution of the already known and established law, and has been frequently put in practice; being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom.(a) A commoner cannot, however, be impeached before the lords for any capital offence, but only for high misdemeanours.(b)[1] A peer may be impeached for any *crime: and they usually (in case of an impeachment of a peer for treason) address the [*260

(a) 1 Hal. P. C. 150.

(b) When (in 4 Edw. III.) the king demanded the earls, barons, and peers to give judgment against Simon de Bereford, who had been a notorious accomplice in the treasons of Roger, earl of Mortimer, they came before the king in parliament, and said all, with one voice, that the said Simon was not their *peer*, and therefore they were not bound to judge him as a peer of the land. And when afterwards, in the same parliament, they were prevailed upon, in respect of the notoriety and heinousness of his crimes, to receive the charge and to give judgment against him, the following protest and proviso was entered in the parliament-roll:— "And it is assented and accorded by our lord the king, and all the great men, in full parliament, that albeit the peers, as judges of the parliament, have taken upon them, in the presence of our lord the king, to make and render the said

[1] For misdemeanours, as libels, riots, &c., peers are to be tried, like commoners, by a jury; for, "at the common law, in these four cases only, a peer shall be tried by his

crown to appoint a lord high steward for the greater dignity and regularity of their proceedings, which high steward was formerly elected by the peers themselves, though he was generally commissioned by the king;(c) but it hath of late years been strenuously maintained(d) that the appointment of a high steward in such cases is not indispensably necessary, but that the house may proceed without one. The articles of impeachment are a kind of bills of indictment found by the house of commons, and afterwards tried by the lords, who are, in cases of misdemeanours, considered not only as their own peers, but as the peers of the whole nation. This is a custom derived to us from the constitution of the antient Germans, who, in their great councils, sometimes tried capital accusations relating to the public: "*licet apud consilium accusare quoque, et discrimen capitis intendere.*"(e) And it has a peculiar propriety in the English constitution, which has much improved upon the antient model imported hither from the continent. For, though in general the union of the legislative and judicial powers ought to be more carefully avoided,(f) yet it may happen that a subject intrusted with the administration of public affairs may infringe the rights of the people, and be guilty of such crimes as the ordinary magistrate either *261] *dares not or cannot punish. Of these the representatives of the people or house of commons cannot properly *judge*, because their constituents are the parties injured, and can therefore only *impeach*. But before what court shall this impeachment be tried? Not before the ordinary tribunals, which would naturally be swayed by the authority of so powerful an accuser. Reason, therefore, will suggest that this branch of the legislature, which represents the people, must bring its charge before the other branch, which consists of the nobility, who have neither the same interests nor the same passions as popular assemblies.(g) This is a vast superiority which the constitution of this island enjoys over those of the Grecian or Roman republics, where the people were at the

judgment, yet the peers who now are, or shall be in time to come, be not bound or charged to render judgment upon others than peers; nor that the peers of the land have power to do this, but thereof ought ever to be discharged and acquitted; and that the aforesaid judgment now rendered be not drawn to example or consequence in time to come, whereby the said peers may be charged hereafter to judge others than their peers, contrary to the laws of the land, if the like case happen, which God forbid." *Rot. Parl.* 4 Edw. III. n. 2 and 6. 2 Brad. Hist. 190. Selden, Judic. in Parl. ch. 1.

(c) 1 Hal. P. C. 350.

(d) Lords' Jour. May 12, 1679. Com. Jour. May 15, 1679. Foster, 142, &c.

(e) Tacit. *de Mor. Germ.* 12.

(f) See book ii. page 269.

(g) Montesq. Sp. L. xi. 6.

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peers,—viz., in treason, felony, misprision of treason, and misprision of felony; and the statute law which gives such trial hath reference unto these or to other offences made treason or felony. His trial by his peers shall be as before; and to this effect are all these statutes,—viz., 32 Hen. VIII. c. 4, Rastall, 404, pl. 10. 33 Hen. VIII. c. 12, Rastall, 415. 35 Hen. VIII. c. 2, Rastall, 416; and in all these express mention is made of trial by peers. But in this case of a *præmunire*, the same being only in effect but a contempt, no trial shall be here in this of a peer by his peers." Per Fleming, C. J., assented to by the whole court, in Rex *vs.* Lord Vaux, 1 Bulstr. 197.—Chitty.

But, according to the last resolution of the house of lords, a commoner may be impeached for a capital offence. On the 26th of March, 1680, Edward Fitzharris, a commoner, was impeached by the commons of high treason; upon which the attorney-general acquainted the peers that he had an order from the king to prosecute Fitzharris by indictment; and a question thereupon was put whether he should be proceeded against according to the course of the common law, or by way of impeachment, and it was resolved against proceeding in the impeachment. 13 Lords' Jour. p. 755. Fitzharris was afterwards prosecuted by indictment, and he pleaded in abatement that there was an impeachment pending against him for the same offence; but this plea was overruled, and he was convicted and executed. But on the 26th of June, 1689, Sir Adam Blair and four other commoners were impeached for high treason, in having published a proclamation of James the Second. On the 2d of July a long report of precedents was produced, and a question was put to the judges whether the record 4 Edw. III. No. 6 was a statute. They answered, as it appeared to them by the copy, they believed it to be a statute, but if they saw the roll itself they could be more positive. It was then moved to ask the judges—but the motion was negatived—whether by this record the lords were barred from trying a commoner for a capital crime upon an impeachment of the commons; and they immediately resolved to proceed in this impeachment, notwithstanding the parties were commoners and charged with high treason. 14 Lords' Jour. p. 260. But the impeachment was not prosecuted with effect, on account of an intervening dissolution of parliament.—Christian.

same time both judges and accusers. It is proper that the nobility should judge, to insure justice to the accused, as it is proper that the people should accuse, to insure justice to the commonwealth. And therefore, among other extraordinary circumstances attending the authority of this court, there is one of a very singular nature, which was insisted on by the house of commons in the case of the earl of Danby, in the reign of Charles II.;(*h*) and it is now enacted, by statute 12 & 13 W. III. c. 2, that no pardon under the great seal shall be pleadable to an impeachment by the commons of Great Britain in parliament.(*i*)

2. The court of the *lord high steward* of Great Britain(*k*) is a court instituted for the trial of peers indicted for treason or felony, or for misprision of either.(*l*) The office of this great magistrate is very antient, and was formerly hereditary, or at least held for life, or *dum bene se gesserit:* but now it is usually, and hath been for many centuries past,(*m*) granted *pro hac vice* only; and it hath been the constant practice (and therefore seems now to have become necessary) to grant *it to a lord of parliament, else he is incapable to try such delinquent peer.(*n*) When such an indictment is therefore found by a grand jury [*262 of freeholders in the king's bench, or at the assizes before the justices of *oyer* and *terminer*, it is to be removed by a writ of *certiorari* into the court of the lord high steward, which only has power to determine it. A peer may plead a pardon before the court of king's bench, and the judges have power to allow it, in order to prevent the trouble of appointing a high steward merely for the purpose of receiving such plea. But he may not plead in that inferior court any other plea, as *guilty* or *not guilty* of the indictment, but only in this court; because, in consequence of such plea, it is possible that judgment of death might be awarded against him. The king, therefore, in case a peer be indicted for treason, felony, or misprision, creates a lord high steward *pro hac vice*, by commission under the great seal, which recites the indictment so found, and gives his grace power to receive and try it *secundum legem et consuetudinem Angliæ.* Then, when the indictment is regularly removed by writ of *certiorari*, commanding the inferior court to certify it up to him, the lord high steward directs a precept to a serjeant-at-arms to summon the lords to attend and try the indicted peer. This precept was formerly issued to summon only eighteen or twenty, selected from the body of the peers: then the number came to be indefinite, and the custom was for the lord high steward to summon as many as he thought proper, (but of late years not less than twenty-three,)(*o*) and that those lords only should sit upon the trial;[2] which threw a monstrous weight of power into the hands of the crown and this its great officer of selecting only such peers as the then predominant party should most approve of. And accordingly, when the earl of Clarendon fell into disgrace with Charles II., *there was a design formed to pro- [*263 rogue the parliament, in order to try him by a select number of peers, it being doubted whether the whole house could be induced to fall in with the views of the court.(*p*) But now, by statute 7 W. III. c. 3, upon all trials of peers for treason or misprision, all the peers who have a right to sit and vote in parliament shall be summoned at least twenty days before such trial to appear and vote therein; and every lord appearing shall vote in the trial of such peer, first taking the oaths of allegiance and supremacy and subscribing the declaration against popery.

During the session of parliament the trial of an indicted peer is not properly in the court of the lord high steward, but before the court last mentioned,—of our lord the *king in parliament.*(*q*) It is true, a lord high steward is always

(*h*) Com. Jour. May 5, 1679.
(*i*) See ch. 31.
(*k*) 4 Inst. 58. 2 Hawk. P. C. 5, 421. 2 Jon. 54.
(*l*) 1 Bulstr. 198.
(*m*) Pryn. on 4 Inst. 46.
(*n*) *Quand un* seigneur de parlement *serra arrein de treason ou felony, le roy par ses lettres patents fera un grand et sage* seigneur *d'estre le grand seneschal d'Angleterre: qui doit faire un precept pur faire venir xx.* seigneurs *ou xviii., &c.* Year-book, 13 Hen. VIII. 11. See Staundf. P. C. 152. 3 Inst. 28. 4 Inst. 59. 2 Hawk. P. C. 5. Barr. 234
(*o*) Kelynge, 56.
(*p*) Carte's Life of Ormonde, vol. ii.
(*q*) Fost. 141.

[2] The decision is by a majority; but a majority cannot convict unless it consists of twelve or more. See *ante*, book iii. p. 376, note.

A peer cannot have the benefit of a challenge like a commoner. 1 Harg. St. Trials, 198, 388.—CHITTY.

appointed in that case to regulate and add weight to the proceedings; but he is rather in the nature of a speaker *pro tempore* or chairman of the court than the judge of it; for the collective body of the peers are therein the judges both of law and fact, and the high steward has a vote with the rest, in right of his peerage. But in the court of the lord high steward, which is held in the recess of parliament, he is the sole judge of matters of law, as the lords triors are in matters of fact; and as they may not interfere with him in regulating the proceedings of the court, so he has no right to intermix with them in giving any vote upon the trial.(*r*) Therefore, upon the conviction and attainder of a peer for murder in full parliament, it hath been holden by the judges(*s*) that in case the day appointed in the judgment for execution should lapse before execution done, a new time of execution may be appointed by either the high court of parliament during its sitting, though no high steward be existing, or in the recess of parliament by the court of king's bench, the record being removed into that court.

*264] *It has been a point of some controversy whether the bishops have now a right to sit in the court of the lord high steward to try indictments of treason and misprision. Some incline to imagine them included under the general words of the statute of king William, "all peers who have a right to sit and vote in parliament;" but the expression had been much clearer if it had been "all *lords*," and not "all *peers*;" for though bishops, on account of the baronies annexed to their bishoprics, are clearly lords of parliament, yet, their blood not being ennobled, they are not universally allowed to be peers with the temporal nobility: and perhaps this word might be inserted purposely with a view to exclude them. However, there is no instance of their sitting on trials for capital offences, even upon impeachments or indictments in full parliament, much less in the court we are now treating of; for, indeed, they usually withdraw voluntarily, but enter a protest declaring their right to stay. It is observable that, in the eleventh chapter of the constitutions of Clarendon, made in parliament, 11 Hen. II., they are expressly excused, rather than excluded, from sitting and voting in trials when they come to concern life or limb: "*episcopi, sicut cæteri barones, debent interesse judiciis cum baronibus, quousque perveniatur ad diminutionem membrorum, vel ad mortem;*" and Becket's quarrel with the king hereupon was not on account of the exception, (which was agreeable to the canon law,) but of the general rule that compelled the bishops to attend at all. And the determination of the house of lords in the earl of Danby's case,(*t*) which hath ever since been adhered to, is consonant to these constitutions: "that the lords spiritual have a right to stay and sit in court in capital cases till the court proceeds to the vote of guilty or not guilty." It must be noted that this resolution extends only to trials *in full parliament:* for to the court of the lord high steward (in which no vote can be given but merely that of guilty or not guilty) no bishop, as such, ever was or could be summoned; and though the statute of

*265] king William *regulates the proceedings in that court as well as in the court of parliament, yet it never intended to new-model or alter its constitution, and consequently does not give the lords spiritual any right in cases of blood which they had not before.(*u*) And what makes their exclusion more reasonable is, that they have no right to be tried themselves in the court of the lord high steward,(*w*) and therefore surely ought not to be judges there. For the privilege of being thus tried depends upon nobility of blood rather than a seat in the house, as appears from the trial of popish lords, of lords under age, and (since the union) of the Scots nobility, though not in the number of the sixteen; and from the trials of females, such as the queen consort or dowager, and of all peeresses by birth, and peeresses by marriage also, unless they have, when dowagers, disparaged themselves by taking a commoner to their second husband.[3]

(*r*) State Trials, vol iv. 214, 232, 233.
(*s*) Fost. 139.
(*t*) Lords' Jour. May 15, 1679.
(*u*) Fost. 248.
(*w*) Bro. Abr. tit. *Trial*, 142.

[3] But peeresses by marriage cannot be said to be ennobled by blood; for after the death

3. The court of *king's bench*,(*x*) concerning the nature of which we partly inquired in the preceding book,(*y*) was (we may remember) divided into a *crown* side and a *plea* side. And on the crown side or crown office it takes cognizance of all criminal causes, from high treason down to the most trivial misdemeanour or breach of the peace.[4] Into this court also indictments from all inferior courts may be removed by writ of *certiorari*, and tried either at bar or at *nisi prius* by a jury of the county out of which the indictment is brought.[5] The judges of his court are the supreme coroners of the kingdom, and the court itself is the principal court of criminal jurisdiction (though the two former are of greater dignity) known to the laws of England. For which reason, by the coming of the court of king's bench into any county, (as it was removed to Oxford on account of the sickness in 1665,) all former commissioners of *oyer* and *terminer* and general gaol delivery are at once absorbed and determined *ipso facto;* "in the same manner as, by the old Gothic and Saxon constitutions, "*jure consuetudinis obtinuit, quod vicissim omnia inferiora judicia, dicente jus rege.*"(*z*)[6] [*266

Into this court of king's bench hath reverted all that was good and salutary of the jurisdiction of the court of *starchamber*, *camera stellata*,(*a*)[7] which was a

(*x*) 4 Inst. 70. 2 Hal. P. C. 2. 2 Hawk. P. C. 6.
(*y*) See book iii. page 41.
(*z*) Stiernhook, *l.* 1, c. 2.
(*a*) This is said (Lamb. *Arch.* 154) to have been so called either from the Saxon word ꝥeopan, to *steer* or govern,—or from its punishing the *crimen stellionatus*, or cosenage,—or because the room wherein it sat—the old council-chamber of the palace of Westminster, (Lamb. 148.) which is now converted into the lottery-office, and forms the eastern side of New Palace-yard—was full of windows, or (to which Sir Edward Coke (4 Inst. 66) accedes) because *haply* the roof thereof was at the first garnished with gilded *stars*. As all these are merely conjectures, (for no stars are now in the roof, nor are any said to have remained there so late as the reign of queen Elizabeth,) it may be allowable to propose another conjectural etymology, as plausible perhaps as any of them. It is well known that before the banishment of the Jews under Edward I. their contracts and obligations were denominated in our ancient records *starra* or *starrs*, from a corruption of the Hebrew word *shetâr*, a covenant. Tovey's *Angl. Judaic.* 32. Selden, tit. of Hon. ii. 34. *Uxor. Hebraic.* i. 14. These starrs, by an ordinance of Richard the First, preserved by Hoveden, were commanded to be enrolled and deposited in chests under three keys in certain places,—one and the most considerable of which was in the king's exchequer at Westminster; and no starr was allowed

of their husbands they have even a less estate in their nobility than bishops, it being only *durante viduitate*. See the editor's conjecture how the notion was originally introduced that bishops were not entitled to a trial by the peers in parliament. Book i. p. 401, note. Since that note was written, the editor has been happy in finding what he suggested only as a conjecture drawn from general principles confirmed by the more extensive learning of the late Vinerian professor, Mr. Wooddesson, who not only has adopted the same opinion, but has adduced in confirmation of it several instances of bishops who, being arraigned before a jury, demanded the privileges of the church, and disclaimed the authority of all secular jurisdictions. 2 Woodd. 585.—CHRISTIAN.

[4] Without some statute for that purpose, offences committed out of England are not cognizable by this court. 1 Esp. Rep. 62. 1 Sess. Ca. 246. If, however, any part of an offence be completed in Middlesex, though the rest were committed abroad, an indictment lies in this court, or, in case of misdemeanour, an information, if the offence were committed in any other county. 1 Esp. Rep. 63. 2 New Rep. 91. And this though the defendant himself was out of the kingdom at the time, if he caused the offence to be committed here; as where the defendant sent over a libel from Ireland to be published at Westminster. 6 East, 589, 590. Persons in his majesty's service abroad committing offences there may be prosecuted in the King's Bench by indictment or information, laying the venue in Middlesex. 42 Geo. III. c. 85, s. 1. 8 East, 31. So offences committed in the East Indies are subject to this jurisdiction. 24 Geo. III. sess. 2, c. 25, ss. 64, 78, 81. 5 T. R. 607. So if high treason be committed out of the kingdom, it can only be tried in the court of King's Bench, or under a special commission. 32 Hen. VIII. c. 23. 1 Leach, 157. 1 Hale, 1. And this court has jurisdiction by information over offences committed in Berwick. 2 Burr. 860.—CHITTY.

[5] All informations filed in the court of King's Bench, and all indictments removed there by *certiorari*, if not tried at the bar of the court, (which rarely happens,) must be tried by writ of *nisi prius*.—CHRISTIAN.

[6] But, by the 25 Geo. III. c. 18, it is enacted that the session of oyer and terminer and gaol-delivery of the gaol of Newgate for the county of Middlesex shall not be discontinued on account of the commencement of the term, and the sitting of the court of King's Bench at Westminster, but may be continued till the business is concluded. And the 32 Geo. III. c. 48 was passed to continue in like manner the sessions of the peace, and of oyer and terminer, held before the justices of the peace for the county of Middlesex.—CHRISTIAN.

[7] In one of the statutes of the University of Cambridge, the antiquity of which is not known, the word *starrum* is twice used for a schedule or inventory. The statute is entitled *De computatione procuratorum;* and it directs that *in fine computi fiat* starrum *per*

court of very antient original,(*b*) but new-modelled by statutes 3 Hen. VII. c. 1 and 21 Hen. VIII. c. 20, consisting of divers lords spiritual and temporal being privy counsellors, together with two judges of the courts of common law, without the intervention of any jury. Their jurisdiction extended legally over riots, *267] perjury, misbehaviour of sheriffs, and other notorious *misdemeanours contrary to the laws of the land. Yet this was afterwards (as lord Clarendon informs us)(*c*) stretched "to the asserting of all proclamations and orders of state; to the vindicating of illegal commissions and grants of monopolies; holding for honourable that which pleased and for just that which profited, and becoming both a court of law to determine civil rights and a court of revenue to enrich the treasury; the council-table by proclamations enjoining to the people that which was not enjoined by the laws, and prohibiting that which was not prohibited; and the star-chamber, which consisted of the same persons in different rooms, censuring the breach and disobedience to those proclamations by very great fines, imprisonments, and corporal severities: so that any disrespect to any acts of state or to the persons of statesmen was in no time more penal, and the foundations of right never more in danger to be destroyed." For which reason it was finally abolished, by statute 16 Car. I. c. 10, to the general joy of the whole nation.(*d*)

*268] 4. *The court of *chivalry*,(*e*) of which we also formerly spoke(*f*) as a military court or court of honour, when held before the earl marshal only, is also a criminal court when held before the lord high constable of England jointly with the earl marshal. And then it has jurisdiction over pleas of life and member, arising in matters of arms and deeds of war, as well out of the realm as within it. But the criminal as well as civil part of its authority is fallen into entire disuse, there having been no permanent high constable of England (but only *pro hac vice*, at coronations and the like) since the attainder and execution of Stafford duke of Buckingham in the thirteenth year of Henry VIII.; the authority and charge, both in war and peace, being deemed too ample for a subject: so ample, that when the chief justice Fineux was asked by king Henry the Eighth how far they extended, he declined answering, and said the decision of that question belonged to the law of arms, and not to the law of England.(*g*)

5. The high court of *admiralty*,(*h*) held before the lord high admiral of England or his deputy, styled the judge of the admiralty, is not only a court of civil but also of criminal jurisdiction. This court hath cognizance of all crimes and offences committed either upon the sea or on the coasts out of the body or extent of any English county, and, by statute 15 Ric. II. c. 3, of death and mayhem happening in great ships being and hovering in the main stream of great rivers,

to be valid unless it were found in some of the said repositories. *Memorand. in Scacc. P.* 6 *Edw. I.* prefixed to Maynard's Year-book of Edw. II. fol. 8. Madox, Hist. Exch. ch. vii. §§ 4, 5, 6. The room at the exchequer where the chests containing these starrs were kept was probably called the *starr-chamber*, and, when the Jews were expelled the kingdom, was applied to the use of the king's council, sitting in their judicial capacity. To confirm this, the first time the starr-chamber is mentioned in any record it is said to have been situated near the receipt of the exchequer at Westminster: the king's council, his chancellor, treasurer, justices, and other sages were assembled *en la chaumbre des esteilles pres la resceipt al Westminster. Claus.* 41 *Edw. III. m.* 13. For in process of time, when the meaning of the Jewish *starrs* was forgotten, the word *starr-chamber* was naturally rendered in law-French *la chaumbre des esteilles*, and in law-Latin, *camera stellata*, which continued to be the style in Latin till the dissolution of that court.

(*b*) Lamb. *Arch.* 158.

(*c*) Hist. of Reb., books i. iii.

(*d*) The just odium into which this tribunal had fallen before its dissolution has been the occasion that few memorials have reached us of its nature, jurisdiction, and practice, except such as on account of their enormous oppression are recorded in the histories of the times. There are, however, to be met with some reports of its proceedings in Dyer, Croke, Coke, and other reporters of that age, and some in manuscript, of which the author hath two,—one from 40 Eliz. to 13 Jac. I., the other for the first three years of king Charles; and there is in the British Museum (Harl. MSS. vol. i. No. 1226) a very full, methodical, and accurate account of the constitution and course of this court, compiled by William Hudson, of Gray's Inn, an eminent practitioner therein;[8] and a short account of the same, with copies of all its process, may also be found in 18 Rym. Fœd. 192, &c.

(*e*) 4 Inst. 123. 2 Hawk. P. C. 9.

(*f*) See book iii. page 68.

(*g*) Duck. *de authorit. jur. civ.*

(*h*) 4 Inst. 134, 147.

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modum dividendæ, in quo ponentur omnia remanentia in communi cistâ tam pignora quam pecunia, ac etiam arreragia et debita, ita quod omnibus constare poterit evidenter, in quo statu tunc universitas fuerit quoad bona, &c. Stat. Acad. Cant. p. 32. Such inventories would be made at the king's exchequer, and the room where they were deposited would probably be called the Star-chamber.—Christian.

[8] Hudson's Treatise of the Court of Starchamber is now published at the beginning of the 2d vol. of Collectanea Juridica.—Christian.

below the bridges of the same rivers, which are then a sort of ports or havens; such as are the ports of London and Gloucester, though they lie at a great distance from the sea. But, as this court proceeded without jury, in a method much conformed to the civil law, the exercise of a criminal jurisdiction there was contrary to the genius of the law of England, inasmuch as a man might be there deprived of his life by the opinion of a single judge, without the judgment of his peers. And besides, as innocent persons might thus fall a sacrifice to the caprice of a single man, so very gross offenders might and did frequently escape *punishment; for the rule of the civil law is, how reasonably I shall not at present inquire, that no judgment of death can be given against offenders without proof by two witnesses, or a confession of the fact by themselves. This was always a great offence to this English nation; and therefore, in the eighth year of Henry VI., it was endeavoured to apply a remedy in parliament, which then miscarried for want of the royal assent. However, by the statute 28 Hen. VIII. c. 15, it was enacted that these offences should be tried by commissioners of *oyer* and *terminer* under the king's great seal, namely, the admiral or his deputy, and three or four more, (among whom two common-law judges are usually appointed;) the indictment being first found by a grand jury of twelve men, and afterwards tried by a petty jury: and that the course of proceedings should be according to the law of the land. This is now the only method of trying marine felonies in the court of admiralty, the judge of the admiralty still presiding therein, as the lord mayor is the president of the session of *oyer* and *terminer* in London.[9] [*269

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[9] The jurisdiction of the commissioners appointed under the 28 Hen. VIII. c. 15 was confined by that statute to treasons, felonies, robberies, murders, and confederacies; and therefore the 39 Geo. III. c. 15 declares that it is expedient that other offences committed on the seas should be tried in the like manner: and it enacts that every offence committed upon the high seas shall be subject to the same punishment as if it had been committed upon the shore, and shall be tried in the same manner as the crimes enumerated in the 28 Hen. VIII. c. 15 are directed to be tried. And as persons tried for murder under that statute could not be found guilty of manslaughter, and where the circumstances made the crime manslaughter were acquitted entirely, the 39 Geo. III. c. 15 expressly enacts that where persons tried for murder or manslaughter committed on the high seas are found guilty of manslaughter only, they shall be subject to the same punishment as if they had committed such manslaughter upon the land.—CHRISTIAN.

The 46 Geo. III. c. 54 enables the king to issue a similar commission for trying such offences in the same manner in any of his majesty's islands, plantations, colonies, dominions, forts, or factories. The 43 Geo. III. c. 113, ss. 2 & 3 provides that any person wilfully casting away any vessel, &c., or procuring it to be done, shall be guilty of felony without benefit of clergy, and shall, if the offence were committed on the high seas, be tried, &c. by a special commission as directed by stat. 28 Hen. VIII. c. 15. The stat. 11 & 12 W. III. c. 7 contains provisions against accessories to piracies and robberies on the high seas. Accessories before the fact, on shore, to the wilful destruction of a ship on the high seas were not triable by the admiralty jurisdiction under 11 Geo. I. c. 29, s. 7. 2 Leach, 947. East, P. C. Addenda, 26. Russ. & Ry. C. C. 37, S. C. But now this is provided for by the stat. 43 Geo. III. c. 113, which repeals the statutes 4 Geo. I. c. 12, s. 3, and 11 Geo. I. c. 29, ss. 5, 6, & 7.

The 28 Hen. VIII. c. 15 merely altered the mode of trial in the admiralty court, and its jurisdiction still continues to rest on the same foundations as it did before that statute. Com. Dig. Admiralty, E. 5. It is regulated by the civil law *et per consuetudines marinas*, grounded on the law of nations, which may possibly give to that court a jurisdiction with which our common law is not able to invest it. Per Mansfield, C. J., 1 Taunt. 29. The statutes 28 Hen. VIII. c. 15, and 39 Geo. III. c. 37, do not, however, take away any jurisdiction as to the trial of offences which might before have been tried in a court of common law; and therefore an indictment for a conspiracy on the high seas is triable at common law, on proof of an overt act on shore, in the county where the venue is laid. 4 East, 164. If a pistol be fired on shore which kills a man at sea, the offence is properly triable at the admiralty sessions, because the murder is in law committed where the death occurs. 1 East, P. C. 367. 1 Leach, 388. 12 East, 246. 2 Hale, 17, 20. But if, on the other hand, a man be stricken upon the high sea and died upon shore after the reflux of the water, the admiral, by virtue of this commission, has no cognizance of that felony. 2 Hale, 17, 20. 1 East, P. C. 365, 366. And, it being doubtful whether it could be tried at common law, the stat. 2 Geo. II. c. 21 provides that the offender may be in-

These five courts may be held in any part of the kingdom, and their jurisdiction extends over crimes that arise throughout the whole of it, from one end to the other. What follow are also of a general nature, and universally diffused over the nation, but yet are of a local jurisdiction, and confined to particular districts. Of which species are,[10]—

6, 7. The courts of *oyer* and *terminer* and the general *gaol delivery*,(*i*) which are held before the king's commissioners, among whom are usually two judges of the courts at Westminster, twice in every year in every county of the kingdom except the four northern ones, where they are held only once, and London and Middlesex, wherein they are held eight times. These were slightly mentioned in the preceding book.(*k*) We then observed that at what is usually called the assizes the judges sit by virtue of five several authorities, two of which, the commission of *assize* and its attendant jurisdiction of *nisi* *270] *prius*, being principally of a civil nature, were then explained at large; to which I shall only add that these justices have, by virtue of several statutes, a criminal jurisdiction also in certain special cases.(*l*) The third, which is the commission of the *peace*, was also treated of in a former volume,(*m*) when we inquired into the nature and office of a justice of the peace. I shall only add that all the justices of the peace of any county wherein the assizes are held are bound by law to attend them, or else are liable to a fine, in order to return recognizances, &c., and to assist the judges in such matters as lie within their knowledge and jurisdiction, and in which some of them have probably been concerned by way of previous examination. But the fourth authority is the commission of *oyer* and *terminer*,(*n*) to hear and determine all treasons, felonies, and misdemeanours. This is directed to the judges and several others, or any two of them; but the judges or serjeants-at-law only are of the *quorum*, so that the rest cannot act without the presence of one of them. The words of the commission are, "to inquire, hear, and determine;" so that by virtue of this commission they can only proceed upon an indictment found at the same assizes; for they must first inquire by means of the grand jury or inquest before they are empowered to hear and determine by the help of the petit jury. Therefore they have, besides, fifthly, a commission of general *gaol delivery*,(*o*) which empowers them to try and deliver every prisoner who shall be in the gaol when the judges arrive at the circuit town, whenever or before whomsoever indicted,

(*i*) 4 Inst. 162, 168. 2 Hal. P. C. 22, 32. 2 Hawk. P. C. 14, 23.
(*k*) See book iii. p. 60.
(*l*) 2 Hal. P. C. 39. 2 Hawk. P. C. 28.
(*m*) See book i. page 351.
(*n*) See Appendix, § 1.
(*o*) Ibid.

dicted in the county where the party died. So the courts of common law have concurrent jurisdiction with the admiralty in murders committed in Milford Haven and in all other havens, creeks, and rivers in this realm. 2 Leach, 1093. 1 East, P. C. 368. R. & R. C. C. 243, S. C. Piratically stealing a ship's anchor and cable is a capital offence by the marine laws, and punishable under the 28 Hen. VIII. c. 15,—the 39 Geo. III. c. 37 not extending to this case. R. & R. C. C. 123. The 1 Geo. IV. c. 91, s. 1 provides that the crimes and offences mentioned in 43 Geo. III. c. 58, which shall be committed on the high seas, out of the body of any county, shall be liable to the same punishment as if committed on land in England or Ireland, and shall be inquired of, &c. as treasons, &c. are by 28 Hen. VIII. R. & R. C. C. 286.—Chitty.

[10] The Central Criminal Court, which has jurisdiction to hear and determine all treasons, murders, felonies, and misdemeanours committed within the city of London and the county of Middlesex and certain parts of the counties of Essex, Kent, and Surrey, and also all offences committed on the high seas and other places within the jurisdiction of the admiralty. This court was established in 1834, by the statute 4 & 5 W. IV. c. 36, and sits twelve times (and oftener if necessary) every year, under commission of oyer and terminer and gaol-delivery. The judges or persons named in the commission consist of the lord mayor, for the time-being, of the city of London, the lord chancellor, all the judges, for the time-being, of the courts of Queen's Bench, Common Pleas, and Exchequer, the judges of the Court of Bankruptcy, the judge of the Admiralty, the Dean of the Arches, the aldermen of the city of London, the Recorder and Common Serjeant of the city of London, the judge of the Sheriff's Court of the city of London, and ex-chancellors and ex-judges of the superior courts; but in practice the trials are generally presided over by two judges of the superior courts (who sit by rotation) and the law-officers of the city of London.—Kerr.

or for whatever crime committed. It was antiently the course to issue special writs of gaol delivery for each particular prisoner, which were called the writs *de bono et malo*;(*p*) but, these being found inconvenient and oppressive, a *general* commission for all the prisoners has long been established in their stead. So that, one way or other, the gaols are in general cleared, and all offenders tried, punished, or delivered, twice in every year: a constitution of singular use and *excellence.[11] Sometimes, also, upon urgent occasions, the king [*271 issues a special or extraordinary commission of *oyer* and *terminer* and *gaol delivery*, confined to those offences which stand in need of immediate inquiry and punishment; upon which the course of proceeding is much the same as upon general and ordinary commissions. Formerly it was held, in pursuance of the statutes 8 Ric. II. c. 2 and 33 Hen. VIII. c. 4, that no judge or other lawyer could act in the commission of *oyer* and *terminer* or in that of gaol delivery within his own county where he was born or inhabited, in like manner as they are prohibited from being judges of assize and determining civil causes. But that local partiality, which the jealousy of our ancestors was careful to prevent, being judged less likely to operate in the trial of crimes and misdemeanours than in matters of property and disputes between party and party, it was thought proper, by the statute 12 Geo. II. c. 27, to allow any man to be a justice of *oyer* and *terminer* and general gaol delivery within any county of England.

8. The court of general *quarter sessions* of the peace(*q*) is a court that must be held in every county once in every quarter of a year, which, by statute 2 Hen. V. c. 4, is appointed to be in the first week after Michaelmas-day, the first week after the Epiphany, the first week after the close of Easter, and in the week after the translation of St. Thomas the martyr, or the seventh of July.[12] It is held before two or more justices of the peace, one of which must be of the *quorum*. The jurisdiction of this court, by statute 34 Edw. III. c. 1, extends to the trying

(*p*) 2 Inst. 43. (*q*) 4 Inst. 170. 1 Hal. P. C. 42. 2 Hawk. P. C. 32.

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[11] The 3 Geo. IV. c. 10 enables in certain cases the opening and reading of commissions under which the judges sit upon their circuit after the day appointed for holding assizes.

Every description of offence—even high treason—is cognizable under this commission, (2 Hale, 35. Hawk. b. ii. c. 6, s. 4. Bac. Abr. Court of Justices of Oyer, &c. B.;) and the justices may proceed upon any indictment of felony or trespass found before other justices, (2 Hale, 32. Hawk. b. ii. c. 6, s. 2. Bac. Abr. Court of Justices of Oyer, &c. B. Cro. C. C. 2,) or may take an indictment originally before themselves, (Hawk. b. ii. c. 6, s. 3. 2 Hale, 34:) and they have power to discharge, not only prisoners acquitted, but also such against whom, upon proclamation made, no parties shall appear to indict them, —which cannot be done either by justices of oyer and terminer, or of the peace. Hawk. b. ii. c. 6, s. 6. 2 Hale, 34. It is not imperative on a commissioner of gaol-delivery to discharge all the prisoners in the gaol who are not indicted; but it is discretionary in him to continue on their commitments such prisoners as appear to him committed for trial, but the witnesses against whom did not appear, having been bound over to the sessions. Russ. & R. C. C. 173. But it seems clear from the words of the commission that these justices cannot try any persons, except in some special cases, who are not in actual or constructive custody of the prison specifically named in the commission. Hawk. b. ii. c. 6, s. 5. Bac. Abr. Court of Justices of Oyer, &c. B. But it is not necessary that the party should be always in actual custody; for if a person be admitted to bail, yet he is, in law, in prison, and his bail are his keepers, and justices of gaol-delivery may take an indictment against him, as well as if he were actually in prison. 2 Hale, 34, 35. The commissions of gaol-delivery are the same on all the circuits. Unlike the commission of oyer and terminer, in which the same authority suffices for every county, there is a distinct commission to deliver each particular gaol of the prisoners under the care of its keeper.

The court of general gaol-delivery has jurisdiction to order that the proceedings on a trial from day to day shall not be published till all the trials against different prisoners shall be concluded; and the violation of such orders is a contempt of court, punishable by fine or imprisonment; and if the party refuse to attend, he may be fined in his absence. 4 B. & A. 218. 11 Price, 68.—CHITTY.

[12] The Michaelmas quarter-sessions must now be holden in the first week after the 11th October. 54 Geo. III. c. 84. If the feast-day fall on Sunday, the sessions are to be holden in the week following. 2 Hale, 49.—CHITTY.

and determining all felonies and trespasses whatsoever, though they seldom if ever try any greater offence than small felonies within the benefit of clergy; their commission providing that, if any case of difficulty arises, they shall not proceed to judgment but in the presence of one of the justices of the court of king's bench or common pleas, or one of the judges of assize. And therefore murders and other capital felonies are usually remitted, for a *more *272] solemn trial, to the assizes. They cannot also try any new-created offence without express power given them by the statute which creates it.(r) But there are many offences and particular matters which by particular statutes belong properly to this jurisdiction, and ought to be prosecuted in this court; as the smaller misdemeanours against the public or commonwealth not amounting to felony, and especially offences relating to the game, highways, alehouses, bastard children, the settlement and provision of the poor, vagrants, servants' wages, apprentices, and popish recusants.(s) Some of these are proceeded upon by indictment, and others in a summary way by motion and order thereupon; which order may for the most part, unless guarded against by particular statutes, be removed into the court of king's bench by a writ of *certiorari facias*, and be there either quashed or confirmed. The records or rolls of the sessions are committed to the custody of a special officer denominated the *custos rotulorum*, who is always a justice of the *quorum;* and among them of the *quorum* (saith Lambard)(t) a man for the most part especially picked out, either for wisdom, countenance, or credit. The nomination of the *custos rotulorum* (who is the principal *civil* officer in the county, as the lord lieutenant is the chief in *military* command) is by the king's sign-manual; and to him the nomination of the clerk of the peace belongs, which office he is expressly forbidden to sell for money.(u)

In most corporation-towns there are quarter sessions kept before justices of their own, within their respective limits, which have exactly the same authority as the general quarter sessions of the county, except in a very few instances: one of the most considerable of which is the matter of appeals from orders of removal of the poor, which, though they be from the orders of corporation-justices, must be to the sessions of the county, by statute 8 & 9 W. III. c. 30. In both corporations and counties at large there is sometimes kept a special or *petty session, by a few justices, for despatching smaller business in the *273] neighbourhood between the times of the general sessions: as for licensing alehouses, passing the accounts of the parish officers, and the like.

9. The *sheriff's tourn*,(v) or rotation, is a court of record held twice every year, within a month after Easter and Michaelmas, before the sheriff, in different parts of the county; being indeed only the turn of the sheriff to keep a court-leet in each respective hundred:(w) this therefore is the great court-leet of the county, as the county-court is the court-baron; for out of this, for the ease of the sheriff, was it taken.

10. The *court-leet*, or *view of frankpledge*,(x) which is a court of record, held once in the year, and not oftener,(y) within a particular hundred, lordship, or manor, before the steward of the leet: being the king's court, granted by charter to the lords of those hundreds or manors. Its original intent was to view the frankpledges, that is, the freemen within the liberty; who, (we may remember,)(z) according to the institution of the great Alfred, were all mutually pledges for the good behaviour of each other. Besides this, the preservation of the peace, and the chastisement of divers minute offences against the public good, are the objects both of the court-leet and the sheriff's tourn; which have exactly the same jurisdiction, one being only a larger species of the other, extending over more territory but not over more causes. All freeholders within the precinct are obliged to attend them, and all persons commorant therein; which commorancy consists in usually lying there: a regulation which owes its origin to the laws of king Canute.(a) But persons under twelve and above sixty

(r) 4 Mod. 379. Salk. 406. Lord Raym. 1144.
(s) See Lambard's *Eirenarcha* and Burn's Justice.
(t) B. iv. c. 3.
(u) Stat. 37 Hen. VIII. c. 1. 1 W. and M. st. 1. c. 21.
(v) 4 Inst. 259. 2 Hal. P. C. 69. 2 Hawk. P. C. 55.
(w) Mirror, c. 1, §§ 13, 16.
(x) 4 Inst. 261. 2 Hawk. P. C. 72.
(y) Mirror, c. 1, § 10.
(z) See book iii. page 113.
(a) Part 2, c. 19.

years old, peers, clergymen, women, and the king's tenants in antient demesne, are excused from attendance there; all others being bound to appear upon the jury, if required, and make their due presentments. It was also antiently the custom to summon all the king's subjects, as they respectively grew to years of discretion and strength, to *come to the court-leet and there take the oath of allegiance to the king. The other general business of the leet [*274 and tourn was to present by jury all crimes whatsoever that happened within their jurisdiction; and not only to present, but also to punish, all trivial misdemeanours, as all trivial debts were recoverable in the court-baron and county-court: justice, in these minuter matters of both kinds, being brought home to the doors of every man by our antient constitution. Thus, in the Gothic constitution, the *hæreda*, which answered to our court-leet, "*de omnibus quidem cognoscit, non tamen de omnibus judicat.*"(*b*) The objects of their jurisdiction are therefore unavoidably very numerous: being such as in some degree, either less or more, affect the public weal or good governance of the district in which they arise; from common nuisances, and other material offences against the king's peace and public trade, down to eaves-dropping, waifs, and irregularities in public commons. But both the tourn and the leet have been for a long time in a declining way; a circumstance owing in part to the discharge granted by the statute of Marlbridge, 52 Hen. III. c. 10, to all prelates, peers, and clergymen, from their attendance upon these courts, which occasioned them to grow into disrepute. And hence it is that their business hath for the most part gradually devolved upon the quarter sessions, which it is particularly directed to do in some cases by statute 1 Edw. IV. c. 2.

11. The court of the *coroners*(*c*) is also a court of record, to inquire when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end. And this he is only entitled to do *super visum corporis.*[13] Of the coroner and his office we treated at large in a former volume,(*d*) among the public officers and ministers of the kingdom, and therefore shall not here repeat our inquiries: only mentioning his court by way of regularity among the criminal courts of the nation.

*12. The court of the *clerk of the market*(*e*) is incident to every fair and market in the kingdom, to punish misdemeanours therein, as a court [*275 of *pie poudre* is, to determine all disputes relating to private or civil property. The object of this jurisdiction(*f*) is principally the recognizance of weights and measures, to try whether they be according to the true standard thereof or no; which standard was antiently committed to the custody of the bishop, who appointed some clerk under him to inspect the abuse of them more narrowly; and hence this officer, though now usually a layman, is called the *clerk* of the market.(*g*) If they be not according to the standard, then, besides the punishment of the party by fine, the weights and measures themselves ought to be burned. This is the most inferior court of criminal jurisdiction in the kingdom: though the objects of its coercion were esteemed among the Romans of such importance to the public that they were committed to the care of some of their most dignified magistrates, the curule ædiles.

II. There are a few other criminal courts of greater dignity than many of these, but of a more confined and partial jurisdiction; extending only to some particular places which the royal favour, confirmed by act of parliament, has distinguished by the privilege of having peculiar courts of their own for the

(*b*) Stiernh. *de jure Goth. l.* 1, c. 2.
(*c*) 4 Inst. 271. 2 Hal. P. C. 53. 2 Hawk. P. C. 42.
(*d*) See book i. page 349.
(*e*) 4 Inst. 278.
(*f*) See stat. 17 Car. II. c. 19. 22 Car. II. c. 8. 23 Car. II. c. 12.
(*g*) Bacon of English Govt. b. x. c. 8.

[13] The finding of such inquest is equivalent to the finding of a grand jury; and a woman tried on the coroner's inquest for the murder of her bastard child may be found guilty, under 43 Geo. III. c. 58, s. 4, of endeavouring to conceal its birth, there being no distinction in this respect between the coroner's inquisition and a bill of indictment returned by the grand jury, (2 Leach, 1095. 3 Camp. 371. Russ. & Ry. C. C. 240, S. C.:) but, in order to found an indictment on a coroner's inquest, the jurors, and not merely the coroner, must have subscribed it. Imp. Cor. 65.—CHITTY.

punishment of crimes and misdemeanours arising within the bounds of their cognizance. These, not being universally dispersed, or of general use, as the former, but confined to one spot as well as to a determinate species of causes, may be denominated private or special courts of criminal jurisdiction.

I speak not here of ecclesiastical courts, which punish spiritual sins, rather than temporal crimes, by penance, contrition, and excommunication, *pro salute animæ*, or, which is looked upon as equivalent to all the rest, by a sum of *money to the officers of the court by way of commutation of penance. *276] Of these we discoursed sufficiently in the preceding book.(*h*) I am now speaking of such courts as proceed according to the course of the common law; which is a stranger to such unaccountable bartering of public justice.

1. And, first, the court of the *lord steward, treasurer, or comptroller* of the king's *household*(*i*) was instituted, by statute 3 Hen. VII. c. 14, to inquire of felony by any of the king's sworn servants, in the check-roll of the household, under the degree of a lord, in confederating, compassing, conspiring, and imagining the death or destruction of the king or any lord or other of his majesty's privy council, or the lord steward, treasurer, or comptroller of the king's house. The inquiry, and trial thereupon, must be by a jury, according to the course of the common law, consisting of twelve sad men (that is, sober and discreet persons) of the king's household.

2. The court of the *lord steward* of the king's *household*, or (in his absence) of the treasurer, comptroller, and steward of the *marshalsea*.(*k*) was erected by statute 33 Hen. VIII. c. 12, with a jurisdiction to inquire of, hear, and determine all treasons, misprisions of treason, murders, manslaughters, bloodshed, and other malicious strikings, whereby blood shall be shed in or within the limits (that is within two hundred feet from the gate) of any of the palaces and houses of the king, or any other house where the royal person shall abide. The proceedings are also by jury, both a grand and a petit one, as at common law, taken out of the officers and sworn servants of the king's household. The form and solemnity of the process, particularly with regard to the execution of the sentence for cutting off the hand, which is part of the punishment for shedding blood in the king's court, are very minutely set forth in the said statute 33 Hen. VIII., and the several offices of the servants of the household in and about such execution are *prescribed, from the sergeant of the wood- *277] yard, who furnishes the chopping-block, to the sergeant-farrier, who brings hot irons to sear the stump.[14]

3. As in the preceding book(*l*) we mentioned the courts of the two universities, or their chancellors' courts, for the redress of civil injuries, it will not be improper now to add a short word concerning the jurisdiction of their criminal courts, which is equally large and extensive. The chancellor's court of Oxford (with which university the author hath been chiefly conversant, though probably that of Cambridge hath also a similar jurisdiction) hath authority to determine all causes of property wherein a privileged person is one of the parties, except only causes of freehold, and also all criminal offences or misdemeanours under the degree of treason, felony, or mayhem. The prohibition of meddling with freehold still continues; but the trial of treason, felony, and mayhem, by a particular charter, is committed to the university-jurisdiction in another court, namely, the court of the *lord high steward* of the university.

For, by the charter of 7 Jun. 2 Hen. IV., (confirmed, among the rest, by the statute 13 Eliz. c. 29,) cognizance is granted to the university of Oxford of all indictments of treasons, insurrections, felony, and mayhem which shall be found in any of the king's courts against a scholar or privileged person; and

(*h*) See book iii. p. 61.
(*i*) 4 Inst. 133.
(*k*) Ibid. 2 Hal. P. C. 7.
(*l*) See book iii. page 83.

[14] The 3 Hen. VII. c. 14 is wholly repealed by the 9 Geo. IV. c. 31, as is also the 33 Hen. VIII. c. 12, part of s. 6 to s. 18, relating to this subject. The two courts mentioned in the text may now, therefore, be considered as no longer existing. They had for many years been utterly disused.—Chitty.

they are to be tried before the high steward of the university, or his deputy, who is to be nominated by the chancellor of the university for the time-being. But when his office is called forth into action, such high steward must be approved of by the lord high chancellor of England; and a special commission under the great seal is given to him and others to try the indictment, then depending, according to the law of the land and the privileges of the said university. When, therefore, an indictment is found *at the assizes, or elsewhere, against any scholar of the university, or other privileged [*278 person, the vice-chancellor may claim the cognizance of it; and (when claimed in due time and manner) it ought to be allowed him by the judges of assize: and then it comes to be tried in the high steward's court. But the indictment must first be found by a grand jury, and then the cognizance claimed; for I take it that the high steward cannot proceed originally *ad inquirendum*, but only, after inquest in the common-law courts, *ad audiendum et determinandum*. Much in the same manner as when a peer is to be tried in the court of the lord high steward of Great Britain, the indictment must first be found at the assizes or in the court of king's bench, and then (in consequence of a writ of *certiorari*) transmitted to be finally heard and determined before his grace the lord high steward and the peers.

When the cognizance is so allowed, if the offence be *inter minora crimina*, or a misdemeanour only, it is tried in the chancellor's court by the ordinary judge. But if it be for treason, felony, or mayhem, it is then, and then only, to be determined before the high steward, under the king's special commission to try the same. The process of the trial is this. The high sheriff issues one precept to the sheriff of the county, who thereupon returns a panel of eighteen freeholders; and another precept to the bedels of the university, who thereupon return a panel of eighteen matriculated laymen, "*laicos privilegio universitatis gaudentes:*" and by a jury formed *de medietate*, half of freeholders and half of matriculated persons, is the indictment to be tried; and that in the guildhall of the city of Oxford. And if execution be necessary to be awarded, in consequence of finding the party guilty, the sheriff of the county must execute the university-process; to which he is annually bound by an oath.

*I have been the more minute in describing these proceedings, as there has happily been no occasion to reduce them into practice for [*279 more than a century past, nor will it perhaps ever be thought advisable to revive them; though it is not a right that merely rests *in scriptis* or theory, but has formerly often been carried into execution. There are many instances—one in the reign of queen Elizabeth, two in that of James the First, and two in that of Charles the First—where indictments for murder have been challenged by the vice-chancellor at the assizes, and afterwards tried before the high steward by jury. The commissions under the great seal, the sheriff's and bedel's panels, and all the other proceedings on the trial of the several indictments are still extant in the archives of that university.

CHAPTER XX.

OF SUMMARY CONVICTIONS.

*WE are next, according to the plan I have laid down, to take into consideration the proceedings in the courts of criminal jurisdiction in [*280 order to the punishment of offences. These are plain, easy, and regular; the law not admitting any fictions, as in civil causes, to take place where the life, the liberty, and the safety of the subject are more immediately brought into jeopardy. And these proceedings are divisible into two kinds, *summary* and *regular;* of the former of which I shall briefly speak before we enter upon the latter, which will require a more thorough and particular examination.

By a *summary* proceeding[1] I mean principally such as is directed by several acts of parliament (for the common law is a stranger to it, unless in the case of contempts) for the conviction of offenders and the inflicting of certain penalties created by those acts of parliament.[2] In these there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only as the statute has appointed for his judge,—an institution designed professedly for the greater ease of the subject by doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attend-
*281] ances to try every minute *offence. But it has of late been so far extended as, if a check be not timely given, to threaten the disuse of our admirable and truly English trial by jury, unless only in capital cases.[3] For,—

I. Of this summary nature are all trials of offences and frauds contrary to the laws of the *excise* and other branches of the *revenue*, which are to be inquired into and determined by the commissioners of the respective departments, or by justices of the peace in the country; officers who are all of them appointed and removable at the discretion of the crown. And though such convictions are absolutely necessary for the due collection of the public money, and are a species of mercy to the delinquents, who would be ruined by the expense and delay of frequent prosecutions by action or indictment; and though such has usually been the *conduct* of the commissioners, as seldom (if ever) to afford just grounds to complain of oppression, yet when we again(*a*) consider the various and almost innumerable branches of this revenue which may be in their turns the subjects of fraud, or at least complaints of fraud, and of course the objects of this summary and arbitrary jurisdiction, we shall find that the power of these officers of the crown over the property of the people is increased to a very formidable height.

II. Another branch of summary proceedings is that before *justices of the peace*, in order to inflict divers petty pecuniary mulcts and corporal penalties denounced by act of parliament for many disorderly offences, such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others, for which I must refer the student to the justice-books formerly cited,(*b*) and which used to be formerly punished by the verdict of a jury in the court-leet. This change in the administration of justice hath, however, had some mischievous effects; as,—1. The almost entire disuse and contempt of the court-leet and sheriff's tourn, the king's antient courts of common law, formerly much revered and respected.
*282] *2. The burthensome increase of the business of a justice of the peace, which discourages so many gentlemen of rank and character from acting in the commission, from an apprehension that the duty of their office would take up too much of that time which they are unwilling to spare from the necessary concerns of their families, the improvement of their understandings, and their engagements in other services of the public. Though if *all* gentlemen of fortune had it both in their power and inclinations to act in this capacity, the business of a justice of the peace would be more divided and fall the less heavy upon individuals; which would remove what in the present scarcity of magistrates is really an objection so formidable that the country is greatly

(*a*) See book i. page 319, &c. (*b*) Lambard and Burn.

[1] As to summary proceedings in general, and the disposition of the courts, especially where no appeal is given, to require a stricter accuracy than is essential in other cases where there is a trial by jury, see 1 Stra. 67. Burn, J., tit. Convictions. 1 East, 649, 655. 5 M. & S. 206. 1 Chitty on Game Laws, 189 to 223.—Chitty.

[2] As to convictions in general, and the forms, see Paley on Convictions. Boscawen on Convictions. Burn, J., tit. Convictions. Chitty's Game Law, vol. i. 189 to 223, and vol. iii. 37 to 132.—Chitty.

[3] See observations, Burn, J., tit. Convictions. 1 East, 649. Hence it has been a doctrine that a different rule of evidence as to the strictness of proof should be required in the case of proceedings on a summary information than in an action, (see 1 East, 649;) but that doctrine now seems to have been properly overruled, (1 East, 655. 1 M. & S. 206;) for if the legislature has thought fit to intrust magistrates or other inferior jurisdictions with the decision in certain matters, their proceedings ought to be governed by the same rules of evidence as affect superior courts.—Chitty.

obliged to any gentleman of figure who will undertake to perform that duty which, in consequence of his rank in life, he owes more peculiarly to his country. However, this backwardness to act as magistrates, arising greatly from this increase of summary jurisdiction, is productive of,—3. A third mischief, which is, that this trust, when slighted by gentlemen, falls of course into the hands of those who are not so, but the mere tools of office. And then the extensive power of a justice of the peace, which even in the hands of men of honour is highly formidable, will be prostituted to mean and scandalous purposes, to the low ends of selfish ambition, avarice, or personal resentment. And from these ill consequences we may collect the prudent foresight of our antient lawgivers, who suffered neither the property nor the punishment of the subject to be determined by the opinion of any one of two men; and we may also observe the necessity of not deviating any further from our antient constitution by ordaining new penalties to be inflicted upon summary convictions.[4]

The process of these summary convictions, it must be owned, is extremely speedy. Though the courts of common law have thrown in one check upon them by making it necessary to *summon* the party accused before he is *condemned. This is now held to be an indispensable requisite,(c) though the justices long struggled the point; forgetting that rule of natural reason expressed by Seneca,— [*283

> "*Qui statuit aliquid, parte inaudita altera,*
> *Aequum licet statuerit, haud acquus fuit:*"[5]

(c) Salk. 131. 2 Lord Raym. 1405.

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[4] Unless a power of appeal be expressly given by the legislature, there is no appeal, (6 East. 514. Wightw. 22. 4 M. & S. 421.) as in proceedings against unqualified persons in the game-laws, (8 T. R. 218, note 6;) but the party has in general a right to a certiorari, to remove the conviction into the court of King's Bench, unless that right be expressly taken away. 8 T. R. 542. But though it seems to be a principle that an appeal ought to be preserved in cases where the certiorari is taken away, yet in many cases, although there be no appeal, yet the certiorari is expressly taken away. Per Lord Mansfield, Dougl. 552. If a statute authorizing a summary conviction before a magistrate give an appeal to the sessions, who are directed to hear and *finally* determine the matter, this does not take away the certiorari even after such an appeal made and determined; and lord Kenyon said, "The certiorari, being a beneficial writ for the subject, could not be taken away without express words, and he thought it was much to be lamented in a variety of cases that it was taken away at all." 8 T. R. 542. Where an appeal is given, the magistrates should make known to the convicted party his right to appeal, but if he decline appealing they need not go on to inform him of the necessary steps to be taken in order to appeal. 3 M. & S. 493. Upon an appeal the magistrates are bound to receive any fresh evidence, although not tendered on the former hearing. 3 M. & S. 133.

Upon a certiorari the conviction of the magistrate is removed into the superior court, but there is not (as upon an appeal) any rehearing of the evidence or merits; and the court can only look to the form of the conviction and see from that whether or not the party has been legally convicted, and the certiorari therefore operates in the nature of a writ of error, and no extrinsic objection to the proceedings can be taken. 6 T. R. 376. 8 T. R. 590. If therefore the magistrate, in order to sustain his conviction, should misstate the evidence or other proceeding before him, the remedy is by motion founded on affidavits to the court of King's Bench for a rule to show cause why a mandamus should not issue, requiring the magistrate to state the whole of the evidence adduced before him correctly in his conviction, pursuant to 3 Geo. IV. c. 23. 4 Dowl. & R. 352. If a magistrate wilfully misstate material evidence he will be subject to a criminal information or indictment. 1 East, 186.—CHITTY.

[5] "He who decides a case without hearing both parties, though his decision may be just, is himself unjust;" which is adopted as a principle of law by Lord *Coke*, in 11 Co. Rep. 99. A summons is indispensably required in all penal proceedings of a summary nature by justices of peace. Rex *vs.* Dyer, 1 Salk. 181. 6 Mod. 41; and see the cases collected in 8 Mod. 154, note(*a*). It is declared by Lord *Kenyon* to be an invariable rule of law, (Rex *vs.* Benn, 6 T. R. 198;) and it is stated by Mr. Serj. *Hawkins* to be implied in the construction of all penal statutes. 1 Hal. P. C. 420. So jealous is the law to enforce this equitable rule that the neglect of it by a justice in proceeding summarily without a previous summons to the party has been treated as a misdemeanour, proper for the interference of the court of King's Bench by information, (Rex *vs.* Venables, 2 Lord Raym. 1407. Rex *vs.* Simpson, 1 Stra. 46. Rex *vs.* Allington, id. 678;) which has been granted

A rule to which all municipal laws that are founded on the principles of justice have strictly conformed: the Roman law requiring a citation at the least; and our common law never suffering any fact (either civil or criminal) to be tried till it has previously compelled an appearance by the party concerned. After this summons the magistrate, in summary proceedings, may go on to examine one or more witnesses, as the statute may require, upon oath;[6] and then make

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upon affidavits of the fact. Rex *vs.* Harwood, 2 Stra. 1088. 3 Burr. 1716, 1768. Rex *vs.* Constable, 7 D. & R. 663. 3 M. C. 488. As this is a privilege of common right which requires no special provision to entitle the defendant to the advantage of it, so it cannot be taken away by any custom. Rex *vs.* Cambridge, (University,) 8 Mod. 163. Upon a sufficient information properly laid, the magistrates are bound to issue a summons and proceed to a hearing, and if they refuse to do so will be compelled by mandamus. Rex *vs.* Benn, 6 T. R. 195. The summons should be directed to the party against whom the charge is laid, and should in general be signed by the justice himself by whom it is issued. Rex *vs.* Steventon, 2 East, 365. Where a particular form of notice is prescribed by the act, that must be strictly pursued. Rex *vs.* Croke, Cowp. 30. The intention of the summons being to afford the person accused the means of making his defence, it should contain the substance of the charge and fix a day and place for his appearance, allowing a sufficient time for the attendance of himself and his witnesses. Rex *vs.* Johnson, 1 Stra. 260. A summons to appear immediately upon the receipt thereof has been thought insufficient in one case. 2 Burr. 681. In another, an objection made to the summons that it was to appear on the same day was only removed by the fact of the defendant having actually appeared, and so waived any irregularity in the notice. Rex *vs.* Johnson, 1 Stra. 261. It is equally necessary that it should be to appear at a place certain: otherwise the party commits no default by not appearing; and the magistrate cannot proceed in the defendant's absence upon a summons defective in these particulars without making himself liable to an information. Rex *vs.* Simpson, 1 Stra. 46. It has been made a question whether the service of the summons must be *personal*. It seems in general necessary that it should be so, unless where personal service is expressly dispensed with by statute. *Parker, C. J.*, was of that opinion. 10 Mod. 345. And the provisions specially introduced into many acts of parliament to make a service at the dwelling-house sufficient, seem to justify the inference that the law in other cases is understood to require a service upon the person. Where personal service is not necessary, leaving a copy at the house is sufficient, (Rex *vs.* Chandler, 14 East, 268;) and the delivery may be to a person on the premises apparently residing there as a servant. Id. ibid. These rules apply, however, only to those cases where the defendant does not in fact appear; for if he actually appears and pleads, there is no longer any question upon the sufficiency or regularity of the summons. 1 Stra. 261. Paley on Convictions, 2d ed. by Dowling, 21, 23. —Chitty.

[6] The magistrate has in general no authority to compel the attendance of witnesses for the purpose of a summary trial, unless where it is specially given by act of parliament. This in many cases has been done; and in sundry acts the provision is accompanied with a penalty on refusal to attend for the purpose of being examined. It seems agreed that the examination of witnesses must be upon oath, and that no legal conviction can be founded upon any testimony not so taken. There is a difference in the manner in which the acts are worded in regard to the mode of examination to be pursued; for while some acts expressly mention the testimony of witnesses *on oath*, others in general terms authorize the magistrate *to hear and determine*, or to convict or give judgment *on the examination of witnesses* without noticing the oath. But such general expressions seem in legal construction necessarily to refer to the only kind of testimony known to the law, namely, that upon oath. "For," says *Dalton*, "in all cases wheresoever any man is authorized to examine witnesses, such examination shall be taken and construed to be as the law will, *i.e.* upon oath." Dalt. c. 6, s. 6; and see id. c. 115, c. 164; Plowd. 12, a.; Lamb, 517; *ex parte* Aldridge, 4 D. & R. 83; 2 M. C. 120; Rex *vs.* Glossopp, 4 B. & A. 616; Paley, 33, 34. Although no mode of examination be pointed out by the statutes giving jurisdiction over the offence, yet, as justice requires that the accused should be confronted with the witnesses against him and have an opportunity of cross-examination, it is required by law, in the summary mode of trial now under consideration, that the evidence and depositions should be taken in the presence of the defendant where he appears. For though the legislature, by a summary mode of inquiry, intended to substitute a more expeditious process for the common-law method of trial, it could not design to dispense with the rules of justice as far as they are compatible with the method adopted. Indeed, it may be useful upon this occasion to notice the general maxim which has been laid down as a guide to the conduct of magistrates in regulating all their summary proceedings, namely, that "acts of parliament, in what they are silent, are best expounded

his conviction of the offender in writing: upon which he usually issues his warrant either to apprehend the offender, in case corporal punishment is to be inflicted on him; or else to levy the penalty incurred by distress and sale of his goods. This is in general the method of summary proceedings before a justice or justices of the peace; but for particulars we must have recourse to the several statutes which create the offence or inflict the punishment; and which usually chalk out the method by which offenders are to be convicted.[7] Otherwise they fall of course under the general rule, and can only be convicted by indictment or information at the common law.

III. To this head of summary proceedings may also be properly referred the method, immemorially used by the superior courts of justice, of punishing contempts by *attachment*, and the subsequent proceedings thereon.

The contempts that are thus punished are either *direct*, which openly insult or resist the powers of the courts or the persons of the judges who preside there, or else are *consequential*, which (without such gross insolence or direct opposition) *plainly tend to create a universal disregard of their authority. The principal instances of either sort that have been usually(*d*) punishable by attachment are chiefly of the following kinds: 1. Those committed by inferior judges and magistrates by acting unjustly, oppressively, or irregularly in administering those portions of justice which are intrusted to their distribution, or by disobeying the king's writs issuing out of the superior courts by proceeding in a cause after it is put a stop to or removed by writ of prohibition, *certiorari*, error, *supersedeas*, and the like; for, as the king's superior courts (and especially the courts of king's bench) have a general superintendence over all inferior jurisdictions, any corrupt or iniquitous practices of subordinate judges are contempts of that superintending authority whose duty it is to keep them within the bounds of justice. 2. Those committed by sheriffs, bailiffs, gaolers, and other officers of the court, by abusing the process of the law or deceiving the parties; by any acts of oppression, extortion, collusive behaviour, or culpable neglect of duty. 3. Those committed by attorneys and solicitors, who are also officers of the respective courts, by gross instances of fraud and corruption, injustice to their clients, or other dishonest practice;[8] for the malpractice of the [*284

(*d*) 2 Hawk. P. C. 142, &c.

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according to the use and reason of the common law." Rex *vs.* Simpson, 1 Stra. 45. Unless, therefore, the defendant forfeits this advantage by his wilful absence, he ought to be called upon to plead before any evidence is given. 1 T. R. 320. And the witnesses must be sworn and examined in his presence. Rex *vs.* Vipont, 2 Burr. 1163. Or, if the evidence has been taken down in his absence and is read over to him afterwards, the witness must at the same time, unless the defendant upon hearing the evidence should confess the fact, (Rex *vs.* Hall, 1 T. R. 320,) be resworn in his presence, and not merely called upon to assert the truth of his former testimony. Rex *vs.* Crowther, 1 T. R. 125. For the intent of the rule is that the witness should be subjected to the examination of the defendant upon his oath. 2 Burr. 1163; and see Rex *vs.* Kiddy, 4 D. & R. 734; 2 M. C. 364. This rule is confirmed rather than contradicted by those cases wherein convictions have been sustained without expressly alleging the evidence to have been taken in the presence of the defendant. Rex *vs.* Baker, 2 Stra. 1240. Rex *vs.* Aiken, 3 Burr. 1786. Rex *vs.* Kempson, Cowp. 241. For it will be found that in all those cases the judgment proceeded upon a presumption collected from the whole conviction that the defendant was in fact present and did hear the evidence given, which was always admitted to be necessary to the regularity of the magistrate's proceedings. Rex *vs.* Vipont, 2 Burr. 1163; and see Rex *vs.* Lovat, 7 T. R. 162; Rex *vs.* Thompson, 2 T. R. 18; Rex *vs.* Swallow, 3 T. R. 284; Paley, 39, 40.—CHITTY.

[7] These acts have been consolidated, and the duties of justices clearly defined, by the statute 11 & 12 Vict. c. 43, which provides a procedure applicable to the great majority of cases in which a summary conviction or order may be made by justices of the peace out of sessions.—KERR.

[8] It is not, however, usual for the court to interfere in a summary way against an attorney for a mere breach of promise where there is nothing criminal, (2 Wils. 371; and see 2 Moore, 665. 1 Bingh. 102, 105;) or on account of negligence or unskillfulness, (4 Burr. 2060. 2 Bla. Rep. 780. 1 Chitt. Rep. 661,) except it be very gross, (Say, 50, 169;) nor for the misconduct of an attorney independently of his profession But see 4 B. &

officers reflects some dishonour on their employers, and, if frequent or unpunished, creates among the people a disgust against the courts themselves. 4. Those committed by jurymen in collateral matters relating to the discharge of their office, such as making default when summoned, refusing to be sworn or to give any verdict, eating or drinking without the leave of the court, and especially at the cost of either party, and other misbehaviour or irregularities of a similar kind; but not in mere exercise of their judicial capacities, as by giving a false or erroneous verdict. 5. Those committed by witnesses, by making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn. 6. Those committed by parties to any suit or proceeding before the court, as by disobedience to any *rule or order made in the progress *285] of a cause, by non-payment of costs awarded by the court upon a motion, or by non-observance of awards duly made by arbitrators or umpires after having entered into a rule for submitting to such determination.(e) Indeed, the attachment for most of this species of contempts, and especially for non-payment of costs and non-performance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court.[9] And therefore it hath been held that such contempts, and the process thereon, being properly the civil remedy of individuals for a private injury, are not released or affected by the general act of pardon. And upon a similar principle, obedience to any rule of court may also, by statute 10 Geo. III. c. 59, be enforced against any person having privilege of parliament by the process of distress infinite. 7. Those committed by any other persons under the degree of a peer, and even by peers themselves, when enormous and accompanied with violence, such as forcible *rescous* and the like,(f) or when they import a disobedience to the king's great prerogative writs of prohibition, *habeas corpus*,(g) and the rest.[10] Some of these contempts may arise in the face of the court, as by rude and contumelious behaviour; by obstinacy, perverseness, or prevarication; by breach of the peace, or any wilful disturbance whatever: others in the absence of the party, as by disobeying or treating with disrespect the king's writ, or the rules or process of the court, by perverting such writ or process to the purposes of private malice, extortion, or injustice; by speaking or writing contemptuously of the court or judges, acting in their judicial capacity; by printing false accounts (or even true ones without proper permission) of causes then depending in *286] judgment; *and by any thing, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people.

The process of attachment for these and the like contempts must necessarily be as antient as the laws themselves; for laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the supreme courts of justice, to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly, we find it actually exercised as early as the annals of our law extend; and though a very learned author(h) seems inclinable to derive the process from the statute of Westm. 2, 13 Edw. I. c. 39, (which ordains that in case the process of the king's courts be *resisted* by

(e) See book iii. page 17.
(f) Styl. 277. 2 Hawk. P. C. 152. Cro. Jac. 419. Salk. 586.
(g) 4 Burr. 632. Lords' Jour. Feb. 7, June 8, 1757.
(h) Gilb. Hist. C. P. ch. 5.

A. 47. 5 B. & A. 898. 8 Chitt. Rep. 58. 1 Bingh. 91. 7 Moore, 424, 437. Tidd, 5th ed. 81.—Chitty.

[9] By the insolvent acts, persons committed to prison upon an attachment for non-payment of money awarded to be paid upon a submission to an arbitration which has been made a rule of court, or upon an attachment for not paying costs, may have the benefit of that statute as insolvent debtors.—Chitty.

[10] But a peer cannot be attached for non-payment of money, pursuant to an order of nisi prius, which has been made a rule of court. 7 T. R. 171, 448.—Chitty.

the power of any great man, the sheriff shall chastise the resisters by imprisonment, "*a qua non deliberentur sine speciali præcepto domini regis;*" and if the sheriff himself be resisted, he shall certify to the courts the names of the principal offenders, their aiders, consenters, commanders, and favourers, and by a special writ judicial they shall be *attached* by their bodies to appear before the court, and if they be convicted thereof they shall be punished at the king's pleasure, without any interfering by any other person whatsoever,) yet he afterwards more justly concludes that it is a part of the *law of the land*, and, as such, is *confirmed* by the statute of *magna charta*.

If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges,(*i*) without any further proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon *affidavit* see sufficient ground to suspect that *a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him,(*j*) or, in very flagrant instances of contempt, the attachment issues in the first instance;(*k*) as it also does if no sufficient cause be shown to discharge; and thereupon the court confirms and makes absolute the original rule. This process of attachment is merely intended to bring the party into court; and, when there, he must either stand committed, or put in bail, in order to answer upon oath to such *interrogatories* as shall be administered to him for the better information of the court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation, and must by the course of the court be exhibited within the first four days;(*l*) and if any of the interrogatories are improper, the defendant may refuse to answer it, and move the court to have it struck out.(*m*) If the party can clear himself upon oath, he is discharged, but, if perjured, may be prosecuted for the perjury.(*n*) If he confesses the contempt, the court will proceed to correct him by fine or imprisonment, or both, and sometimes by a corporal or infamous punishment.(*o*) If the contempt be of such nature that, when the fact is once acknowledged, the court can receive no further information by interrogatories than it is already possessed of, (as in the case of a *rescous*, (*p*) the defendant may be admitted to make such simple acknowledgment, and receive his judgment without answering to any interrogatories:[11] but if he wilfully and obstinately refuses to answer, or answers in an evasive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court. [*287

It cannot have escaped the attention of the reader that this method of making the defendant answer upon oath to a criminal charge is not agreeable to the genius of the common law in any other instance,(*q*) *and seems, indeed, to have been derived to the courts of king's bench and common pleas through the medium of the courts of equity. For the whole process of the courts of equity, in the several stages of a cause, and finally to enforce their decrees, was, till the introduction of sequestrations, in the nature of a process of contempt; acting only *in personam*, and not *in rem*. And there, after the party in contempt has answered the interrogatories, such his answer may be contradicted and disproved by *affidavits* of the adverse party: whereas, in the courts of law, the admission of the party to purge himself by oath is more favourable to his liberty, though perhaps not less dangerous to his conscience; for, if he clears himself by his answers, the complaint is totally dismissed. And, with regard to this singular mode of trial, thus admitted in this [*288

(*i*) Staund. P. C. 73, b.
(*j*) Styl. 277.
(*k*) Salk. 84. Stra. 185, 564.
(*l*) 6 Mod. 73.
(*m*) Stra. 444.
(*n*) 6 Mod. 73.
(*o*) Cro. Car. 146.
(*p*) The King *vs.* Elkins. M. 8 Geo. III. B. R.
(*q*) See book iii. pp. 100, 101.

[11] Although the defendant acknowledges all the facts charged against him, yet it is the practice of the court to compel him to answer interrogatories, unless they are waived by the prosecutor. 5 T. R. 362.—CHRISTIAN.

one particular instance, I shall only for the present observe that, as the process by attachment in general appears to be extremely antient,(r) and has in more modern times been recognised, approved, and confirmed by several express acts of parliament,(s) so the method of examining the delinquent himself upon oath, with regard to the contempt alleged, is at least of as high antiquity,(t) and by long and immemorial usage is now become the law of the land.

CHAPTER XXI.

OF ARRESTS.

*289] *We are now to consider the regular and ordinary method of proceeding in the courts of criminal jurisdiction; which may be distributed under twelve general heads, following each other in a progressive order; viz., 1. Arrest; 2. Commitment, and bail; 3. Prosecution; 4. Process; 5. Arraignment, and its incidents; 6. Plea, and issue; 7. Trial, and conviction; 8. Clergy; 9. Judgment, and its consequences; 10. Reversal of Judgment; 11. Reprieve, or pardon; 12. Execution;—all of which will be discussed in the subsequent part of this book.

First, then, of an *arrest*;[1] which is the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime. To this arrest all persons whatsoever are, without distinction, equally liable in all criminal cases; but no man is to be arrested unless charged with such a crime as will at least justify holding him to bail when taken. And, in general, an arrest may be made four ways: 1. By warrant; 2. By an officer without warrant; 3. By a private person also without a warrant; 4. By a hue and cry.

*290] *1. A warrant may be granted in extraordinary cases by the privy council, or secretaries of state;(a)[2] but ordinarily by justices of the peace. This they may do in any cases where they have a jurisdiction over the offence, in order to compel the person accused to appear before them;(b) for it would be absurd to give them power to examine an offender unless they had also a power to compel him to attend and submit to such examination. And this extends undoubtedly to all treasons, felonies, and breaches of the peace;[3] and also

(r) Year-book, 20 Hen. VI. c. 37. 22 Edw. IV. c. 29.
(s) Stat. 43 Eliz. c. 6, § 3. 13 Car. II. st. 2, c. 2, § 4. 9 & 10 W. III. c. 15. 12 Anne, st. 2, c. 15, § 5.
(t) M. 5 Edw. IV. rot. 75, cited in Rast. Ent. 268, pl. 5.
(a) 1 Lord Raym. 65.
(b) 2 Hawk. P. C. 84.

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[1] As to arrests in criminal cases in general, see 1 Chitt. C. L. 2d ed. 11 to 71. Burn, J., tit. Arrest.

[2] Or by the speaker of the house of commons (14 East, 1, 163) or house of lords, (8 T. R. 314,) or by a judge of the court of King's Bench. 1 Hale, 578; and see 48 Geo. III. c. 58.

When the offender is not likely to abscond before a warrant can be obtained, it is in general better to apprehend him by a *warrant* than for a private person or officer to arrest him of his own accord, because if the justice should grant his warrant erroneously, no action lies against the party obtaining it. 3 Esp. 166, 167. And if a magistrate exceed his jurisdiction, the officer who executes a warrant is protected from liability, and the magistrate himself cannot be sued until after a month's notice of action, during which he may tender amends, (24 Geo. II. c. 44. See *ante*, 1 book, 354, n. 37;) and no action can be supported against the party procuring the warrant, though the arrest was without cause, unless it can be proved that the warrant was obtained maliciously. 1 T. R. 535. 3 Esp. R. 135.—Chitty.

[3] Perjury and libels, (4 J. B. Moore, 195. 1 B. & B. 548. Gow. 84. Fortesc. 37, 358, 140. 11 St. Tr. 305, 316. 2 Wils. 159, 160,) and nuisances, when persisted in, (Ventr. 169. 1 Mod. 76. 5 Mod. 80, 142. 6 Mod. 180,) subject the offender to such criminal process. And there are some misdemeanours for which particular acts of parliament expressly authorize a justice of the peace to issue his warrant, as for keeping a disorderly house, (25 Geo. II. c. 36, s. 6,) or obtaining money under false pretences. 30 Geo. II. c. 24. In modern practice, however, it is not usual for a justice out of sessions to issue a warrant

to all such offences as they have power to punish by statute.[4] Sir Edward Coke, indeed,(c) hath laid it down that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found; and the contrary practice is by others(d) held to be grounded rather upon connivance than the express rule of law, though now by long custom established. A doctrine which would in most cases give a loose to felons to escape without punishment; and therefore Sir Matthew Hale hath comated it with invincible authority and strength of reason; maintaining, 1. That a justice of the peace hath power to issue a warrant to apprehend a person *accused* of felony, though not yet *indicted*;(e) and 2. That he may also issue a warrant to apprehend a person *suspected* of felony, though the original suspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party against whom the warrant is prayed.(f)[5] This warrant ought to be under the hand and seal of the justice,[6] should set forth the time and place of making, and the cause for which it is made, and should be directed to the *constable or other peace-officer, (or, it may be, to any private person by name,) (g)[7] requiring him to bring the party either, generally,[8] [*291 before *any* justice of the peace for the county, or only before the justice who granted it; the warrant in the latter case being called a *special* warrant.(h) A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty;(i) for it is the duty of the magistrate, and ought not to be left to the

(c) 4 Inst. 176.
(d) 2 Hawk. P. C. 84.
(e) 2 Hal. P. C. 108.
(f) Ibid. 110.
(g) Salk. 176.
(h) 2 Hawk. P. C. 85.
(i) 1 Hal. P. C. 580. 2 Hawk. P. C. 82.

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for a libel on a private individual, or for perjury,—though where an illegal publication is manifestly dangerous in its tendency to the public interests they will exercise that discretion with which long practice has invested them. 4 J. B. Moore, 195. 1 B. & B. 548. Gow. 84. This also they will always do on the commission of any misdemeanour which involves an attempt to perpetrate a felony; and, when assembled in session, they may issue a warrant against a party suspected of perjury, even though he has not been indicted.—CHITTY.

[4] Where a statute gives a justice jurisdiction over an offence, it impliedly gives him power to apprehend any person charged with such offence, and especially after a party has neglected a summons. 2 Bingh. 63. Hawk. b. ii. c. 13, s. 15. 12 Rep. 131, b. 10 Mod. 248.—CHITTY.

[5] The power to grant such warrants is now regulated, by statute 11 & 12 Vict. c. 42, "to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to persons charged with indictable offences," consolidating and amending previous statutes.—STEWART.

[6] But it seems sufficient if it be in writing and signed by him, unless a seal is expressly required by a particular act of parliament. Willes' Rep. 411. Bull. N. P. C. 83.—CHITTY.

[7] It has recently been decided that warrants may be directed to officers either by their particular names, or by the description of their office; and that, in the first case, the officer may execute the warrant anywhere within the jurisdiction of the magistrate who issued it: in the latter case, not beyond the precincts of his office. And where a warrant of a magistrate was directed "To the constables of W. and to all other his majesty's officers," it was held that the constables of W. (their names not being inserted in the warrant) could not execute it out of the district. 1 Bar. & Cres. 288. 2 D. & R. 444. If an act of parliament direct that a justice shall grant a warrant, and do not state to whom it shall be directed, it must be directed to the constable, and not to the sheriff, unless such power be given by the act. 2 Ld. Raym. 1192. 2 Salk. 381; *sed vid.* 1 H. Bla. 15, *notis*. These distinctions are now rendered immaterial by the 5 Geo. IV. c. 18, s. 6, whereby the constable or any other peace-officer of any parish or place may execute any warrant within the magistrate's jurisdiction, whether the warrant be addressed to him by name or not, or whether he be a constable or peace-officer, &c. of the place in which he executes the warrant.—CHITTY.

[8] The warrant need not state the time when the party is to be brought before the magistrate for examination. Fort. 143. 8 T. R. 110.—CHITTY.

officer, to judge of the ground of suspicion. And a warrant to apprehend all persons guilty of a crime therein specified is no legal warrant; for the point upon which its authority rests is a fact to be decided on a subsequent trial, namely, whether the person apprehended thereupon be really guilty or not.[9] It is therefore, in fact, *no* warrant at all, for it will not justify the officer who acts under it;(*k*) whereas a warrant properly penned (even though the magistrate who issues it should exceed his jurisdiction) will, by statute 24 Geo. II. c. 44, at all events indemnify the officer who executes the same ministerially. And when a warrant is received by the officer he is bound to execute it so far as the jurisdiction of the magistrate and himself extends. A warrant from the chief or other justice of the court of king's bench extends all over the kingdom, and is *teste'd* or *dated England;* not *Oxfordshire, Berks,* or other particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be backed, that is, signed, by a justice of the *peace in *292] another, as Middlesex, before it can be executed there. Formerly, regularly speaking, there ought to have been a fresh warrant in every fresh county: but the practice of backing warrants had long prevailed without law, and was at last authorized by statutes 23 Geo. II. c. 26, and 24 Geo. II. c. 55. And now, by statute 13 Geo. III. c. 31, any warrant for apprehending an English offender who may have escaped into Scotland, and *vice versa*, may be endorsed and executed by the local magistrates, and the offender conveyed back to that part of the united kingdoms in which such offence was committed.[10]

(*k*) A practice had obtained in the secretaries' office ever since the Restoration, grounded on some clauses in the acts for regulating the press, of issuing *general* warrants to take up (without naming any person in particular) the authors, printers, or publishers of such obscene or seditious libels as were particularly specified in the warrant. When those acts expired, in 1694, the same practice was inadvertently continued in every reign, and under every administration, except the four last years of queen Anne, down to the year 1763, when, such a warrant being issued to apprehend the authors, printers, and publishers of a certain seditious libel, its validity was disputed; and the warrant was adjudged by the whole court of King's Bench to be void in the case of Money *vs.* Leach. Trin. 5 Geo. III. B. R. After which the issuing of such general warrants was declared illegal by a vote of the house of commons. Com. Jour. April 22, 1766.

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[9] General warrants to take up loose, idle, and disorderly people, (3 Burr. 1766,) and search-warrants, (Hawk, b. ii. c. 13, s. 17, n. 6,) are the only exceptions to this rule.—Chitty.

[10] And now, by the 44 Geo. III. c. 92, if any offender has escaped from Ireland into England or Scotland, or *vice versâ*, he may be apprehended by a warrant endorsed by a justice of the peace of the county or jurisdiction within which the offender shall be found; and he may be conveyed to that part of the United Kingdom in which the warrant issued and the offence is charged to have been committed.—Christian.

By the 54 Geo. III. c. 186, all warrants issued in England, Scotland, or Ireland may be executed in any part of the United Kingdom. Independently of this, the secretary of state for Ireland may, by his warrant, remove a prisoner there to be tried in England for an offence committed in the latter, (3 Esp. Rep. 178;) and an English justice may commit a person here who has committed an offence in Ireland preparatory to sending him thither for trial. 2 Stra. 848. 4 Taunt. 34.

With respect to the *time* of arresting a person. A person may be apprehended in the night as well as the day, (9 Co. 66;) and though the statute 29 Car. II. c. 7, s. 6 prohibits arrests on Sundays, it excepts the cases of treasons, felonies, and breaches of the peace: in these cases, therefore, an arrest may be made on that day. Cald. 291. 1 T. R. 265. Willes, 459.

As to the *place* in which a party may be arrested. Since the privileges of sanctuary and abjuration were abolished, by 21 Jac. I. c. 28, no place affords protection to offenders against the criminal law. And even the clergy may, on a criminal charge, be arrested whilst in their churches, (Cro. Jac. 321,) though it is illegal to arrest them in any civil case whilst in the church to perform divine service, or going to or returning from the same, on any day. Bac. Abr. Trespass, D. 3. And if a person having committed a felony in a foreign country comes into England, he may be arrested here and conveyed and given up to the magistrates of the country against the laws of which the offence was committed. 4 Taunt. 34.

It may be here observed as a general rule that if the warrant be materially defective or the officer exceed his authority in executing it, and if he be killed in the attempt, this is only manslaughter in the party whom he endeavoured to arrest, (1 East, P. C. 310. 1 Leach, 206. 6 T. R. 122. 5 East, 308. 1 B. & C. 291;) and any third person may lawfully interfere to prevent an arrest under it, doing no more than is necessary for that purpose. 5 East, 304, 308. 1 Leach, 206.—Chitty.

By 6 & 7 Vict. c. 34, when a warrant has been issued for a supposed offender in the

2. Arrests by *officers without warrant* may be executed,—1. By a justice of the peace, who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence.(*l*) 2. The sheriff,[11] and, 3. The coroner, may apprehend any felon within the county without warrant. 4. The constable, of whose office we formerly spoke,(*m*) hath great original and inherent authority with regard to arrests. He may, without warrant, arrest any one for a breach of the peace committed in his view, and carry him before a justice of the peace. And in case of felony *actually* committed, or a dangerous wounding, whereby felony is likely to ensue, he may upon probable suspicion arrest the felon,[12] and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon, if he cannot otherwise be taken; and if he or his assistants be killed in attempting such arrests, it is murder in all concerned.(*n*) 5. Watchmen, either those appointed by the statute of Winchester, 13 Edw. I. c. 4, to keep watch and ward in all towns from sunsetting to sunrising, or such as are mere assistants to the constable, may *virtute officii* arrest all offenders, and particularly night-walkers, and commit them to custody till the morning.(*o*)[13]

(*l*) 1 Hal. P. C. 86. (*m*) See book i. page 355. (*n*) 2 Hal. P. C. 88, 89. (*o*) 2 Hal. P. C. 98.

colonies, and he escapes into the United Kingdom, it shall be lawful for a secretary of state to endorse such warrant. And a still more important power has been given by two acts passed in the same session of parliament, (6 & 7 Vict. c. 75, 76,) which provides for the arrest of certain offenders who have escaped from France and the United States of America into this country. Under the former of these acts, (giving effect to a convention for that purpose,) persons accused of murder, forgery, or fraudulent bankruptcy are to be delivered up by the proper authorities in this country to the proper authorities of France: and by the latter, (giving effect to an article for this purpose in the Washington treaty,) persons charged with murder, or assault with intent to commit murder, piracy, arson, robbery, or forgery, are to be delivered up to the United States. Corresponding laws have been passed by the legislatures of both these countries for giving the same powers as against offenders escaping from this country to France and the United States.—STEWART. See Act of Congress, 12 Aug. 1848. 9 Stat. at Large, 302.—SHARSWOOD.

[11] And the sheriff may arrest though the party be merely suspected of a capital offence, (2 Hale, 87;) and if the sheriff be assaulted in the execution of his office he may arrest the offender. 1 Saund. 77. 1 Taunt. 146.—CHITTY.

[12] A constable may justify an imprisonment without warrant on a reasonable charge of felony made to him, although he afterwards discharges the prisoner without taking him before a magistrate, and although it turn out that no felony was committed by any one, (Holt, C. N. P. 418. Cald. 291;) and the charge need not specify all the particulars necessary to constitute the offence. R. & R. C. C. 329. In general, however, a constable cannot, without an express charge or warrant, justify the arrest of a supposed offender upon suspicion of his guilt unless some actual felony has been committed and there is reasonable cause for the suspicion that the party imprisoned is guilty, (4 Esp. Rep. 80. Holt, C. N. P. 478. Hawk. b. 2, c. 12, s. 16. 2 Hale, 92, 89, n. f. Cald. 291;) and a constable is not justified in apprehending and imprisoning a person on suspicion of having received stolen goods on the mere assertion of one of the principal felons. 2 Stark. 167. There are, however, authorities in favour of an exception to this rule in the case of night-walkers and persons reasonably suspected of felony in the night. 3 Taunt. 14. 1 East, P. C. 303. Hawk. b. 2, c. 12, s. 20. 2 Hale, 89. 5 Edw. III. c. 14. 2 Inst. 52. Bac. Abr. tit. Constable, G. And, by a modern act of parliament, an express power is given to constables and other peace-officers, when on duty, to apprehend every person who may reasonably be suspected of having, or carrying, or by any ways conveying, at any time after sunsetting and before sunrising, goods suspected to be stolen. 22 Geo. III. c. 58, s. 3. 54 Geo. III. c. 57, ss. 16, 17, 18. And other statutes (32 Geo. III. c. 53, s. 17. 51 Geo. III. c. 119, ss. 18, 24) authorize constables and other peace-officers to apprehend evil-disposed and suspected persons and reputed thieves. Thus, by the 32 Geo. III. c. 53, s. 17, constables, headboroughs, patrols, and watchmen are empowered to apprehend reputed thieves frequenting the streets, highways, and avenues of public resort, and convey them before a proper magistrate. And in order to give more effect to the public office at Bow street, the 51 Geo. III. c. 119, s. 24, and 54 Geo. III. c. 37, s. 16, 17, 18, direct two magistrates of that office (of whom the chief magistrate must be one) to swear in men to act as constables for Middlesex, Surrey, Essex, Kent, and Westminster, and enable the persons so sworn to apprehend offenders against the peace, both by night and by day, with all the powers which other constables possess.—CHITTY.

[13] But at common law no peace-officer is justified in taking up a night-walker unless he

3. Any private person (and *a fortiori* a peace-officer) that is present when any felony is committed is bound by the law to *arrest the felon, on pain of fine and imprisonment if he escapes through the negligence of the standers-by.(*p*) And they may justify breaking open the doors upon following such felon; and if *they kill him*, provided he cannot be otherwise taken, it is justifiable; though if *they are killed* in endeavouring to make such arrest it is murder.(*q*) Upon probable suspicion, also, a private person may arrest the felon or other person so suspected,(*r*)[14] but he cannot justify breaking open doors to do it; and if either party kill the other in the attempt, it is manslaughter, and no more.(*s*) It is no more, because there is no malicious design to kill; but it amounts to so much, because it would be of most pernicious consequence if, under pretence of suspecting felony, any private person might break open a house or kill another, and also because such arrest upon suspicion is barely *permitted* by the law, and not *enjoined*, as in the case of those who are present when a felony is committed.

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4. There is yet another species of arrest, wherein both officers and private men are concerned, and that is upon a *hue and cry* raised upon a felony committed. A hue, (from *huer*, to shout and cry,) *hutesium et clamor*, is the old common-law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another.(*t*) It is also mentioned by statute Westm. 1, 3 Edw. I. c. 9, and 4 Edw. I., *de officio coronatoris*. But the principal statute relative to this matter is that of Winchester, 13 Edw. I. c. 1 and 4, which directs that from thenceforth every county shall be so well kept, that immediately upon robberies and felonies committed, fresh suit shall be made from town to town and from county to county, and that hue and cry shall be raised upon the felons, and they that keep the town shall follow with hue and cry with all the town and the towns near, and so hue and cry shall be made from town to town until they be taken and delivered to the sheriff. And, that such hue and cry may more effectually be made, the *hundred is bound by the same statute, cap. 3, to answer for all robberies therein committed, unless they take the felon; which is the foundation of an action against the hundred(*u*) in case of any loss by robbery. By statute 27 Eliz. c. 13, no

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(*p*) 2 Hawk. P. C. 74.
(*q*) 2 Hal. P. C. 77.
(*r*) Stat. 30 Geo. II. c. 24.
(*s*) 2 Hal. P. C. 82, 83.
(*t*) Bracton, *l.* 3, *tr.* 2, c. 1, § 1. Mirr. c. 2, § 6.
(*u*) See book iii. page 161.

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has committed some disorderly or suspicious act. Bac. Abr. Trespass, D. 3. 2 Ld. Raym. 1301.—Chitty.

[14] Where a felony has been *actually* committed, a private person acting with a good intention, and upon such information as amounts to a *reasonable and probable ground of suspicion*, is justified in apprehending without a warrant the suspected person in order to carry him before a magistrate. Cald. 291. 4 Taunt. 34, 35. Price, 525. But where a private person had delivered another into the custody of a constable, upon a suspicion which appeared afterwards to be *unfounded*, it was held that the person so arrested might maintain an action of trespass for an assault and false imprisonment against such private person, although a felony had been actually committed. 6 T. R. 315.—Christian.

With respect to interference and arrests in order to *prevent* the commission of a crime, any person may lawfully lay hold of a lunatic about to commit any mischief which, if committed by a sane person, would constitute a criminal offence, or any other person whom he shall see on the point of committing a treason or felony, or doing any act which will manifestly endanger the life or person of another, and may detain him until it may be reasonably presumed that he has changed his purpose; but where he interferes to prevent others from fighting he should first notify his intention to prevent the breach of the peace. Hawk. b. 2, c. 12, s. 19. 1 Hale, 589. 2 Rol. Abr. 559. E. pl. 3, n. 8. Selw. 3d ed. 830. Com. Dig. Pleader, 3 M. 22. Bac. Abr. Trespass, D. 3. 1 East, P. C. 304. Thus, any one may justify breaking and entering a party's house and imprisoning him, to prevent him from murdering his wife, who cries out for assistance. 2 B. & P. 260. Selw. 3d ed. 830. Bac. Abr. Trespass, D. 3. And the riding in a body to quell a riot is lawful; and no information will be granted for small irregularities in the pursuit of such a design. 1 Bla. Rep. 47. 1 B. & P. 264, n. a. 1 East, P. C. 304. If a man be found attempting to commit a felony in the night, any one may apprehend and detain him till he be carried before a magistrate. 1 R. & M. C. C. 93.—Chitty.

hue and cry is sufficient unless made with both horsemen and footmen. And, by statute 8 Geo. II. c. 16, the constable or like officer refusing or neglecting to make hue and cry forfeits 5*l.*; and the whole vill or district is still in strictness liable to be amerced, according to the law of Alfred, if any felony be committed therein and the felon escapes:[15] an institution which hath long prevailed in many of the Eastern countries, and hath in part been introduced even into the Mogul empire, about the beginning of the last century, which is said to have effectually delivered that vast territory from the plague of robbers, by making in some places the villages, in others the officers of justice, responsible for all the robberies committed within their respective districts.(*w*) Hue and cry(*x*) may be raised either by precept of a justice of the peace, or by a peace-officer, or by any private man that knows of a felony. The party raising it must acquaint the constable of the vill with all the circumstances which he knows of the felony and the person of the felon, and thereupon the constable is to search his own town, and raise all the neighbouring vills, and make pursuit with horse and foot; and in the prosecution of such hue and cry the constable and his attendants have the same powers, protection, and indemnification as if acting under a warrant of a justice of the peace. But if a man wantonly or maliciously raises a hue and cry without cause, he shall be severely punished as a disturber of the public peace.(*y*)

In order to encourage further the apprehending of certain felons, rewards and immunities are bestowed on such as bring them to justice by divers acts of parliament. The statute 4 & 5 W. and M. c. 8 enacts that such as apprehend a highwayman and prosecute him to conviction shall receive a reward of 40*l.* from the public, to be paid to them (or, if *killed in the endeavour to take him, their executors) by the sheriff of the county, besides the horse, [*295 furniture, arms, money, and other goods taken upon the person of such robber, with a reservation of the right of any person from whom the same may have been stolen; to which the statute 8 Geo. II. c. 16 superadds 10*l.* to be paid by the hundred indemnified by such taking. By statutes 6 & 7 W. III. c. 17 and 15 Geo. II. c. 28, persons apprehending and convicting any offender against those statutes respecting the coinage shall (in case the offence be treason or felony) receive a reward of forty pounds, or ten pounds if it only amount to counterfeiting the copper coin. By statute 10 & 11 W. III. c. 23, any person apprehending and prosecuting to conviction a felon guilty of burglary, house-breaking, horse-stealing, or private larceny to the value of 5*s.* from any shop, warehouse, coach-house, or stable, shall be excused from all parish offices. And, by statute 5 Anne, c. 31, any person so apprehending and prosecuting a burglar or felonious house-breaker (or, if killed in the attempt, his executors) shall be entitled to a reward of 40*l.*(*z*) By statute 6 Geo. I. c. 23, persons discovering, apprehending, and prosecuting to conviction any person taking reward for helping others to their stolen goods, shall be entitled to forty pounds. By statute 14 Geo. II. c. 6, explained by 15 Geo. II. c. 34, any person apprehending and prosecuting to conviction such as steal, or kill with an intent to steal, any sheep or other cattle specified in the latter of the said acts, shall for every such conviction receive a reward of ten pounds. Lastly, by statutes 16 Geo. II. c. 15 and 8 Geo. III. c. 15, persons discovering, apprehending, and convicting felons and others being found at large during the term for which they are ordered to be transported, shall receive a reward of twenty pounds.[16]

(*w*) Mod. Un. Hist. vi. 383, vii. 156.
(*x*) 2 Hal. P. C. 100–104.
(*y*) 1 Hawk. P. C. 75.
(*z*) The statutes 4 & 5 W. and M. c. 8, 6 & 7 W. III. c. 17, and 5 Anne, c. 31 (together with 3 Geo. I. c. 15, § 4, which directs the method of reimbursing the sheriffs) are extended to the county-palatine of Durham, by stat. 14 Geo. III. c. 46.

[15] These acts are all repealed, by 7 & 8 Geo. IV. c. 27.—CHITTY.

[16] The above acts are repealed, by 7 & 8 Geo. IV. c. 22, 27, 64, and 58 Geo. III. c. 70; and costs are allowed to prosecutors in certain cases.—CHITTY.

CHAPTER XXII.

OF COMMITMENT AND BAIL.

*296] *When a delinquent is arrested by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a justice of the peace;[1] and how he is there to be treated I shall next show under the second head of *commitment* and *bail*.

The justice before whom such prisoner is brought is bound immediately to *examine* the circumstances of the crime alleged;[2] and to this end, by statute 2 & 3 Ph. and M. c. 10, he is to take in writing the examination of such prisoner and the information of those who bring him:[3] which, Mr. Lambard observes,(a) was the first warrant given for the examination of a felon in the English law. For, at the common law, *nemo tenebatur prodere seipsum:* and his fault was not to be wrung out of himself, but rather to be discovered by other means and other men.[4] If upon this inquiry it manifestly appears that either no such

(a) *Eirenarch.* b. ii. c. 7. See page 357.

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[1] In a late case, where it was stated the party behaved improperly in a church, it was held that though a constable might be justified in removing him from the church and detaining him till the service was over, yet he could not legally detain him afterwards to take him before a magistrate. 2 B. & C. 699.

A *watchman* should deliver the supposed offender over to a constable, or take him before a magistrate. Dalt, J., c. 104.

A *private* person may do the same as a watchman. In a late case it was held that a private person when he took a party endeavouring to commit a felony might detain him in order to take him before a magistrate. 1 R. & M. C. C. 93.—Chitty.

[2] A constable arresting a man on suspicion of felony is bound to take him before a magistrate as soon as he reasonably can; and he has no right to detain a prisoner three days without taking him before a magistrate, in order that evidence may be collected in support of a felony with which he is charged. Wright *vs.* Court, 6 D. & R. 623. And see 2 Hawk. P. C. 117.

It is the duty of the magistrate to take and complete the examination of all concerned, and to discharge or commit the individual suspected, as soon as the nature of the case will admit. Fost. 142, 143. But he is allowed a *reasonable* time for this purpose before he makes his final decisions. It seems to have been formerly considered that the law intends three days to be sufficient, and that a magistrate cannot justify the detainer of a party eighteen days under examination. Scavage *vs.* Tateham, Cro. Eliz. 829. 1 Hale, P. C. 585, 586. 2 id. 120, 121. 2 Hawk. P. C. c. 16, s. 12. 1 Chitt. C. L. 72. This point was considered in a very recent case,—Davis *vs.* Capper, King's Bench, sittings in banc before Easter Term, 1829. That was an action against a magistrate for false imprisonment. The plaintiff had been brought before the defendant upon suspicion of felony, and was committed by him for further examination for fourteen days. The court, without giving judgment upon the whole case, which comprehended other questions, expressed a strong opinion that fourteen days was not a reasonable period for commitment for re-examination, and that a warrant for such commitment was bad for not setting forth full and satisfactory reasons for committing for so long a period; and they referred to the case of Scavage *vs.* Tateham (Cro. Eliz. 829) as justifying that opinion. Ed. MS.—Chitty.

[3] The prisoner's examination must *not* be upon oath: that of the witnesses must be. 2 Hale, P. C. 52. 1 id. 585. 1 Phil. Ev. 106. Where magistrates first took the examination of witnesses, not on oath, in support of a conviction, and afterwards swore them to the truth of their evidence, the court of King's Bench expressed their disapprobation of the practice. Rex *vs.* Kiddy, 4 D. & R. 734. The prisoner has no *right* to the assistance of an attorney when under examination on a charge of felony: the privilege, when allowed, is entirely a matter of discretion in the magistrate. Cox *vs.* Coleridge, 2 D. & R. 86. 1 B. & C. 37. 1 M. C. 142. See, however, an elaborate note on this important subject, Paley on Convictions, 2d ed. by Dowling, 28, *et seq.*, where the propriety of that decision is considered.—Chitty.

[4] But the statute of Philip and Mary was repealed, by statute 7 Geo. IV. c. 64, and other provisions introduced. And now the statute 11 & 12 Vict. c. 42, s. 17 provides that in all cases where any person shall appear or be brought before any justice or justices of the peace, charged with any indictable offence, whether committed in England or Wales,

crime was committed or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison or give bail; that is, put in securities for his appearance to answer the charge against him.[5] This commitment, therefore, being only for safe custody, wherever bail will answer the same intention it ought to be taken, as in most of the inferior crimes; but in felonies and other offences of a *capital nature no bail can be a security [*297 equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit to save his own life? and what satisfaction or indemnity is it to the public to seize the effects of them who have bailed a murderer, if the murderer himself be suffered to escape with impunity? Upon a principle similar to which the Athenian magistrates, when they took a solemn oath never to keep a citizen in bonds that could give three sureties of the same quality with himself, did it with an exception to such as had embezzled the public money or been guilty of treasonable practices.(b) What the nature of bail is hath been shown in the preceding book,(c) viz., a delivery or bailment of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance; he being supposed to continue in their friendly custody, instead of going to gaol. In civil cases we have seen that every defendant is bailable; but in criminal matters it is otherwise. Let us therefore inquire in what cases the party accused ought or ought not to be admitted to bail.

(b) Pott. Antiq. b. i. c. 18.

(c) See book iii. page 200.

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or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons, or have been apprehended with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit him to prison for trial or before admitting him to bail, shall in the presence of such accused person, who is at liberty to put questions to the witnesses, take the statement on oath or affirmation of the witnesses and reduce such statement to writing. And after such examination is completed, their depositions are to be read over to the accused, and the justices, or one of them, shall say to him these words, or words to the like effect: —"Having heard the evidence, do you wish to say any thing in answer to the charge? You are not obliged to say any thing unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon the trial." And if the accused then makes a statement, it is to be taken down accordingly. The place where the examination is taken is not to be deemed an open court, but such examination may be conducted privately; and (unlike cases of summary conviction) it is discretionary with the justices to allow the accused the assistance of an attorney or counsel.—STEWART.

[5] *Recognizance to Prosecute.*—Besides this commitment and bail, the magistrate should take the recognizance of the prosecutor to appear and prefer an indictment and give evidence at the next sessions of the peace, or general gaol-delivery, as the case may require, and in case of refusal may commit him to gaol. 1 Hale, 586. 2 Hale, 52, 121. 3 M. & S. 1. See further, Burn, J., Recognizance. Williams, J., Recognizance. 1 Chitt. C. L. 90.

Recognizance to give Evidence.—When it appears that a person brought before the magistrate as a witness may probably be able to give material evidence against the prisoner, he has, in the cases of manslaughter and felony, by the express provisions of the statutes 1 & 2 Ph. and M. c. 13, s. 5 and 2 & 3 Ph. and M. c. 10, s. 2, authority to bind such witness by recognizance or obligation to appear at the next general gaol-delivery, to give evidence against the party indicted; and infants and married women, who cannot legally bind themselves, must procure others to be bound for them. And if the witness refuse to give such recognizance, the magistrate has power to commit him, this being virtually included in his commission, and, by necessary consequence, upon the above-mentioned statutes. 3 M. & S. 1. 1 Hale, 586. This doctrine was confirmed in a late case where a married woman refused to enter into a recognizance for her appearance at sessions, to give evidence against a felon, and the magistrate committed her, and the court of King's Bench held that the commitment was legal. 3 M. & S. 1. But a justice of the peace is not authorized by law to commit a witness willing to enter into a recognizance for his appearance to give evidence against an offender, merely because such witness is unable to find a surety to join him in such recognizance, nor ought the justice to require such surety: the party's own recognizance (at the peril of commitment) is all that ought to be required. Per Graham, B., Bodmin Sum. Ass. 1817. 1 Burn, J., 24th ed. 1013.—CHITTY.

And, first, to refuse or delay to bail any person bailable is an offence against the liberty of the subject in any magistrate, by the common law,(*d*) as well as by the statute Westm. 1, 3 Edw. I. c. 15, and the *habeas corpus* act, 31 Car. II. c. 2. And, lest the intention of the law should be frustrated by the justice's requiring bail to a greater amount than the nature of the case demands, it is expressly declared, by statute 1 W. and M. st. 2, c. 1, that excessive bail ought not to be required; though what bail should be called excessive must be left to the courts, on considering the circumstances of the case, to determine. And, on the other hand, if the magistrate takes insufficient bail he is liable to be fined if the criminal doth not appear.(*e*)[6] Bail may be taken either in court, or in some particular cases by the sheriff,[7] coroner, or other magistrate,[8] but most usually by the justices of the peace.[9] Regularly, in all offences, either *298] against the common *law or act of parliament, that are below felony, the offender ought to be admitted to bail, unless it be prohibited by some special act of parliament.(*f*) In order, therefore, more precisely to ascertain what offences *are* bailable,—

Let us next see who may *not* be admitted to bail, or what offences are *not* bailable. And here I shall not consider any one of those cases in which bail is ousted by statute from prisoners *convicted* of particular offences; for then such imprisonment without bail is part of their sentence and punishment. But where the imprisonment is only for safe custody *before* the conviction, and not for punishment *afterwards*, in such cases bail is ousted or taken away wherever the offence is of a very enormous nature; for then the public is entitled to demand nothing less than the highest security that can be given, viz., the body of the accused, in order to insure that justice shall be done upon him if guilty. Such persons therefore, as the author of the Mirror observes,(*g*) have no other sureties but the four walls of the prison. By the antient common law, before(*h*) and since(*i*) the conquest, all felonies were bailable, till murder was excepted by statute; so that persons might be admitted to bail before conviction almost in every case. But the statute Westm. 1, 3 Edw. I. c. 15 takes away the power of bailing in treason and in divers instances of felony. The statutes 23 Hen. VI. c. 9 and 1 & 2 P. and M. c. 13 give further regulations in this matter;[10] and

(*d*) 2 Hawk. P. C. 90.
(*e*) Ibid. 89.
(*f*) 2 Hal. P. C. 127.
(*g*) C. 2, § 24.
(*h*) 2 Inst. 189.
(*i*) *In omnibus placitis de felonia solet accusatus per plegios dimitti, præter quam in placito de homicidio, ubi ad terrorem aliter statutum est.* Glanv. *l.* 14, c. 1.

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[6] And even if the criminal does appear, yet if the bail were taken corruptly the magistrate would continue liable to an information or indictment. 2 T. R. 190.—Chitty.

[7] *Sed quære* if a sheriff has this power? It seems not. See 4 T. R. 505. 2 H. Bla. 418. Lamb. 15.—Chitty.

[8] The court of King's Bench, or any judge thereof, in vacation, may at their discretion admit persons to bail in all cases whatsoever, (see 3 East, 163. 5 T. R. 169;) but none can claim this benefit *de jure*. 2 Hale, 129. As to when this court will bail, see 1 Chitt. C. L. 2d ed. 98, 99.—Chitty.

[9] The 24 Geo. II. c. 55 enacts that where a warrant has been backed, and the party accused has been taken out of the county where the supposed offence has been committed, any justice of the county where he was taken may, if the offence be bailable, take bail; and the same provision is extended to Ireland, by 44 Geo. III. c. 92, s. 1, and the 45 Geo. III. c. 92 and the 48 Geo. III. c. 58, s. 2 enact that where the offender escapes from one part of the United Kingdom to the other he may be bailed by any judge or justice of that part of the United Kingdom where he was apprehended, unless the judg who granted the warrant has written the words "not bailable" on the back of the process.—Chitty.

[10] These statutes are all repealed, by the 7 Geo. IV. c. 64, by sect. 1 of which it is enacted "that where any person shall be taken on a charge of felony, or suspicion of felony, before one or more justice or justices of the peace, and the charge shall be supported by positive and credible evidence of the fact, or by such evidence as, if not explained or contradicted, shall, in the opinion of the justice or justices, raise a strong presumption of the guilt of the person charged, such person shall be committed to prison by such justice or justices, in the manner thereinafter mentioned; but if there shall be only one justice present, and the whole evidence given before him shall be such as neither to raise a strong presumption of guilt, nor to warrant the dismissal of the

upon the whole we may collect(*k*) that no justice of the peace can bail, 1. Upon an accusation of treason; nor, 2. Of murder; nor, 3. In case of manslaughter, if the prisoner be clearly the slayer, and not barely suspected to be so; or if any indictment be found against him; nor, 4. Such as, being committed for felony, have broken prison; because it not only carries a presumption of guilt, but is also superadding one felony to another; 5. Persons outlawed; 6. Such as have abjured the realm; 7. *Approvers, of whom we shall speak in a subsequent chapter, and persons by them accused; 8. Persons taken with the mainour, or in the fact of felony; 9. Persons charged with arson; 10. Excommunicated persons, taken by writ *de excommunicato capiendo:* all which are clearly not admissible to bail by the justices. Others are of a dubious nature, as, 11. Thieves openly defamed and known; 12. Persons charged with other felonies, or manifest and enormous offences, not being of good fame: and 13. Accessories to felony, that labour under the same want of reputation. These seem to be in the discretion of the justices, whether bailable or not. The last class are such as *must* be bailed upon offering sufficient surety; as, 14. Persons of good fame charged with a bare suspicion of manslaughter or other inferior homicide; 15. Such persons being charged with petit larceny or any felony not before specified; or, 16. With being accessory to any felony. Lastly, it is agreed that the court(*l*) of king's bench (or any judge(*m*) thereof in time of vacation) may bail for any crime whatsoever, be it treason,(*n*) murder,(*o*) or any other offence, according to the circumstances of the case. And herein the wisdom of the law is very manifest. To allow bail to be taken commonly for such enormous crimes would greatly tend to elude the public justice; and yet there are cases (though they rarely happen) in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offence. The law has therefore provided one court, and only one, which has a discretionary power of bailing in any case: except only, even to this high jurisdiction, and of course to all inferior ones, such persons as are committed by either house of parliament, so long as the *session lasts; or such as are committed for contempts by any of the king's superior courts of justice.(*p*) [*299 [*300

Upon the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the justice, or warrant under his hand and seal, containing the cause of his commitment; there to abide till delivered by due course of law.(*q*)[11] But this imprisonment, as has

(*k*) 2 Inst. 186. 2 Hal. P. C. 129.

(*l*) 2 Inst. 189. Latch. 12. Vaugh. 157. Comb. 111, 298. 1 Comyns Dig. 495.

(*m*) Skin. 683. Salk. 105. Stra. 911. 1 Comyns Dig. 497.

(*n*) In the reign of queen Elizabeth it was the unanimous opinion of the judges that no court could bail upon a commitment for a charge of high treason by any of the queen's privy council. 1 Anders. 298.

(*o*) *In omnibus placitis de felonia solet accusatus per plegios dimitti, præterquam in placito de homicidio.* Glanv. *l.* 14, c. 1. *Sciendum tamen quod, in hoc placito, non solet accusatus per plegios dimitti, nisi ex regiæ potestatis beneficio.* Ibid. c. 3.

(*p*) Staundf. P. C. 73, b.

(*q*) 2 Hal. P. C. 122.

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charge, such justice shall order the person charged to be detained in custody until he or she shall be taken before two justices at the least; and where any person so taken, or any person in the first instance taken before two justices, shall be charged with felony, or on suspicion of felony, and the evidence given in support of the charge shall in their opinion not be such as to raise a strong presumption of the guilt of the person charged and to require his or her committal, or such evidence shall be adduced on behalf of the person charged as shall in their opinion weaken the presumption of his or her guilt, but there shall notwithstanding appear to them in either of such cases to be sufficient ground for judicial inquiry into his or her guilt, the person charged shall be admitted to bail, by such two justices, in the manner thereinafter mentioned; provided always that nothing therein contained shall be construed to require any such justice or justices to hear evidence on behalf of any person so charged unless it shall appear to him or them to be meet and conducive to the ends of justice to hear the same.—CHITTY.

[11] This is not the form where the offence is bailable and the party cannot find bail: in that case it is to keep the prisoner in custody "for want of sureties, or until he shall be discharged by due course of law." And where the commitment is in the nature of punishment, the time of imprisonment must be stated, and if it be until the party be discharged by due course of law it will be bad, (5 B. & A. 895:) but where in other respects the time of imprisonment is sufficiently stated, the unnecessary addition of the words "until he be discharged by due course of law" will not vitiate. 3 M. & S. 283

been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only; though what are so requisite must too often be left to the discretion of the gaolers, who are frequently a merciless race of men, and, by being conversant in scenes of misery, steeled against any tender sensation. Yet the law (as formerly held) would not justify them in fettering a prisoner unless where he was unruly or had attempted to escape;(r) this being the humane language of our antient lawgivers:(s) "*custodes pœnam sibi commissorum non augeant, nec eos torqueant; sed omni sævitia remota, pietateque adhibita, judicia debite exequantur.*"

CHAPTER XXIII.

OF THE SEVERAL MODES OF PROSECUTION.

*301] *The next step towards the punishment of offenders is their prosecution, or the manner of their formal accusation.[1] And this is either upon a previous finding of the fact by an inquest or grand jury; or without such previous finding. The former way is either by *presentment* or *indictment*.

I. A presentment, *generally* taken, is a very comprehensive term, including not only presentments properly so called, but also inquisitions of office and indictments by a grand jury. A presentment, *properly* speaking, is the notice taken by a grand jury of any offence from their own knowledge or observation,(a) without any bill of indictment laid before them at the suit of the king: as the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment(b) before the party presented can be put to answer it. An inquisition of office is the act of a jury summoned by the proper officer to inquire of matters relating to the crown upon evidence laid before them. Some of these are in themselves convictions, and cannot afterwards be traversed or denied; and therefore the inquest, or jury, ought to hear all that can be alleged on both sides. Of this nature are all inquisitions of *felo de se*; of flight in persons accused of felony; of deodands and the like;[2] and presentments of petty offences in the sheriff's tourn or court-leet, whereupon the presiding officer may set a fine.[3] Other inquisitions may be afterwards

(r) 2 Inst. 381. 3 Inst. 34.
(s) Flet. l. 1, c. 26.
(a) Lamb. *Eirenarch. l.* 4, c. 5.
(b) 2 Inst. 739.

And as to the form of the mittimus in general, see 1 Chitt. C. L. 109 to 116, 2d ed.——Chitty.

[1] It may here be useful briefly to consider the time when the prosecution should be commenced. The habeas corpus act provides that a person committed for treason or felony must be indicted in the ensuing term or sessions, or the party must be bailed, unless it be shown upon oath that the witnesses for the prosecution could not be produced at the preceding session. 31 Car. II. c. 2, s. 7. See, accordingly, 2 R. S. 737, § 28, &c. This regulation applies, however, only to persons actually confined upon suspicion, and is solely intended to prevent the protracting of arbitrary imprisonment; so that it does not preclude the crown from preferring an indictment at any distance of time from the actual perpetration of the offence, unless some particular statute limits the time of prosecuting.

There is no general statute of limitations applicable to criminal proceedings. 2 Hale, 158. Lieutenant-colonel Wall was tried and executed for a murder committed twenty years before. And it has been repeatedly held that no length of time can legalize a public nuisance, although it may afford an answer to an action of a private individual. 7 East, 199; *ante*, 167, note 12.—Chitty

[2] But such an inquisition is now considered traversable. 1 Saund. 363, note 1. Impey's Off. Cor. 437.—Chitty.

[3] There is some inaccuracy in this statement. An inquisition finding that a man was

traversed and examined; as particularly the coroner's *inquisition of the death of a man when it finds any one guilty of homicide;[4] for in such [*302 cases the offender so presented must be arraigned upon this inquisition and may dispute the truth of it; which brings it to a kind of indictment, the most usual and effectual means of prosecution, and into which we will therefore inquire a little more minutely.

II. An *indictment*(c) is a written accusation of one or more persons of a crime or misdemeanour, preferred to, and presented upon oath by, a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of *oyer* and *terminer*, and of general gaol-delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things which on the part of our lord the king shall then and there be commanded them.(d) They ought to be freeholders, but to what amount is uncertain;(e) which seems to be *casus omissus*, and as proper to be supplied by the legislature as the qualifications of the petit jury, which were formerly equally vague and uncertain but are now settled by

(c) See Appendix, § 1. (d) 2 Hal. P. C. 154. (e) Ibid. 155.

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felo de se cannot of course be traversed by the individual; but it may be removed into the king's bench by *certiorari* and then traversed by the executors or administrators of the deceased. Toomes *vs.* Etherington, 1 Saund. Rep. 363, n. (1), ed. 1824. As to the flight of persons accused of felony, I am not aware that this was ever made a substantive matter of inquiry distinct from the trial of the felony itself, (see *post*, 387;) and, as that trial could only be in the presence of the party accused, it was then the regular verdict of a jury after an open trial, and not a case in point. The coroner, indeed, holding an inquisition on the death of a person, may find that he was murdered by A. B. and that A. B. has fled for it; and the authorities all agree that this latter part of the finding is not traversable, though it is observed that no adequate reason for this distinction is to be found in the books. This probably was the flight which the author intended to mention. With respect to deodands, there is no mode, indeed, by which the lord of the franchise can quarrel with the finding of the jury, so as to increase the value they have affixed, but the court will interfere to diminish that value, (Foster, 266;) and therefore it must be inferred that the finding is not absolutely conclusive.

And lastly, as to presentments of petty offences in the town or leet, lord Mansfield has said that it cannot be true that they are not traversable anywhere, (Rex *vs.* Roupell, Cowp. 459;) and the law seems to be that before the fine is estreated and paid, though not afterwards, the presentment may be removed by *certiorari* into the court of King's Bench and traversed there. Rex *vs.* Heaton, 2 T. R. 184.

Upon the whole, it may be laid down generally that, with the exception of flight on the death of a man, no finding of an inquisition can be conclusive on a party who has had no opportunity of vindicating his rights before the jury; while there are cases in which a party who has voluntarily foregone that right in one stage may yet traverse the finding in some future stage. As when, upon an inquiry by the sheriff under a writ of extent, the jury find certain goods to be the goods of A. B., and that finding is returned to the court of Exchequer, C. D., who claims the goods, and might have done so, but neglected to do so before the sheriff, may yet traverse the finding in the court above.—COLERIDGE.

[4] Upon this inquisition the party accused may be tried without the intervention of the grand jury, (2 Hale, 61. 3 Camp. 371. 2 Leach, 1095. Russ. & R. C. C. 240, S. C.;) and if an indictment be found for the same offence, and the defendant be acquitted on the one, he must be arraigned on the other,—to which he may, however, effectually plead his former acquittal. 2 Hale, 61.

Verdict in an Action.—There is also a mode in which a party may be put on his trial without any written accusation, viz., the verdict of a jury in a civil cause. 2 Hale, 150. 4 T. R. 293. 3 Esp. 134. Thus, in an action for taking away goods, if the jury found that they were taken feloniously, the verdict served also as an indictment. 2 Hale, 151. Hawk. b. 2, c. 15, s. 6. Com. Dig. Indictment, C. Bac. Abr. Indictment, B. 5. And at the present day, in an action for slander, in which the plaintiff is charged with a criminal offence, and the defendant justifies, if the jury find that the justification is true, the plaintiff may be immediately put upon his trial for the crime alleged against him, without the intervention of a grand jury. 5 T. R. 293. But the verdict must be found in some court which has competent jurisdiction over criminal matters, or otherwise it seems to have but little force. 2 Hale, 151. Hawk. b. 2, c. 25, s. 6. An affidavit taken at *nisi prius* on a trial may also be received by the court of King's Bench as the foundation of a criminal information against another. T. R. 285.—CHITTY.

several acts of parliament. However, they are usually gentlemen of the best figure in the county. As many as appear upon this panel are sworn upon the grand jury to the amount of twelve at the least, and not more than twenty-three; that twelve may be a majority. Which number, as well as the constitution itself, we find exactly described so early as the laws of king Ethelred.(*f*) "*Exeant seniores duodecim thani, et præfectus cum eis, et jurent super sanctuarium quod eis in manus datur, quod nolint ullum innocentem accusare, nec aliquem noxium celare.*" In the time of king Richard the First (according to Hoveden) the process of electing the grand jury ordained by that prince was as follows: four knights were to be taken from the county at large, who chose two more out of every hundred; which two associated to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district. This number was probably *found too large and inconvenient; but the traces of this institution still remain in that some of the jury must be summoned out of every hundred. This grand jury are previously instructed in the articles of their inquiry by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths whether there be sufficient cause to call upon the party to answer it. A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment so far as their evidence goes, and not to rest satisfied merely with remote probabilities; a doctrine that might be applied to very oppressive purposes.(*g*)

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The grand jury are sworn to inquire only for the body of the county, *pro corpore comitatus;* and therefore they cannot regularly inquire of a fact done out of that county for which they are sworn, unless particularly enabled by an act of parliament. And to so high a nicety was this matter antiently carried, that where a man was wounded in one county and died in another, the offender was at common law indictable in neither, because no complete act of felony was done in any one of them; but, by statute 2 & 3 Edw. VI. c. 24, he is now indictable in the county where the party died.[5] And, by statute 2 Geo. II. c. 21, if the stroke or poisoning be in England, and the death upon the sea or out of England, or *vice versa*, the offenders and their accessories may be indicted in the county where either the death, poisoning, or stroke shall happen. And so in some other cases; as, particularly, where treason is committed out of the realm, it may be inquired of in any county within the realm, as the king shall direct, in pursuance of statutes 26 Hen. VIII. c. 13, 33 Hen. VIII. c. 23, 35 Hen. VIII. c. 2, and 5 & 6 Edw. VI. c. 11. And counterfeiters, washers, or minishers *of the current coin, together with all manner of felons and their accessories, may, by statute 26 Hen. VIII. c. 6, (confirmed and explained by 34 & 35 Hen. VIII. c. 26, §§ 75, 76,) be indicted and tried for those offences, if committed in any part(*h*) of Wales, before the justices of gaol-delivery and of the peace in the next adjoining county of England, where the king's writ runneth: that is, at present in the county of Hertford or Salop, and not, as it should seem, in the county of Chester or Monmouth; the one being a county palatine where the king's writ did not run, and the other a part of Wales, in 26 Hen. VIII.(*i*) Murders, also, whether committed in England or in foreign parts,(*k*) may, by virtue of the statute 33 Hen. VIII. c. 23, be inquired of and tried by the king's special commission in any shire or place in the kingdom. By statute 10 & 11 W. III. c. 25, all robberies and other capital crimes committed in Newfoundland may be inquired of and

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(*f*) Wilk. *LL. Angl. Sax.* 117.
(*g*) State Trials, iv. 183.
(*h*) Stra. 533. 3 Mod. 134.
(*i*) See Hardr. 66.
(*k*) Ely's case, at the Old Bailey, Dec. 1720. Roache's case, Dec. 1775.

[5] By stat. 7 Geo. IV. c. 64, this statute was repealed; and it is enacted by s. 12 that when any felony or misdemeanour shall be begun in one county and completed in another, or shall be committed on the boundary or boundaries of two or more counties, or within five hundred yards thereof, it may be tried and punished in either.—Stewart.

tried in any county in England. Offences against the black act, 9 Geo. I. c. 22, may be inquired of and tried in any county of England, at the option of the prosecutor.(*l*) So felonies in destroying turnpikes or works upon navigable rivers, erected by authority of parliament, may, by statutes 8 Geo. II c. 20 and 13 Geo. III. c. 84, be inquired of and tried in any adjacent county By statute 26 Geo. II. c. 19, plundering or stealing from any vessel in distress or wrecked, or breaking any ship contrary to 12 Anne, st. 2, c. 18,(*m*) may be prosecuted either in the county where the fact is committed or in any county next adjoining; and if committed in Wales, then in the next adjoining English county: by which is understood to be meant such English county as, by the statute 26 Hen. VIII. above mentioned, had before a concurrent jurisdiction with the great sessions of felonies committed in Wales.(*n*) Felonies committed out of the realm, in burning or destroying the king's ships, *magazines, or stores, may, by statute 12 Geo. III. c. 24, be inquired of and tried in any county of England, or in the place where [*305 the offence is committed. By statute 13 Geo. III. c. 63, misdemeanours committed in India may be tried upon informations or indictments in the court of king's bench in England; and a mode is marked out for examining witnesses by commission, and transmitting their depositions to the court. But, in general, all offences must be inquired into as well as tried in the county where the fact is committed. Yet, if larceny be committed in one county and the goods carried into another, the offender may be indicted in either, for the offence is complete in both;(*o*) or he may be indicted in England for larceny in Scotland and carrying the goods with him into England, or *vice versa;* or for receiving in one part of the united kingdom goods that have been stolen in another.(*p*) But for robbery, burglary, and the like, he can only be indicted where the fact was actually committed; for though the carrying away and keeping of the goods is a continuation of the original taking, and is therefore larceny in the second county, yet it is not a robbery or burglary in that jurisdiction. And if a person be indicted in one county for larceny of goods originally taken in another, and be thereof convicted or stands mute, he shall not be admitted to his clergy, provided the original taking be attended with such circumstances as would have ousted him of his clergy by virtue of any statute made previous to the year 1691.(*q*)[6]

(*l*) So held by all the judges, H. 11 Geo. III. in the case of Richard Morris, on a case referred from the Old Bailey.

(*m*) See page 245.

(*n*) At Shrewsbury Summer Assizes, 1774, Parry and Roberts were convicted of plundering a vessel which was wrecked on the coast of Anglesey. It was moved in arrest of judgment that Chester, and not Salop, was the next adjoining English county; but all the judges (in Mich. 15 Geo. III.) held the prosecution to be regular.

(*o*) 1 Hal. P. C. 507.

(*p*) Stat. 13 Geo. III. c. 31.

(*q*) Stat. 25 Hen. VIII. c. 3. 3 W. and M. c. 9.

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[6] The law respecting venue in criminal prosecutions has been recently revised and simplified, and is now as follows:—

As to murder. By 9 Geo. IV. c. 31, s. 7, if any British subject shall be charged in England with any murder or manslaughter, or with being accessory before the fact to any murder or manslaughter, committed on land out of the United Kingdom, whether within the king's dominions or without, any justice of the county or place where the person so charged shall be may take cognizance of the charge, and proceed therein as if it had been committed within the limits of his ordinary jurisdiction; and if any person so charged shall be committed for trial or admitted to bail, a commission shall be directed to such persons, and into such county or place, as shall be appointed by the lord chancellor, for the speedy trial of any such offender; and such persons shall have power to hear and determine all such offences, within the county or place limited in their commission, by a jury of such county or place, in the same manner as if the offences had been actually committed in such county or place; and, by s. 8, where any person, being feloniously struck, poisoned, or hurt, upon the sea, or at any place out of England, shall die of such stroke, &c. in England, or *vice versâ*, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or manslaughter, or being accessory before the fact to murder, or after the fact to murder or manslaughter, may be tried and punished in the county or place in England in which such death, stroke, &c. shall happen, in the same manner in all respects as if such offence had been wholly committed in that county or place.

As to offences committed on the borders of counties. By 7 Geo. IV. c. 64, s. 12, where any felony or misdemeanour shall be committed on the boundary or boundaries of two or more counties, or within five hundred yards thereof, or shall be begun in one county and completed in another, every such felony or misdemeanour may be tried and punished

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to endorse on the back of the bill "*ignoramus*," or, we know nothing of it; intimating that, though the facts might possibly be true, that truth did not appear to them: but now they assert in English more absolutely "not a true bill," or (which is the better way) "not found," and then the party is discharged without further answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then *endorse upon it "a true bill," antiently "*billa vera*." The indictment is then said to be found, and the party stands indicted. But to find a bill there must at least twelve of the jury agree; for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours: that is, by twelve at least of the grand jury, in the first place, assenting to the accusation, and after-

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in any of the said counties in the same manner as if it had been actually and wholly committed therein.

As to offences committed on persons or property in coaches or vessels. By 7 Geo. IV. c. 64, s. 13, where any felony or misdemeanour shall be committed on any person, or on or in respect of any property in or upon any coach, wagon, cart, or other carriage whatever, employed in any journey, or on board any vessel whatever employed on any voyage upon any inland navigation, such felony or misdemeanour may be tried and punished in any county through any part whereof such coach, &c. or vessel shall have passed in the course of the journey or voyage during which such felony or misdemeanour shall have been committed, in the same manner as if it had been actually committed in such county; and where any part of any highway or navigation shall constitute the boundary of any two counties, such felony or misdemeanour may be tried and punished in either of the said counties through, or adjoining to, or by the boundary of any part whereof such coach, &c. or vessel shall have passed in the course of the journey or voyage during which such felony or misdemeanour shall have been committed, in the same manner as if it had been actually committed in such county.

As to larceny generally. By the Larceny Act, (7 & 8 Geo. IV. c. 29, s. 76.) if any person, having feloniously taken any property in any one part of the United Kingdom, shall afterwards have it in his possession in any other part, he may be indicted for larceny in that part where he shall so have such property in his possession, as if he had actually stolen it there; and if any person having knowingly received, in any one part of the United Kingdom, any stolen property which shall have been stolen in any other part, he may be indicted for such offence in that part where he shall so receive such property, as if it had been originally stolen in that part.

As to accessories. By 7 Geo. IV. c. 64, s. 9, accessories before the fact to any felony may be tried in any court that has jurisdiction to try the principal offender, although the offence of such accessories may be committed on the high seas, or on land, within or without the king's dominions; and if the principal offence is committed in one county and the other offence in another, such accessories may be tried in either; and, by s. 10, a similar provision is made with respect to accessories after the fact to felony.

As to treasons. By 35 Hen. VIII. c. 2, (which is not repealed by 1 & 2 P. and M. c. 10, see 1 East, P. C. 103,) all treasons or misprisions of treason committed out of the realm may be tried in the court of King's Bench by a jury of the county in which the court sits, or by a special commission in any county in England. See Chit. C. L. 188.

An indictment for bigamy may, by 9 Geo. IV. c. 31, s. 22, be tried in the county where the offender is apprehended or is in custody, the same as if the offence had been actually committed there.

In an indictment for a libel the venue must be laid in the county where the publication took place.

Indictments for offences against the customs and excise may be tried in any county of England. See 6 Geo. IV. c. 108, ss. 74 & 78, and 7 & 8 Geo. IV. c. 53, s. 43.

Offences committed in a county of a city or town may be tried in the county at large. See 38 Geo. III. c. 52; 51 Geo. III. c. 100; 60 Geo. III. c. 4; 1 Geo. IV. c. 4. If the indictment states the felony to have been committed in the county at large, and it was committed in the county of a city or town, this is bad. Rex *vs.* Mellor, R. & R. C. C. 144. But if the offence be properly laid in the county of a town, and the indictment is preferred in the county at large, it need not be averred that that is the next adjoining county to the county of the town. Rex *vs.* Goff, id. 179. The 26 Hen. VIII. c. 6, s. 6, which makes felonies in Wales triable in the next English county, extends to felonies created since that statute. Rex *vs.* Wyndham, id. 197.—Chitty.

wards by the whole petit jury of twelve more finding him guilty upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree;(r) and the indictment, when so found, is publicly delivered into court.

Indictments must have a precise and sufficient certainty.[7] By statute 1 Hen.

(r) 2 Hal. P. C. 161.

[7] The following general rules as to the form of the indictment may be found useful. The indictment must state the facts of the crime with as much certainty as the nature of the case will admit. Cowp. 682. 5 T. R. 611–623. Therefore an indictment charging the defendant with obtaining money by false pretences, without stating what were the particular pretences, is insufficient. 3 T. R. 581. The cases of indictment for being a common scold or barretor, or for keeping a disorderly house, or for conspiracy, may be considered as exceptions to the general rule. 2 T. R. 586. 1 T. R. 754. 2 B. & A. 205. And an indictment for endeavouring to incite a soldier to commit an act of mutiny, or a servant to rob his master, without stating the particular means adopted, may also be considered as an exception. 1 B. & P. 180.

The indictment ought to be certain to every intent and without any intendment to the contrary. Cro. Eliz. 490. Cro. Jac. 20. But this strictness does not so far prevail as to render an indictment invalid in consequence of the omission of a letter which does not change the word into another of different signification, as *undertood* for *understood*, and *recevd* for *received*, (1 Leach, 134, 145;) and if the sense be clear, nice objections ought not to be regarded, (5 East, 259;) and in stating mere matter of inducement, not so much certainty is required as in stating the offence itself. 1 Vent. 170. Com. Dig. Indictment, G. The charge must be sufficiently explicit to support itself; for no latitude of intention can be allowed to include any thing more than is expressed. 2 Burr. 1127. 2 M. & S. 381. And every crime must appear on the face of the record with a scrupulous certainty, (Cald. 187,) so that it may be understood by every one, alleging all the requisites that constitute the offence: and that every averment must be so stated that the party accused may know the general nature of the crime of which he is accused, and who the accusers are, whom he will be called upon to answer, (1 T. R. 69;) and as a branch of this rule it is to be observed that in describing some crimes technical phrases and expressions are required to be used to express the precise idea which the law entertains of the offence. See the instances in the text. The offence must be positively charged, and not stated by way of recital: so that the words "that whereas" prefixed will render it invalid. 2 Stra. 900, n. 1. 2 Lord Raym. 1363. Stating an offence in the disjunctive is bad. 2 Stra. 901, 200; and see further, 1 Chit. C. L. 2d ed. 236. Repugnancy in a material matter may be fatal to the indictment. 5 East, 254. But though the indictment must in all respects be certain, yet the introduction of averments altogether superfluous and immaterial will seldom prejudice. For if the indictment can be supported without the words which are bad, they may, on arrest of judgment, be rejected as surplusage. 1 T. R. 322. 1 Leach, 474. 3 Stark. 26. And see further, as to repugnancy and surplusage, 1 Chit. C. L. 2d ed. 332, 338, &c.

Presumptions of law need not be stated, (4 M. & S. 105. 2 Wils. 147;) neither need facts of which the court will *ex officio* take notice. It is not necessary to state *a conclusion of law* resulting from the facts of a case: it suffices to state the facts and leave the court to draw the inference. 2 Leach, 941. Neither is it necessary to state mere *matter of evidence* which the prosecutor proposes to adduce, unless it alters the offence; for if so, it would make the indictment as long as the evidence. 1 Stra. 139, 140. Forst. 194. 2 B. & A. 205. In general, all *matters of defence* must come from the defendant, and need not be anticipated or stated by the prosecutor. 5 T. R. 84. 2 Leach, 580. 2 East, 19. And it is never necessary to negative all the exceptions which, by some other statute than that which creates the offence, might render it legal; for these must be shown by defendant for his own justification. 2 Burr. 1036. 1 Bla. Rep. 230. Facts which lie more particularly within the defendant's than the prosecutor's knowledge need not be shown with more than a certainty to a common intent. 5 T. R. 607. Hawk. b. 2, c. 25, s. 112. If *notice* be necessary to raise the duty which the defendant is alleged to have broken, it should be averred; but where knowledge must be presumed, and the event lies alike in the knowledge of all men, it is never necessary either to state or prove it. 5 T. R. 621. If a request or demand is necessary to complete the offence, it must be stated in the indictment. 8 East, 52, 53. 1 T. R. 316. Cald. 554. Where an *evil intent* accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment and proved. 2 Stark. 245. R. & R. C. C. 365. 1 Hale, 561. 2 East, P. C. 514, 515. 2 R. & R. C. C. 317. Indictments must be in English. 4 Geo. II. c. 26. 6 Geo. II. c. 6. But if any document in a foreign language, as a libel, be necessarily introduced, it should be set out in the original tongue and then translated, showing its applications, (6 T. R. 162. 7 Moore, 1;) but it has been said to

V. c. 5, all indictments must set forth the Christian name, surname, and addition of the state and degree, mystery, town or place, and the county of the offender; and all this to identify his *person*.[8] The *time* and *place* are also to be ascertained by naming the day and township in which the fact was committed; though a mistake in these points is in general not held to be material, provided the *time* be laid previous to the finding of the indictment and the *place* to be within the jurisdiction of the court, unless where the place is laid not merely as a *venue*, but as part of the description of the fact.(*s*)[9] But sometimes the *time* may be very material, where there is any situation in point of time assigned for the prosecution of offenders, as by the statute 7 Will. III. c. 3, which enacts that no prosecution shall be had for any of the treasons or misprisions therein mentioned, (except an assassination designed or attempted on the person of the

(*s*) 2 Hawk. P. C. 435.

be both needless and dangerous to translate it. 1 Saund. 242, n. 1. By the same acts, statutes 4 Geo. II. c. 26, and 6 Geo. II. c. 14, all indictments must be in words at length; and therefore no abbreviations can be admitted. 2 Hale, 170, n. g. Nor can any figures be allowed in indictments, but all numbers must be expressed in words at length; but to this rule there is an exception in case of forgery and threatening letters, when a *facsimile* of the instrument forged must be given in the indictment. 2 Hale, 170, 146.

As to the insertion of several counts in an indictment, see 1 Chit. C. L. 248 to 250; and as to when part of a count may be found, id. 250 to 252. As to the joinder of several offences, id. 253 to 256. As to variances, id. 2d ed. 293, 294. As to the amendment of indictments, id. 297 to 298; and when an indictment may be quashed, id. 299 to 304. As to the power of a court of equity to stay indictment, id. 2d ed. 304. As to when an action, as well as an indictment, may be brought, see *ante*, 6.—Chitty.

[8] But, by stat. 7 Geo. IV. c. 64, s. 19, it was enacted that no indictment should be abated by reason of any dilatory plea of misnomer, or of want of addition, or of the wrong addition, of the party offering such plea, but the court, if satisfied by affidavit or otherwise of the truth of such plea, might cause the indictment to be amended. And the 14 & 15 Vict. c. 100, s. 24 provides that no indictment shall be held insufficient (*inter alia*) by reason that any person mentioned in the indictment is designated by a name or office or other descriptive appellation instead of his proper name, nor for want of or imperfection in the addition of any defendant.—Stewart.

[9] By 7 Geo. IV. c. 64, s. 20, "*no judgment*, upon any indictment or information, for any felony or misdemeanour, whether after verdict or outlawry, or by confession, default, or otherwise, shall be *stayed or reversed* for want of the averment of any matter unnecessary to be proved; nor for the omission of the words 'as appears by the record,' or 'with force and arms,' or 'against the peace;' nor for the insertion of the words 'against the form of the statute,' instead of 'against the form of the statutes,' or *vice versâ*; nor for that any person or persons mentioned in the indictment or information is or are designated by a name of office, or other descriptive appellation, instead of his, her, or their proper name or names; nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence; nor for stating the time imperfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that never happened; nor for want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence." The objections enumerated in this clause are no longer available, either in arrest of judgment or by writ of error, because it enacts that judgment shall not be *stayed*, which applies to motions in arrest of judgment, or *reversed*, which applies to writs of error. But it seems that any of these objections will still be available on demurrer, where the prisoner prays judgment in his favour, and if his demurrer is allowed, judgment is neither stayed nor reversed, but given in his favour. See further, on this subject, Car. C. L. 46, *et seq.*, and the cases there cited.

If the name of a prisoner is unknown and he refuse to disclose it, an indictment against him as a person whose name is to the jurors unknown, but who is personally brought before the jurors by the keeper of the prison, will be sufficient. Rex *vs.* ——, R. & R. C. C. 489. But an indictment against him as a person to the jurors unknown, without something to ascertain whom the grand jury meant to designate, is insufficient. Id. ibid.—Chitty.

But now also, by stat. 14 & 15 Vict. c. 100, s. 24, no indictment shall be held insufficient for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the pending of the indictment, or on an impossible day, or on a day that never happened.—Stewart.

king,) unless the bill of indictment be found within three years after the offence committed;(t) and in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given. The offence itself must also be set forth with clearness and certainty; and in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the *offence, that no other words, [*307 however synonymous they may seem, are capable of doing it. Thus, in reason the facts must be laid to be done "treasonably and against his allegiance," antiently "*proditorie et contra ligeantiæ suæ debitum*," else the indictment is void. In indictments for murder it is necessary to say that the party indicted "murdered," not "killed," or "slew," the other; which, till the late statute, was expressed in Latin by the word "*murdravit*."(u) In all indictments for felonies the adverb "feloniously," "*felonice*," must be used; and for burglaries, also, "*burglariter*," or, in English, "burglariously:" and all these to ascertain the intent. In rapes the word "*rapuit*" or "ravished" is necessary, and must not be expressed by any periphrasis, in order to render the crime certain. So in larcenies, also, the words "*felonice cepit et asportavit*, feloniously took and carried away," are necessary to every indictment, for these only can express the very offence. Also, in indictments for murder, the length and depth of the wound should in general be expressed, in order that it may appear to the court to have been of a mortal nature; but if it goes through the body, then its dimensions are immaterial, for that is apparently sufficient to have been the cause of the death. Also, where a limb or the like is absolutely cut off, there such description is impossible.(v) Lastly, in indictments the *value* of the thing which is the subject or instrument of the offence must sometimes be expressed. In indictments for larcenies this is necessary, that it may appear whether it be grand or petit larceny, and whether entitled or not to the benefit of clergy;[10] in homicide of all sorts it is necessary, as the weapon with which it is committed is forfeited to the king as a deodand.[11]

The remaining methods of prosecution are, without any previous finding by a jury, to fix the authoritative stamp of verisimilitude upon the accusation One of these, by the common law, was when a thief was taken *with the mainour;* that is, with the thing stolen upon him *in manu*. For he might, when so de-

(t) Fost. 249. (u) See book iii. page 321. (v) 5 Rep. 122.

[10] There are some recent enactments, respecting indictments for larceny, which it seems important to notice here. By 7 Geo. IV. c. 64, s. 14, "to remove the difficulty of stating the names of all the owners of property in the case of partners and other joint owners," the property of partners may be laid in any one partner by name, and another, or others. By s. 15, property belonging to counties, &c. may be laid in the inhabitants without naming them. By s. 16, property ordered for the use of the poor of parishes, &c. may be laid in the overseers without naming them; and materials, &c. for repairing highways may be laid to be the property of the surveyor without naming him. By s. 17, property of turnpike-trustees may be laid in the trustees without naming them. And by s. 18, property under commissioners of sewers may be laid in the commissioners without naming them. By 7 & 8 Geo. IV. c. 29, s. 21, in indictments for stealing records, &c. it is unnecessary to allege either that the article is the property of any person, or that it is of any value. By s. 22, a similar provision is made respecting wills. By s. 44, where the materials therein enumerated are fixed in any square, street, or other like place, it is unnecessary to allege them to be the property of any person. And, by s. 46, in indictments against tenants and lodgers for stealing property from houses or apartments let to them, the property may be laid either in the owner or person letting to hire. For the cases bearing upon this subject, see Car. C. L. 25, *et seq.*; Col. Crim. Stat. 329; and see a full and able summary of the law of larceny, id. 325, 343.—CHITTY.

[11] It is to be observed that, by stat. 11 & 12 Vict. c. 46, any court of oyer and terminer and general gaol-delivery (extended to courts of quarter sessions by 12 & 13 Vict. c. 45) may cause the indictment or information for any offence whatever, in case of any variance between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record, to be forthwith amended, and thereupon the trial shall proceed as if no such variance had appeared. Still further powers of amendment in matters of variance are conferred by stat. 14 & 15 Vict. c. 100, s. 1.—STEWART.

*308] tected *flagrante delicto*, be brought into court, arraigned and tried without indictment; as, by the *Danish law, he might be taken and hanged upon the spot, without accusation or trial.(w) But this proceeding was taken away by several statutes in the reign of Edward the Third,(x) though in Scotland a similar process remains to this day.(y) So that the only species of proceeding at the suit of the king, without a previous indictment or presentment by a grand jury, now seems to be that of *information*.

III. Informations are of two sorts: first, those which are partly at the suit of the king, and partly at that of a subject; and secondly, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer, and are a sort of *qui tam* actions, (the nature of which was explained in a former book,)(z) only carried on by a criminal instead of a civil process; upon which I shall therefore only observe that, by the statute 31 Eliz. c. 5, no prosecution upon any penal statute, the suit and benefit whereof are limited in part to the king and in part to the prosecutor, can be brought by any common informer after one year is expired since the commission of the offence; nor on behalf of the crown after the lapse of two years longer; nor, where the forfeiture is originally given only to the king, can such prosecution be had after the expiration of two years from the commission of the offence.[12]

The informations that are exhibited in the name of the king alone are also of two kinds: first, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the attorney-general; secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer; and they are filed by the king's coroner and attorney in the court of king's bench, usually called the master of the crown-office, who is for this purpose the standing officer of the public. The objects of the king's own prosecutions, filed *ex officio* by his own attorney-

*309] general, are properly such *enormous misdemeanours as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal; which power, thus necessary not only to the ease and safety but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of informations, filed by the master of the crown-office upon the complaint or relation of a private subject, are any gross and notorious misdemeanours, riots, batteries, libels, and other immoralities of an atrocious kind,(a) not peculiarly tending to disturb the government, (for those are left to the care of the attorney-general,) but which, on account of their magnitude or pernicious example, deserve the most public animadversion.[13] And when an information is filed, either thus, or by

(w) Stiernhook, *de jure Sueon. l.* 3, c. 5.
(x) 2 Hal. P. C. 14.
(y) Lord Kaims, i. 331.
(z) See book iii. page 162.
(a) 2 Hawk. P. C. 260.

[12] This statute is so far repealed, by the 11 & 12 Vict. c. 43, s. 36, that where no time is specially limited for laying any such information in the act of parliament relating to each particular case, the information (if it be for an offence punishable by justices upon summary conviction) must be laid within six calendar months from the time when the matter of such information arose.—Stewart.

[13] And see further, as to for what causes the court will grant this information, 1 Chitt. C. L. 2d ed. 849 to 856. The court will always take into consideration the whole of the circumstances of the charge before they lend their sanction to this extraordinary mode of prosecution. They will observe the *time* of making the application, and whether a long interval has elapsed since the injury, and to what cause it may be fairly ascribed, also the *evidence* on which the charge is founded, and weigh the probabilities which it seems to offer. They will also examine the character and motives of the applicant,—at least his share in the matter before them; and they will look forward to the conse-

the attorney-general *ex officio*, it must be tried by a petit jury of the county where the offence arises; after which, if the defendant be found guilty, the court must be resorted to for his punishment.[14]

There can be no doubt but that this mode of prosecution by information (or suggestion) filed on record by the king's attorney-general, or by his coroner or master of the crown-office, in the court of king's bench, is as antient as the common law itself.(*b*) For, as the king was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever the grand jury informed him upon their oaths that there was a sufficient ground for instituting a criminal suit, so when these his immediate officers were otherwise sufficiently assured that a man had committed a gross misdemeanour, either personally against the king or his government, or against the public peace and good order, they were at liberty, without waiting for any further intelligence, to convey that information to the court of king's bench by a *suggestion on record, and to carry on the prosecution in his majesty's name. But [*310 these informations (of every kind) are confined by the constitutional law to mere misdemeanours only; for, whenever any capital offence is charged, the same law requires that the accusation be warranted by the oath of twelve men before the party shall be put to answer it. And as to those offences in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction and were carried on in a legal and regular course in his majesty's court of king's bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given, by the same judges, as if the prosecution had originally been by indictment. But when the statute 3 Hen. VII. c. 1 had extended the jurisdiction of the court of starchamber, the members of which were the sole judges of the law, the fact, and the penalty, and when the statute 11 Hen. VII. c. 3 had permitted informations to be brought by any informer, upon any penal statute not extending to life or member, at the assizes or before the justices of the peace, who were to hear and determine the same according to their own discretion, then it was that the legal and orderly jurisdiction of the court of

(*b*) 1 Show. 118

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quences of the measure they are requested to grant, in the peculiar situation of the defendant. 1 Bla. Rep. 542. In applications of this nature for libels, the applicant must, unless the charge be general, show his innocence of the matter imputed to him. See Doug. 284, 387, 588. 1 Burr. 402. 6 T. R. 294. 4 id. 285. 5 B. & A. 595. 1 D. & R. 197. 2 Chitt. Rep. 163. In applications against magistrates, the applicant must directly impute corrupt motives for the misconduct complained of. 3 B. & A. 432.—CHITTY.

[14] If an information or an indictment for a misdemeanour removed into the court of King's Bench by *certiorari* be not of such importance as to be tried at the bar of the court, it is sent down by writ of nisi prius into the county where the crime is charged to have been committed, and is there tried by a common or special jury, like a record in a civil action; and if the defendant is found guilty he must afterwards receive judgment from the King's Bench. But where an indictment for treason or felony is removed by *certiorari*, the law upon the subject will be found fully stated by lord Hale in the two following sections. 2 P. C. 41.

"As to an indictment of felony or treason removed out of the county by *certiorari*, and the party pleading, the record is sent down by nisi prius to be tried. The judges of nisi prius may upon that record proceed to trial and judgment and execution, as if they were justices of gaol-delivery, by virtue of the statute of 14 Hen. VI. cap. 1.

"But if there were any question upon that statute, yet the statute of 6 Hen. VIII. cap. 6, which extends to all justices and commissioners, as well of those of gaol-delivery and of the peace, enables the court of King's Bench to send to them the very record itself, and by a special writ or mandate to command them to proceed to trial and judgment, upon such issue joined, as they may command the justices before whom the indictment was taken to proceed to hear and determine the same as if no such issue were joined." See Sir Myles Stapleton's case, Raym. 376.

If the treason of felony is to be tried at nisi prius under the 14 Hen. VI. c. 1, then the court sends a transcript of the record, and not the record itself. 2 Hal. P. C. 3. 4 Co. 74. —CHRISTIAN.

king's bench fell into disuse and oblivion, and Empson and Dudley, (the wicked instruments of king Henry VII.,) by hunting out obsolete penalties, and this tyrannical mode of prosecution, with other oppressive devices,(c) continually harassed the subject and shamefully enriched the crown. The latter of these acts was soon indeed repealed, by statute 1 Hen. VIII. c. 6; but the court of starchamber continued in high vigour, and daily increasing its authority, for more than a century longer, till finally abolished by statute 16 Car. I. c. 10.

Upon this dissolution, the old common-law(d) authority of the court of king's bench as the *custos morum* of the nation, being found necessary to reside somewhere, for the peace and good government of the kingdom, was again revived in *practice.(e) And it is observable that in the same act of parliament which abolished the court of starchamber, a conviction by information is expressly reckoned up as one of the legal modes of conviction of such persons as should offend a third time against the provisions of that statute.(f) It is true Sir Matthew Hale, who presided in this court soon after the time of such revival, is said(g) to have been no friend to this method of prosecution; and, if so, the reason of such his dislike was probably the ill use which the master of the crown-office then made of his authority by permitting the subject to be harassed with vexatious informations, whenever applied to by any malicious or revengeful prosecutor, rather than his doubt of their legality or propriety upon urgent occasions.(h) For the power of filing informations, without any control, then resided in the breast of the master; and, being filed in the name of the king, they subjected the prosecutor to no costs, though on trial they proved to be groundless. This oppressive use of them, in the times preceding the revolution, occasioned a struggle, soon after the accession of king William,(i) to procure a declaration of their illegality by the judgment of the court of king's bench. But Sir John Holt, who then presided there, and all the judges, were clearly of opinion that this proceeding was grounded on the common law and could not be then impeached. And in a few years afterwards a more temperate remedy was applied in parliament by statute 4 & 5 W. and M. c. 18, which enacts that the clerk of the crown shall not file any information without express direction from the court of king's bench, and that every prosecutor, permitted to promote such information, shall give security by a recognizance of twenty pounds (which now seems to be too small a sum) to prosecute the same with effect, and to pay costs to the defendant in case he be acquitted thereon, unless the judge, who tries the information, shall certify there was reasonable cause for filing it; and, at all events, to pay costs, unless *the information shall be tried within a year after issue joined. But there is a proviso in this act that it shall not extend to any other informations than those which are exhibited by the master of the crown-office: and, consequently, informations at the king's own suit, filed by his attorney-general, are no way restrained thereby.

*311] *312]

There is one species of informations still further regulated by statute 9 Anne, c. 20, viz., those in the nature of a writ of *quo warranto;* which was shown, in the preceding book,(k) to be a remedy given to the crown against such as had usurped or intruded into any office or franchise. The modern information tends to the same purpose as the antient writ, being generally made use of to try the civil rights of such franchises; though it is commenced in the same manner as other informations are, by leave of the court or at the will of the attorney-general, being properly a criminal prosecution, in order to fine the defendant for his usurpation as well as to oust him from his office, yet usually considered at present as merely a civil proceeding.[15]

(c) 1 And. 167.
(d) 5 Mod. 464.
(e) Styl. Rep. 217, 245. Styl. Pract. Reg. tit. Information, page 187, edit. 1657. 2 Sid. 71. 1 Sid. 152.
(f) Stat. 16 Car. I. c. 10, § 6.
(g) 5 Mod. 460.
(h) 1 Saund. 301. 1 Sid. 174.
(i) M. 1 W. and M. 5 Mod. 459. Comb. 141. Far. 361. 1 Show. 106.
(k) See book iii. page 262.

[15] Because an information in the nature of a *quo warranto* is considered merely as a civil proceeding, the court of King's Bench will grant a new trial, though the verdict should have been given for the defendant. 2 T. R. 484.—Christian.

These are all the methods of prosecution at the suit of the king. There yet remains another, which is merely at the suit of the subject, and is called an *appeal*.

IV. An appeal in the sense wherein it is here used does not signify any complaint to a superior court of an injustice done by an inferior one, which is the general use of the word; but it here means an original suit at the time of its first commencement.(*l*) An appeal, therefore, when spoken of as a criminal prosecution, denotes an accusation by a private subject against another for some heinous crime, demanding punishment on account of the particular injury suffered rather than for the offence against the public. As this method of prosecution is still in force, I cannot omit to mention it; but as it is very little in use, on account of the *great nicety required in conducting it, I shall treat of it very briefly, referring the student for more particulars to other more voluminous compilations.(*m*) [*313

This private process for the punishment of public crimes had probably its original in those times when a private pecuniary satisfaction, called a *weregild*, was constantly paid to the party injured, or his relations, to expiate enormous offences. This was a custom derived to us, in common with other northern nations,(*n*) from our ancestors, the antient Germans; among whom, according to Tacitus,(*o*) "*luitur homicidium certo armentorum ac pecorum numero; recipitque satisfactionem universa domus.*"(*p*) In the same manner, by the Irish Brehon law, in case of murder, the Brehon or judge was used to compound between the murderer and the friends of the deceased, who prosecuted him, by causing the malefactor to give unto them, or to the child or wife of him that was slain, a recompense which they called an *eriach*.(*q*) And thus we find, in our Saxon laws, (particularly those of king Athelstan,)(*r*) the several weregilds for homicide established in progressive order from the death of the ceorl or peasant up to that of the king himself.(*s*) And in the laws of king Henry I.(*t*) we have an account of what other offences were then redeemable by weregild, and what were not so.(*u*) As, therefore, during the continuance of this custom, a process was certainly given for recovering the weregild by the party to whom it was due, it seems that, when *these offences by degrees grew no longer redeemable, the private process was still continued, in order to insure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation for the offence. [*314

But though appeals were thus in the nature of prosecutions for some atrocious injury committed more immediately against an individual, yet it also was antiently permitted that any subject might appeal another subject of high treason, either in the courts of common law,(*w*) or in parliament, or (for treasons committed beyond the seas) in the court of the high constable and marshal. The cognizance of appeals in the latter still continues in force; and so late as 1631 there was a trial by battel awarded in the court of chivalry on such an appeal of treason;(*x*) but that in the first was *virtually* abolished(*y*) by the statutes 5 Edw. III. c. 9, and 25 Edw. III. c. 24, and in the second, *expressly*, by statute 1 Hen. IV. c. 14. So that the only appeals now in force, for things done within the realm, are appeals of felony and mayhem.

An appeal of *felony* may be brought for crimes committed either against the parties themselves or their relations. The crimes against the parties them-

(*l*) It is derived from the French "*appeler*," the verb active, which signifies to call upon, summon, or challenge one, and not the verb neuter, which signifies the same as the ordinary sense of "appeal" English.

(*m*) 2 Hawk. P. C. c. 23.

(*n*) Stiernhook, *de jure Sueon. l.* 3, c. 4.

(*o*) *De Mor. Germ.* c. 21.

(*p*) And in another place, (c. 12.) "*Delictis, pro modo pœnarum, equorum pecorumque numero convicti mulctantur. Pars mulctæ regi vel civitati; pars ipsi qui vindicatur, vel propinquis ejus exsolvitur.*"

(*q*) Spenser's State of Ireland, p. 1513, edit. Hughes.

(*r*) *Judic. Civit. Lund.* Wilk. 71.

(*s*) The weregild of a ceorl was 266 thrysmas, that of the king 30,000; each thrysma being equal to about a shilling of our present money. The weregild of a subject was paid entirely to the relations of the party slain, but that of the king was divided,—one-half being paid to the public, the other to the royal family.

(*t*) C. 12.

(*u*) In Turkey this principle is carried so far that even murder is never prosecuted by the officers of the government, as with us. It is the business of the next relations, and them only, to revenge the slaughter of their kinsmen; and if they rather choose (as they generally do) to compound the matter for money, nothing more is said about it. Lady M. W. Montagu, lett. 42.

(*w*) Britt. c. 22.

(*x*) By Donald lord Rea against David Ramsey. Rushw. vol. ii. part 2, p. 112.

(*y*) 1 Hal. P. C. 349.

selves are *larceny, rape,* and *arson.* And for these, as well as for mayhem, the persons robbed, ravished, maimed, or whose houses are burned may institute this private process. The only crime against one's relations for which an appeal can be brought is that of *killing* him, by either murder or manslaughter. But this cannot be brought by every relation: but only by the wife for the death of her husband, or by the heir male for the death of his ancestor; which heirship was also confirmed by an ordinance of king Henry the First, to the four nearest degrees of blood.(*z*) It is given to the wife on account of the loss of her husband: therefore, if she marries again, before or pending her appeal, it is lost and gone; or if she marries after judgment, she shall not demand execution. The heir, as was said, must also be heir male, and such a *315] one as was the *next heir by the course of the common law, at the time of the killing of the ancestor. But this rule hath three exceptions:—1. If the person killed leaves an innocent wife, she only, and not the heir, shall have the appeal; 2. If there be no wife, and the heir be accused of the murder, the person who next to him would have been heir male shall bring the appeal; 3. If the wife kills her husband, the heir may appeal her of the death. And, by the statute of Glocester, 6 Edw. I. c. 9, all appeals of death must be sued within a year and a day after the completion of the felony by the death of the party: which seems to be only declaratory of the old common law; for in the Gothic constitutions we find the same "*præscriptio annalis, quæ currit adversus actorem, si de homicida ei non constet intra annum a cæde facta, nec quenquam interea arguat et accuset.*"(*a*)

These appeals may be brought previous to any indictment; and if the appellee be acquitted thereon, he cannot be afterwards indicted for the same offence. In like manner as by the old Gothic constitution, if any offender gained a verdict in his favour when prosecuted by the party injured, he was also understood to be acquitted of any crown prosecution for the same offence;(*b*) but, on the contrary, if he made his peace with the king, still he might be prosecuted at the suit of the party. And so, with us, if a man be acquitted on an indictment of murder, or found guilty and pardoned by the king, still he ought not (in strictness) to go at large, but be imprisoned or let to bail till the year and day be past, by virtue of the statute 3 Hen. VII. c. 1, in order to be forthcoming to answer any appeal for the same felony, not having as yet been punished for it, though if he hath been found guilty of manslaughter on an indictment, and hath had the benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed; for it is a maxim in law that "*nemo bis punitur pro eodem delicto.*" Before this statute was made, it was not usual to indict a man for homicide within the time limited for appeals, which produced very great inconvenience, of which more hereafter.(*c*)

*316] *If the appellee be acquitted, the appellor (by virtue of the statute of Westm. 2, 13 Edw. I. c. 12) shall suffer one year's imprisonment, and pay a fine to the king, besides restitution of damages to the party for the imprisonment and infamy which he has sustained; and if the appellor be incapable to make restitution, his abettors shall do it for him and also be liable to imprisonment. This provision, as was foreseen by the author of Fleta,(*d*) proved a great discouragement to appeals; so that thenceforward they ceased to be in common use.

If the appellee be found guilty, he shall suffer the same judgment as if he had been convicted by indictment, but with this remarkable difference:—that on an indictment, which is at the suit of the king, the king may pardon and remit the execution; on an appeal, which is at the suit of a private subject, to make an atonement for the private wrong, the king can no more pardon it than he can remit the damages recovered on an action of battery.(*e*) In like manner as while the weregild continued to be paid as a fine for homicide it could not be remitted by the king's authority.(*f*) And the antient usage was, so

(*z*) Mirr. c. 2, § 7.
(*a*) Stiernh. *de jure Goth. l.* 3, c. 4.
(*b*) Ibid. *l.* 1, c. 5.
(*c*) See page 335.
(*d*) *L.* 1, c. 34, § 48.
(*e*) 2 Hawk. P. C. 392.
(*f*) *LL. Edm.* 3.

late as Henry the Fourth's time, that all the relations of the slain should drag the appellee to the place of execution;(g) a custom founded upon that savage spirit of family resentment which prevailed universally through Europe after the irruption of the northern nations, and is peculiarly attended to in their several codes of law, and which prevails even now among the wild and untutored inhabitants of America; as if the finger of nature had pointed it out to mankind in their rude and uncultivated state.(h) However, the punishment of the offender may be remitted and discharged by the concurrence of all parties interested; and as the king by his pardon may frustrate an indictment, so the appellant by his release may *discharge an appeal;(i) "*nam quilibet potest renunciare juri pro se introducto.*"[16] [*317

These are the several methods of prosecution instituted by the laws of England for the punishment of offences, of which that by indictment is the most general. I shall therefore confine my subsequent observations principally to this method of prosecution; remarking, by the way, the most material variations that may arise from the method of proceeding by either information or appeal.

CHAPTER XXIV.

OF PROCESS UPON AN INDICTMENT.

*WE are next, in the fourth place, to inquire into the manner of issuing *process*, after indictment found, to bring in the accused to answer it. [*318 We have hitherto supposed the offender to be in custody before the finding of the indictment, in which case he is immediately (or as soon as convenience permits) to be arraigned thereon. But if he hath fled or secretes himself in capital cases, or hath not in smaller misdemeanours been bound over to appear at the assizes or sessions, still an indictment may be preferred against him in his absence; since, were he present, he could not be heard before the grand jury against it. And if it be found, then process must issue to bring him into court; for the indictment cannot be tried unless he personally appears, according to the rules of equity in all cases, and the express provision of statute 28 Edw. III. c. 3 in capital ones, that no man shall be put to death without being brought to answer by due process of law.

(g) M. 11 Hen. IV. 12. 3 Inst. 131. (h) Robertson, Chs. V. i. 45. (i) 1 Hal. P. C. 9.

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[16] These appeals had become nearly obsolete; but the *right* still existing was claimed, and in part *exercised*, in the year 1818, by William Ashford, eldest brother and heir-at-law of Mary Ashford, who brought a writ of appeal against Abraham Thornton for the murder of his sister. Thornton had been tried at the Warwick Summer Assizes, 1817, for the murder, and acquitted, though under circumstances of strong suspicion. The appellee, when called upon to plead, pleaded "not guilty, and that he was ready to defend himself by his body:" and, taking his glove off, he threw it upon the floor of the court. A counterplea was afterwards delivered in by the appellant, to which there was a replication. A general demurrer followed, and joinder thereon. See a full detail of the proceedings in that singular case, in the report of it under the name of Ashford *vs.* Thornton, 1 B. & A. 405. It was held in that case that where in an appeal of death the appellee wages his battle, the counterplea, to oust him of this mode of trial, must disclose such violent and strong presumptions of guilt as to leave no possible doubt in the minds of the court, and therefore that a counterplea which only stated strong circumstances of suspicion was insufficient. It was also held that the appellee may reply fresh matter tending to show his innocence,—as an alibi, and his former acquittal of the same offence on an indictment. But it was doubted whether when the counterplea is *per se* insufficient, or where the replication is a good answer to it, the court should give judgment that the appellee be allowed his wager of battle, or that he go without day. Therefore, the appellant praying no further judgment, the court, by consent of both parties, ordered that judgment should be stayed in the appeal and that the appellee should be discharged. This case, the first of the kind that had occurred for more than half a century, (see Bigby *vs.* Kennedy, 5 Burr. 2643, 2 W. Bl. 713. Rex *vs.* Taylor, 5 Burr. 2793. Smith

The proper process on an indictment for any petit misdemeanour, or on penal statute, is a writ of *venire facias*, which is in the nature of a summons to cause the party to appear. And if by the return to such *venire* it appears that the party hath lands in the county whereby he may be distrained, then a *distress infinite* shall be issued from time to time till he appears. But if the sheriff returns that he hath no lands in his bailiwick, (then, upon his non-appearance,) a writ of *capias* *shall issue, which commands the sheriff to take his body and have him at the next assizes; and if he cannot be taken upon the first *capias*, a second and third shall issue, called an *alias* and a *pluries capias*. But on indictments for treason or felony a *capias* is the first process; and for treason or homicide only one shall be allowed to issue,(*a*) or two in the case of other felonies, by statute 25 Edw. III. c. 14, though the usage is to issue only one in any felony, the provisions of this statute being in most cases found impracticable.(*b*) And so, in the case of misdemeanours, it is now the usual practice for any judge of the court of king's bench, upon certificate of an indictment found, to award a writ of *capias* immediately, in order to bring in the defendant.[1] But if he absconds, and it is thought proper to pursue him to an outlawry, then a greater exactness is necessary; for, in such case, after the several writs have issued in a regular number, according to the nature of the respective crimes, without any effect, the offender shall be put in the *exigent* in order to his outlawry: that is, he shall be exacted, proclaimed, or required to surrender at five county courts; and if he be returned *quinto exactus*, and does not appear at the fifth exaction or requisition, then he is adjudged to be *outlawed*, or put out of the protection of the law, so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise.

*319]

The punishment for outlawries upon indictments for misdemeanours is the same as for outlawries upon civil actions, (of which, and the previous process by writs of *capias*, *exigi facias*, and *proclamation*, we spoke in the preceding book,)(*c*) viz., forfeiture of goods and chattels. But an outlawry in treason or felony amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been found guilty by his country.(*d*)[2] His life is, however, still under the protection of the law, as hath formerly been *observed;(*e*) so that, though anciently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head like a wolf by any one that should meet him,(*f*) because, having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him, yet now, to avoid such inhumanity, it is holden that no man is entitled

*320]

(*a*) See Appendix, § 1.
(*b*) 2 Hal. P. C. 195.
(*c*) See book iii. pages 283, 284.
(*d*) 2 Hal. P. C. 205.
(*e*) See page 178.
(*f*) Mirr. c. 4. Co. Litt. 128.

vs. Taylor, id. ibid,—the last cases upon the subject, where the mode of proceeding is detailed at large,) led to the total abolition of appeals of murder, as well as of treason, felony, or other offences, together with wagers of battle, by the passing of the statute 59 Geo. III. c. 46.—Chitty.

[1] Now, by the 48 Geo. III. c. 58, when any person is charged with an offence below the degree of felony, one of the judges may, on an affidavit thereof, or on the production of an indictment, or an information filed, issue his warrant for apprehending and holding him to bail; and if he neglects or refuses to become so bound, he may be committed to gaol until he conforms or is discharged.—Chitty.

By the statute 11 & 12 Vict. c. 42, s. 3, when any indictment is found in any court of oyer and terminer or gaol-delivery, or in any court of general or quarter sessions, against any person at large, whether he has been previously bound by recognizance to appear or not, the clerk of indictments, or clerk of the peace, as the case may be, may at any time issue a certificate of such indictment having been found; and, upon its production, a justice for the county or place where the offence was committed, or where the defendant resides, may issue his warrant, and thereupon commit him for trial or admit him to bail.—Stewart.

[2] In most cases now in which a person convicted by a verdict is deprived of clergy, a person outlawed will also be ousted of clergy; yet some few instances may perhaps still remain where a person outlawed will have clergy, though if he had been tried for the same offence he would not have been entitled to that privilege. See Foster, 358. 2 Leach. Hawk. 481. 4 T. R. 543.—Christian.

to kill him wantonly or wilfully, but in so doing is guilty of murder,(*g*) unless it happens in the endeavour to apprehend him;(*h*) for any person may arrest an outlaw on a criminal prosecution, either of his own head or by writ or warrant of *capias utlagatum*, in order to bring him to execution. But such outlawry may be frequently reversed by writ of error, the proceedings therein being (as it is fit they should be) exceedingly nice and circumstantial; and if any single minute point be omitted or misconducted, the whole outlawry is illegal and may be reversed, upon which reversal the party accused is admitted to plead to and defend himself against the indictment.

Thus much for process to bring in the offender after indictment found; during which stage of the prosecution it is that writs of *certiorari facias* are usually had, though they may be had at any time before trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the court of king's bench,[3] which is the sovereign ordinary court of justice in causes criminal. And this is frequently done for one of these four purposes: either, 1. To consider and determine the validity of appeals or indictments, and the proceedings thereon, and to quash or confirm them as there is cause; or, 2. Where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed, in order to have the prisoner or defendant tried at the bar of the court of king's bench, or before the justices of *nisi prius;* or, 3. It is so removed in order to plead the king's pardon there; or, 4. To issue process of outlawry against the offender in those *counties or places where the process of the inferior judges will [*321 not reach him.(*i*) Such writ of *certiorari*, when issued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal, unless the court of king's bench remands the record to the court below, to be there tried and determined. A *certiorari* may be granted at the instance of either the prosecutor or the defendant: the former as a matter of right, the latter as a matter of discretion; and therefore it is seldom granted to remove indictments from the justices of gaol delivery, or after issue joined or confession of the fact in any of the courts below.(*k*)[4]

(*g*) 1 Hal. P. C. 497.
(*h*) Bracton, fol. 125.
(*i*) 2 Hal. P. C. 210.
(*k*) 2 Hawk. P. C. 287. 4 Burr. 749.

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[3] For the definition and history of the writ of *certiorari*, see Fitz. N. B. 554 As the court of King's Bench has a general superintendence over all other courts of criminal jurisdiction, so it may award a *certiorari* to remove proceedings from them, unless they are expressly exempted from such superintendence by the statutes creating them. 2 Hawk. P. C. 286. Rex *vs.* Young, 2 T. R. 473. Rex *vs.* Jukes, 8 T. R. 542. But *certiorari* cannot be taken away by any general, but only by express negative, words, (Rex *vs.* Reeve, 1 W. Bla. 231;) and a statute taking away *certiorari* does not take it from the crown, unless expressly mentioned. Rex *vs.* ——, 2 Chitt. R. 136; and see Rex *vs.* Tindal, 15 East, 339, n. *Certiorari* lies from the court of King's Bench to justices, even in cases which they are empowered *finally* to hear and determine. 2 Hawk. P. C. 286. Rex *vs.* Morely, 2 Burr. 1040. Hartley *vs.* Hooker, Cowp. 524.—CHITTY.

[4] But, by statute 5 & 6 W. IV. c. 33, s. 1, it was enacted that no *certiorari* should issue to remove any indictment or presentment into the King's Bench from any court of sessions, assize, *oyer and terminer*, and gaol-delivery, or any court, at the instance of the prosecutor or any other person, (except the attorney-general,) without motion first made in the King's Bench or before some judge of that court, and leave obtained in the same manner as where the application was made by the defendant. And now, by statute 16 Vict. c. 30, s. 4, no indictment, except indictments against bodies corporate not authorized to appear by attorney in the court in which the indictment is preferred, can be removed into the court of Queen's Bench or into the Central Criminal Court by writ of *certiorari*, either at the instance of the prosecutor or of the defendant, (other than the attorney-general acting on behalf of the crown,) unless it be made to appear to the court from which the writ is to issue, by the party applying for the same, that a fair and impartial trial of the case cannot be had in the court below, or that some question of law of more than usual difficulty and importance is likely to arise upon the trial, or that a view of the premises in respect whereof any indictment is preferred, or a special jury, may be required for its satisfactory trial. If the indictment be removed at the instance of the defendant,

At this stage of prosecution also it is that indictments found by the grand jury against a peer must, in consequence of a writ of *certiorari*, be certified and transmitted into the court of parliament, or into that of the lord high steward of Great Britain; and that, in places of exclusive jurisdiction, as the two universities, indictments must be delivered (upon challenge and claim of cognizance) to the courts therein established by charter and confirmed by act of parliament, to be there respectively tried and determined.

CHAPTER XXV.

OF ARRAIGNMENT AND ITS INCIDENTS.

*322] *When the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be *arraigned* thereon; which is the fifth stage of criminal prosecution.

To arraign[1] is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment.(*a*) The prisoner is to be called to the bar by his name; and it is laid down in our antient books(*b*) that, though under an indictment of the highest nature, he must be brought to the bar without irons or any manner of shackles or bonds, unless there be evident danger of an escape, and then he may be secured with irons. But yet, in Layer's case, A.D. 1722, a difference was taken between the time of arraignment and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment.(*c*)[2]

*323] *When he is brought to the bar, he is called upon by name to hold up his hand; which, though it may seem a trifling circumstance, yet is of this importance, that by the holding up of his hand *constat de persona*, and he owns himself to be of that name by which he is called.(*d*) However, it is not an indispensable ceremony; for, being calculated merely for the purpose of identifying the person, any other acknowledgment will answer the purpose as well: therefore, if the prisoner obstinately and contemptuously refuses to hold up his hand, but confesses he is the person named, it is fully sufficient.(*e*)

Then the indictment is to be read to him distinctly in the English tongue, (which was law even while all other proceedings were in Latin,) that he may fully understand his charge. After which it is to be demanded of him whether he be guilty of the crime whereof he stands indicted, or not guilty. By the old common law the accessory could not be arraigned till the principal was attainted, unless he chose it: for he might waive the benefit of the law; and therefore principal and accessory might, and may still, be arraigned, and plead, and also be tried, together. But otherwise, if the principal had never been indicted at all, and stood mute, had challenged above thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the accessory in any of these cases could not be arraigned; for *non*

(*a*) 2 Hal. P. C. 216.
(*b*) Bract. *l.* 3, *de coron.* c. 18, § 3. Mirr. c. 5, *sect.* 1, § 54. Flet. *l.* 1, c. 31, § 1. Britt. c. 5. Staundf. P. C. 78. 3 Inst. 34. Kel. 10. 2 Hal. P. C. 219. 2 Hawk. P. C. 308.
(*c*) State Trials, vi. 230.
(*d*) 2 Hal. P. C. 219.
(*e*) Raym. 408.

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he must enter into a recognizance to pay costs if convicted; and so, on the other hand, if the indictment be removed at the instance of the prosecutor, he must enter into a recognizance to pay costs in the event of the defendant being acquitted.—Stewart.

[1] This word in Latin (lord Hale says) is no other than *ad rationem ponere*, and in French, *ad reson*, or, abbreviated, *ad resn.* 2 Hal. P. C. 216.—Christian.

[2] And it has since been held that the court has no authority to order the irons to be taken off till the prisoner has pleaded and the jury are charged to try him. Waite's case, Leach, 34.—Christian.

constitit whether any felony was committed or no, till the principal was attainted; and it might so happen that the accessory should be convicted one day and the principal acquitted the next, which would be absurd. However, this absurdity could only happen where it was possible that a trial of the principal might be had subsequent to that of the accessory; and therefore the law still continues that the accessory shall not be tried so long as the principal remains liable to be tried hereafter. But, by statute *1 Anne, c. 9, if the principal be once convicted, and before attainder (that is, before he receives judgment of death or outlawry) he is delivered by pardon, the benefit of clergy, or otherwise; or if the principal stands mute, or challenges peremptorily above the legal number of jurors, so as never to be convicted at all; in any of these cases in which no subsequent trial can be had of the principal, the accessory may be proceeded against as if the principal felon had been attainted; for there is no danger of future contradiction.[3] And upon the trial of the accessory, as well after as before the conviction of the principal, it seems to be the better opinion, and founded on the true spirit of justice,(*f*) that the accessory is at liberty (if he can) to controvert the guilt of his supposed principal, and to prove him innocent of the charge, as well in point of fact as in point of law.[4] [*324

When a criminal is arraigned, he either *stands mute*, or *confesses* the fact; which circumstances we may call *incidents* to the arraignment; or else he *pleads* to the indictment, which is to be considered as the next stage of proceedings. But, first, let us observe these incidents to the arraignment,—of **standing mute, or confession.**

I. Regularly, a prisoner is said to stand mute when, being arraigned for treason or felony, he either, 1. Makes no answer at all; or, 2. Answers foreign to the purpose, or with such matter as is not allowable; and will not answer otherwise: or, 3. Upon having pleaded not guilty refuses to put himself upon the country.(*g*) If he says nothing, the court ought, *ex officio*, to impanel a jury to inquire whether he stands obstinately mute, or whether he be dumb *ex visitatione Dei*. If the latter appears to be the case, the judges of the court (who are to be of counsel for the prisoner, and to see that he hath law and justice) shall proceed to the trial, and examine all points as if he had pleaded not guilty.(*h*)[5] But whether judgment of death can be given against such a

(*f*) Fost. 365, &c. (*g*) 2 Hal. P. C. 316. (*h*) 2 Hawk. P. C. 327.

[3] And now, by the 11 & 12 Vict. c. 45, s. 1, an accessory before the fact to any felony may be indicted, tried, convicted, and punished in all respects as if he were a principal felon: and an accessory after the fact to any felony may be indicted and convicted either as an accessory after the fact to the principal felony with the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted or shall or shall not be amenable to justice.—STEWART.

[4] See the 7 Geo. IV. c. 64, by sect. 9 of which accessories before the fact, whether in cases of felony at common law, or by virtue of any statute or statutes made or to be made, may be tried as such, or as for substantive felonies, by any court having jurisdiction to try the principal felons, although the offences be committed on the seas or abroad, and, if the offences be committed in different counties, may be tried in either.

By sect. 10, accessories after the fact may be tried by any court having jurisdiction over the principal felons, as in the preceding section; and, by sect. 11, in order that all accessories may be convicted and punished in cases where the principal felon is not attainted, it is enacted that accessories may be prosecuted after the conviction of the principal felon, though the principal felon be not attainted. See further, as to arraignment, 1 Curw. Hawk. P. C. 434. 1 Chitt. C. L. 414. The statute mentioned in the text is repealed by the statute 7 Geo. IV. c. 64.—CHITTY.

[5] By 7 & 8 Geo. IV. c. 28, s. 1, where the prisoner pleads "Not guilty," without more, he shall be put on his trial by jury: and, by sect. 2, if he refuses to plead, the court may order a plea of "Not guilty" to be entered, and proceed as in other cases. But the latter is discretionary; and where there is any real doubt whether the refusal to plead arises from obstinacy or inability, the court may, and will, impanel a jury to try that question. In cases of insanity this is specially provided for by the unrepealed statute of 39 & 40 Geo. III. c. 94, sect. 1 of which enacts that the jury, in case of any person charged with treason, &c., proving *upon the trial* to be insane, shall declare whether he

*325] *prisoner who hath never pleaded, and can say nothing in arrest of judgment, is a point yet undetermined.(i)

If he be found to be obstinately mute, (which a prisoner hath been held to be that hath cut out his own tongue,)(k) then, if it be on an indictment of high treason, it hath long been clearly settled that standing mute is an equivalent to a conviction, and he shall receive the same judgment and execution.(l) And as in this the highest crime, so also in the lowest species of felony, viz., in petit larceny, and in all misdemeanours, standing mute hath always been equivalent to conviction. But upon appeals or indictments for other felonies, or petit treason, the prisoner was not, by the antient law, looked upon as convicted so as to receive judgment for the felony; but should for his obstinacy have received the terrible sentence of *penance*, or *peine* (which, as will appear presently, was probably nothing more than a corrupted abbreviation of *prisone*) *forte et dure.*

Before this was pronounced, the prisoner had not only *trina admonitio*, but also a respite of a few hours, and the sentence was distinctly read to him, that he might know his danger;(m) and, after all, if he continued obstinate, and his offence was clergyable, he had the benefit of his clergy allowed him, even though he was too stubborn to pray it.(n) Thus tender was the law of inflicting this dreadful punishment; but if no other means could prevail, and the prisoner (when charged with a capital felony) continued stubbornly mute, the judgment was then given against him, without any distinction of sex or degree. A judgment which was purposely ordained to be exquisitely severe, that by that very means it might rarely be put in execution.[6]

The rack, or question, to extort a confession from criminals, is a practice of a different nature; *this* having been only *used to compel a man to put himself upon his trial; *that* being a species of trial in itself. And the trial by rack is utterly unknown to the law of England; though once, when the dukes of Exeter and Suffolk, and other ministers of Henry IV., had laid a design to introduce the civil law in this kingdom as the rule of government, for a

*326]

(i) 2 Hal. P. C. 317.
(k) 3 Inst. 178.
(l) 1 Hawk. P. C. 329. 1 Hal. P. C. 317.
(m) 2 Hal. P. C. 320.
(n) Ibid. 321. 2 Hawk. P. C. 332.

was acquitted by them on account of insanity, and the court shall order him to be kept in custody till his majesty's pleasure be known, and his majesty may give an order for the safe custody of such insane person; and sect. 2 enacts that insane persons indicted for any offence, and found to be insane by a jury, to be impanelled *on their arraignment*, shall be ordered by the court to be kept in custody till his majesty's pleasure be known. The latter section has been held to extend to cases of misdemeanour. Rex *vs.* Little, R. & R. C. C. 430. In Rex *vs.* Roberts, Car. C. L. 57, a prisoner would not plead; and, a jury being impanelled to try whether he stood mute by the visitation of God, his counsel claimed a right to address the jury, as this was an issue with the affirmative on the prisoner. This was allowed by Park and Abbott, Js. The prisoner's counsel addressed the jury, and called witnesses to prove he was insane. The jury found that he was so, and Park, J., directed that he should be detained until his majesty's pleasure should be known.—Chitty.

[6] Aulus Gellius with more truth has made the same observation upon the cruel law of the Twelve Tables, *De inope debitore secando*, "*Eo consilio tanta immanitas pœnæ denunciata est, ne ad eam unquam perveniretur;*" for he adds, "*disseretum esse antiquitus neminem equidem neque legi neque audivi.*" Lib. 20, c. 1. But with respect to the horrid judgment of the *peine forte et dure*, the prosecutor and the court could exercise no discretion or show no favour to a prisoner who stood obstinately mute. And in the legal history of this country there are numerous instances of persons who have had resolution and patience to undergo so terrible a death in order to benefit their heirs by preventing a forfeiture of their estates, which would have been the consequence of a conviction by a verdict. There is a memorable story of an ancestor of an ancient family in the north of England. In a fit of jealousy he killed his wife, and put to death his children who were at home by throwing them from the battlements of his castle; and proceeding with an intent to destroy his only remaining child, an infant nursed at a farm-house at some distance, he was intercepted by a storm of thunder and lightning. This awakened in his breast the compunctions of conscience. He desisted from his purpose, and having surrendered himself to justice, in order to secure his estates to this child, he had the resolution to die under the dreadful judgment of *peine forte et dure.*—Christian.

beginning thereof they erected a rack for torture, which was called in derision the Duke of Exeter's daughter, and still remains in the Tower of London;(o) where it was occasionally used as an engine of state, not of law, more than once in the reign of queen Elizabeth.(p) But when, upon the assassination of Villiers, duke of Buckingham, by Felton, it was proposed in the privy council to put the assassin to the rack in order to discover his accomplices, the judges, being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England.(q) It seems astonishing that this usage of administering the torture should be said to arise from a tenderness to the lives of men; and yet this is the reason given for its introduction in the civil law, and its subsequent adoption by the French and other foreign nations;(r) viz., because the laws cannot endure that any man should die upon the evidence of a false, or even a single, witness, and therefore contrived this method that innocence should manifest itself by a stout denial, or guilt by a plain confession. Thus rating a man's virtue by the hardiness of his constitution, and his guilt by the sensibility of his nerves! But there needs only to state accurately,(s) in order most effectually to expose this inhuman species of mercy, the uncertainty of which, as a test and criterion of truth, was long ago very elegantly pointed out by Tully, though he lived in a state wherein it was *usual to torture slaves in order to furnish evidence: "*tamen*," says he, "*illa tormenta gubernat dolor, moderatur natura eujusque tum animi tum corporis, regit quæsitor, flectit libido, corrumpit spes, infirmat metus, ut in tot rerum angustiis nihil veritati loci relinquatur.*"(t) [*327

The English judgment of penance for standing(u) mute was as follows: that the prisoner be remanded to the prison from whence he came, and put into a low, dark chamber, and there be laid on his back on the bare floor, naked, unless where decency forbids; that there be placed upon his body as great a weight of iron as he could bear, and more; that he have no sustenance, save only, on the first day, three morsels of the worst bread; and, on the second day, three draughts of standing water, that should be nearest to the prison-door; and in this situation this should be alternately his daily diet *till he died*, or (as antiently the judgment ran) *till he answered*.(v)

It hath been doubted whether this punishment subsisted at the common law,(w) or was introduced in consequence of the statute Westm. 1, 3 Edw. I. c. 12,(x) which seems to be the better opinion. For not a word of it is mentioned in Glanvil or Bracton, or in any antient author, case, or record (that hath yet been produced) previous to the reign of Edward I.; but there are instances on record in the reign of Henry III.(y) where persons accused of felony, and standing mute, were tried in a particular manner, by two successive juries, and convicted; and it is asserted by the judges in 8 Henry IV. that, by the common law before the statute, standing mute on an appeal amounted to a conviction of the felony.(z) This statute of Edward I. directs such persons *"as will not put themselves upon inquests of felonies before the judges at the suit of the king, to be put into hard and strong prison (*soient mys en la prisone forte et dure*) as those which refuse to be at the common law of the land." And, immediately after this statute, the form of the judgment appears in Fleta and Britton to have been only a very strait confinement in prison, with hardly any degree of sustenance; but no weight is directed to be laid upon the body, so as to hasten the death of the miserable sufferer; and, indeed, any surcharge of punishment on persons adjudged to penance, so as to shorten their lives, is reckoned by Horne in the Mirror(a) as a species of criminal homicide. [*328

(o) 3 Inst. 35.
(p) Barr. 92, 496.
(q) Rushw. Coll. i. 638.
(r) *Coll. l.* 9, *t.* 41, *l.* 8, and *t.* 47, *l.* 16. Fortesq. de *LL. Ang.* c. 22.
(s) The marquis Beccaria, (ch. 16,) in an exquisite piece of raillery, has proposed this problem with a gravity and precision that are truly mathematical:—"The force of the muscles and the sensibility of the nerves of an innocent person being given, it is required to find the degree of pain necessary to make him confess himself guilty of a given crime."
(t) *Pro Sulla*, 28.
(u) 2 Hal. P. C. 319. 2 Hawk. P. C. 329.
(v) Britton, c. 4 and 22. Flet. *l.* 1, *t.* 34, § 33.
(w) 2 Inst. 179. 2 Hal. P. C. 322. 2 Hawk. P. C. 330.
(x) Staundf. P. C. 149. Barr. 82.
(y) Emlyn on 2 Hal. P. C. 322.
(z) *At common ley, avant le statute de West.* 1, *c.* 12, *si ascun ust estre appeal, et vst estre mute, ill serra convict de felony.* M. 8 Ken. IV. 2.
(a) Ch. 1, § 9.

It also clearly appears, by a record of 31 Edw. III.,(b) that the prisoner might then possibly subsist for forty days under this lingering punishment. I should therefore imagine that the practice of loading him with weights, or, as it was usually called, *pressing him to death*, was gradually introduced between 31 Edw. III. and 8 Hen. IV., at which last period it first appears upon our books;(c) being intended as a species of mercy to the delinquent, by delivering him the sooner from his torment: and hence I presume it also was that the duration of the penance was then first(d) altered; and, instead of continuing *till he answered*, it was directed to continue *till he died*, which must very soon happen under an enormous pressure.

The uncertainty of its original, the doubts that were conceived of its legality, and the repugnance of its theory (for it was rarely carried into practice) to the humanity of the laws of England, all concurred to require a legislative abolition of this cruel process, and a restitution of the antient common law; whereby the standing mute in felony, as well as in treason and in trespass, amounted to a confession of the charge. Or, if the corruption of the blood and the consequent escheat in felony had been removed, the judgment of *peine forte et dure* *329] might perhaps have still innocently remained, *as a monument of the savage rapacity with which the lordly tyrants of feodal antiquity hunted after escheats and forfeitures; since no one would ever have been tempted to undergo such a horrid alternative. For the law was, that by standing mute and suffering this heavy penance the judgment, and of course the corruption of the blood and escheat of the *lands*, were saved in felony and petit treason, though not the forfeiture of the *goods*: and therefore this lingering punishment was probably introduced, in order to extort a plea; without which it was held that no judgment of death could be given, and so the lord lost his escheat. But in high treason, as standing mute is equivalent to a conviction, the same judgment, the same corruption of blood, and the same forfeitures always attended it as in other cases of conviction.(e) And very lately, to the honour of our laws, it hath been enacted, by statute 12 Geo. III. c. 20, that every person who being arraigned for felony and piracy shall stand mute or not answer directly to the offence shall be convicted of the same, and the same judgment and execution (with all their consequences in every respect) shall be thereupon awarded as if the person had been convicted by verdict or confession of the crime.[7] And thus much for the demeanour of a prisoner upon his arraignment by standing mute; which now, in all cases, amounts to a constructive confession.

II. The other incident to arraignments, exclusive of the plea, is the prisoner's actual *confession* of the indictment. Upon a simple and plain confession, the court hath nothing to do but to award judgment; but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it and plead to the indictment.(f)

But there is another species of confession which we read much of in our antient books, of a far more complicated kind, which is called *approvement*. And *330] that is when a *person indicted of treason or felony, and arraigned for the same, doth confess the fact before plea pleaded, and appeals or ac-

(b) 6 Raym. 13.
(c) Year-book, 8 Hen. IV. 1.
(d) *Et fuit dit, que le contraire avait estre fait devant ces heurs.* Ibid. 2.
(e) 2 Hawk. P. C. 331.
(f) 2 Hal. P. C. 225.

[7] Two instances have occurred since the passing of this statute of persons who refused to plead, and who in consequence were condemned and executed. One was at the Old Bailey, for murder, in 1777; the other was for burglary, at the summer assizes at Wells, in 1792. It might perhaps have been a greater improvement of the law if the prisoner's silence had been considered a plea of not guilty, rather than a confession; for it would operate more powerfully as an example, and be more satisfactory to the minds of the public, if the prisoner should suffer death after a public manifestation of his guilt by evidence, than that he should be ordered for execution only from the presumption which arises from his obstinate silence.—Christian.

cuses others, his accomplices, in the same crime in order to obtain his pardon. In this case he is called an *approver* or prover, *probator*, and the party appealed or accused is called the *appellee*. Such approvement can only be in capital offences; and it is, as it were, equivalent to an indictment, since the appellee is equally called upon to answer it: and if he hath no reasonable and legal exceptions to make to the person of the approver, which indeed are very numerous, he must put himself upon his trial, either by battel or by the country, and if vanquished or found guilty must suffer the judgment of the law, and the approver shall have his pardon *ex debito justitiæ*. On the other hand, if the appellee be conqueror or acquitted by the jury, the approver shall receive judgment to be hanged, upon his own confession of the indictment; for the condition of his pardon has failed, viz: the conviction of some other person, and therefore his conviction remains absolute.

But it is purely in the discretion of the court to permit the approver thus to appeal or not; and, in fact, this course of admitting approvements hath been long disused; for the truth was, as Sir Matthew Hale observes, that more mischief hath arisen to good men by these kind of approvements, upon false and malicious accusations of desperate villains, than benefit to the public by the discovery and conviction of real offenders. And therefore, in the times when such appeals were more frequently admitted, great strictness and nicety were held therein;(*g*) though since their discontinuance the doctrine of approvements is become a matter of more curiosity than use. I shall only observe that all the good, whatever it be, that can be expected from this method of approvement is fully provided for in the cases of coining, robbery, burglary, house-breaking, horse-stealing, and larceny to the value of five shillings, from shops, warehouses, stables, and coach-houses, by statutes 4 & 5 W. and M. c. 8, *6 & 7 W. III. c. 17, 10 & 11 W. III. c. 23, and 5 Anne, c. 31, which enact that if [*331 any such offender, being out of prison, shall discover two or more persons who have committed the like offences, so as they may be convicted thereof, he shall, in case of burglary or house-breaking, receive a reward of 40*l*., and in general be entitled to a pardon of all capital offences excepting only murder and treason; and of them also in the case of coining.(*h*) And if any such person, having feloniously stolen any lead, iron, or other metal, shall discover and convict two offenders of having illegally bought or received the same, he shall, by virtue of statute 29 Geo. II. c. 30, be pardoned for all such felonies committed before such discovery. It hath also been usual for the justices of the peace, by whom any persons charged with felony are committed to gaol, to admit some one of their accomplices to become a witness (or, as it is generally termed, king's evidence) against his fellows; upon an implied confidence, which the judges of gaol-delivery have usually countenanced and adopted, that if such accomplice makes a full and complete discovery of that and of all other felonies to which he is examined by the magistrate, and afterwards gives his evidence without prevarication or fraud, he shall not himself be prosecuted for that or any other previous offence of the same degree.(*i*)[8]

(*g*) 2 Hal. P. C. ch. 29. 2 Hawk. P. C. ch. 24.

(*h*) The pardon for discovering offences against the coinage act of 15 Geo. II. c. 28 extends only to all *such* offences.

(*i*) The King *vs.* Rudd, Mich. 16 Geo. III. on a case reserved from the Old Bailey, Oct. 1775.

[8] In the case of Mrs. Rudd, in which this subject is clearly and ably explained by lord Mansfield, and again by Mr. J. Aston, in delivering the opinion of all the judges, (Cowp. 331,) it is laid down that no authority is given to a justice of the peace to pardon an offender and to tell him he shall be a witness at all events against others. But where the evidence appears insufficient to convict two or more without the testimony of one of them, the magistrate may encourage a hope that he who will behave fairly and disclose the whole truth, and bring the others to justice, shall himself escape punishment. But this discretionary power exercised by the justices of peace is founded in practice only, and cannot control the authority of the court of gaol-delivery and exempt at all events the accomplice from being prosecuted. A motion is always made to the judge for leave to admit an accomplice to be a witness; and unless he should see some particular reason for a contrary conduct, he will prefer the one to whom this encouragement has been given by the justice of peace. This admission to be a witness amounts to a promise of a recommendation to mercy, upon condition that the accomplice make a full

CHAPTER XXVI.

OF PLEA, AND ISSUE.

*332] *We are now to consider the plea of the prisoner, or defensive matter alleged by him on his arraignment, if he does not confess or stand mute. This is either, 1. A plea to the jurisdiction; 2. A demurrer; 3. A plea in abatement; 4. A special plea in bar; or, 5. The general issue.

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and fair disclosure of all the circumstances of the crime for which the other prisoners are tried, and in which he has been concerned in concert with them. Upon failure on his part with this condition he forfeits all claim to protection. And upon a trial some years ago at York, before Mr. J. Buller, the accomplice, who was admitted as a witness, denied in his evidence all that he had before confessed, upon which the prisoner was acquitted: but the judge ordered an indictment to be preferred against this accomplice for the same crime, and upon his previous confession and other circumstances he was convicted and executed. And if the jury were satisfied with his guilt, there can be no question with regard both to the law and justice of the case.

The learned commentator says that the accomplice thus admitted a witness shall not afterwards be prosecuted for that or *any other previous offence of the same degree.* Mrs. Rudd's case does not warrant the extent of that position, for the decision of that case, and what is advanced by Mr. J. Aston, (Cowp. 341;) and, as the editor conceives, the reason and principles of this doctrine will not extend the claim of the witness to mercy beyond those offences in which he has been connected with the prisoners and concerning which he has previously undergone an examination. And with regard to these crimes he may be cross-examined by the counsel for the prisoner, but of course he may refuse to criminate himself of other charges, against which that prosecution affords him no protection. The evidence and information of an accomplice, taken according to the statutes 1 & 2 Ph. and M. c. 13, and 2 & 3 Ph. and M. c. 10, may be read against a prisoner, upon proof of the death of the accomplice; but it can have no effect unless it is corroborated in the same manner as his living testimony. Westbeer's case, Leach, 14.—Christian.

See further, as to the evidence of an accomplice, 1 Chitty's Crim. L. 603, and Stark. on Evid. part iv. 17.

It has now been solemnly decided that an accomplice admitted as king's evidence, and performing the condition on which he is admitted as a witness, is not *entitled,* as a matter of *right,* to be exempt from prosecution for other offences with which he is charged, but that it will be matter in the discretion of the judge whether he will recommend him for a pardon or not. Rex *vs.* Lee, R. & R. C. C. 361. Rex *vs.* Brunton, id. 454. Even the *equitable claim* of an accomplice to a pardon, on condition of his making a full and fair confession, does not extend to prosecutions for other offences in which he was not concerned with the prisoner: with respect to such offences therefore he is not bound to answer on cross-examination. Lee's, Duce's, and West's cases, 1 Phil. Ev. 37. But the judges will not, in general, admit an accomplice as king's evidence, although applied to for that purpose by the counsel for the prosecution, if it appear that he is charged with any other felony than that on the trial of which he is to be a witness. 2 C. & P. 411. Car. C. L. 62. Where an accomplice is confirmed in his evidence against one prisoner, but not with respect to another, *both* may be convicted if the jury think the accomplice deserving of credit. Rex *vs.* Dawber and others, 2 Stark. N. P. C. 34. Car. C. L. 67, 2d ed. And see Rex *vs.* Dawber, 3 Stark. 34, 35, n., where it is said that if the testimony of an accomplice be confirmed so far as it relates to one prisoner, but not as to another, the *one* may be convicted on the testimony of the accomplice, if the jury deem him worthy of credit. An accomplice does not require confirmation as to the person charged, provided he is confirmed in the particulars of his story, (Rex *vs.* Birkett and Brady, R. & R. C. C. 251;) and the corroboration of his evidence need not be on every material point, but he must be so confirmed as to convince the jury that his statement is correct and true. Rex *vs.* Barnard, 1 C. & P. 88. A person indicted for a misdemeanour *may* be legally convicted upon the uncorroborated evidence of an accomplice. Rex *vs.* Jones, 2 Camp. 132. So *may* a person indicted for a capital offence. Jordaine *vs.* Lashbrook, 7 T. R. 609. But the testimony of accomplices alone is seldom of sufficient weight with a jury to convict offenders, the temptation to commit perjury being so great where the witness by accusing another may escape himself. The practice therefore is to advise the jury to regard the evidence of an accomplice only so far as he may be confirmed in some part of his testimony by unimpeachable testimony. Phil. Ev. 34, 3d ed. And see id. c. 4, s. 2, and the several authorities there cited and considered.—Chitty.

Formerly there was another plea, now abrogated, that of *sanctuary;* which is, however, necessary to be lightly touched upon, as it may give some light to many parts of our antient law: it being introduced and continued during the superstitious veneration that was paid to consecrated ground in the times of popery. First, then, it is to be observed that if a person accused of any crime (except treason, wherein the crown, and sacrilege, wherein the church, was too nearly concerned) had fled to any church or churchyard, and within forty days after went in sackcloth and confessed himself guilty before the coroner, and declared all the particular circumstances of the offence, and thereupon took the oath in that case provided, viz., that he abjured the realm, and would depart from thence forthwith, at the port that should be assigned him, and would never return without leave from the king; he by this means saved his life if he observed the conditions of the oath by going with a cross in *his hand and with all convenient speed to the port assigned and embarking. [*333 For if, during this forty days' privilege of sanctuary, or in his road to the seaside, he was apprehended and arraigned in any court for this felony, he might plead the privilege of sanctuary, and had a right to be remanded if taken out against his will.(*a*) But by this abjuration his blood was attainted, and he forfeited all his goods and chattels.(*b*) The immunity of these privileged places was very much abridged by the statutes 27 Hen. VIII. c. 19, and 32 Hen. VIII. c. 12. And now, by the statute 21 Jac. I. c. 28, all privilege of sanctuary, and abjuration consequent thereupon, is utterly taken away and abolished.

Formerly also the benefit of clergy used to be pleaded before trial or conviction, and was called a *declinatory* plea; which was the name also given to that of sanctuary.(*c*) But, as the prisoner upon a trial has a chance to be acquitted and totally discharged, and if convicted of a clergyable felony is entitled equally to his clergy after as before conviction, this course is extremely disadvantageous; and therefore the benefit of clergy is now very rarely pleaded, but, if found requisite, is prayed by the convict before judgment is passed upon him.[1]

I proceed, therefore, to the five species of pleas before mentioned.

I. A plea to the *jurisdiction* is where an indictment is taken before a court that hath no cognizance of the offence; as if a man be indicted for a rape at the sheriff's tourn, or for treason at the quarter sessions: in these or similar cases, he may except to the jurisdiction of the court, without answering at all to the crime alleged.(*d*)[2]

II. A demurrer to the indictment. This is incident to criminal cases as well as civil when the fact alleged is *allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is no felony, treason, or whatever the crime is alleged to be. [*334 Thus, for instance, if a man were indicted for *feloniously* stealing a greyhound, which is an animal in which no valuable property can be had, and therefore it is not felony, but only a civil trespass, to steal it: in this case the party indicted may demur to the indictment; denying it to be felony, though he confesses the act of taking it. Some have held(*e*) that if, on demurrer, the point of law be adjudged *against* the prisoner, he shall have judgment and execution as if convicted by verdict. But this is denied by others,(*f*) who hold that in such case he shall be directed and received to plead the general

(*a*) Mirr. c. 1, § 13. 2 Hawk. P. C. 335.
(*b*) 2 Hawk. P. C. 52.
(*c*) 2 Hal. P. C. 236.
(*d*) Ibid. 256.
(*e*) Ibid. 257.
(*f*) 2 Hawk. P. C. 334.

[1] Benefit of clergy is abolished in all cases of felony, by 7 & 8 Geo. IV. c. 28, s. 6.—CHITTY.

[2] An affidavit of the truth of the plea must be made.

In some cases the defendant may take advantage of the want of jurisdiction, under the plea of not guilty, as where a statute directs the offence shall be tried only within a certain boundary or by certain magistrates, (1 East, 352,) or where the objection proves that no court in England can try the indictment, (6 East, 583;) and an objection to the jurisdiction, apparent on the face of the proceedings, may be taken advantage of on demurrer. 1 T. R. 316.—CHITTY.

issue, not guilty, after a demurrer determined against him.[3] Which appears the more reasonable, because it is clear that if the prisoner freely discovers the fact in court, and refers it to the opinion of the court whether it be felony or no, and upon the fact thus shown it appears to be felony, the court will not record the confession, but admit him afterwards to plead not guilty.(*g*) And this seems to be a case of the same nature, being for the most part a mistake in point of law, and in the conduct of his pleading; and though a man by mispleading may in some cases lose his property, yet the law will not suffer him by such niceties to lose his life. However, upon this doubt, demurrers to indictments are seldom used: since the same advantages may be taken upon a plea of not guilty, or afterwards in arrest of judgment, when the verdict has established the fact.

III. A plea in *abatement*[4] is principally for a *misnomer*, a wrong name, or false addition to the prisoner. As if *James* Allen, *gentleman*, is indicted by the name of *John* Allen, *esquire*, he may plead that he has the name of James and not of John; and that he is a gentleman, and not an esquire. And if either fact is *335] found by a jury, then the *indictment shall be abated, as writs or declarations may be in civil actions, of which we spoke at large in the preceding book.(*h*) But in the end there is little advantage accruing to the prisoner by means of these dilatory pleas; because, if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner in his plea avers to be his true name and addition. For it is a rule upon all pleas in abatement that he who takes advantage of a flaw must at the same time show how it may be amended. Let us, therefore, next consider a more substantial kind of plea, viz.:

IV. Special pleas in *bar;* which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: a former acquittal, a former conviction, a former attainder, or a pardon. There are many other pleas which may be pleaded in bar of an appeal;(*i*) but these are applicable to both appeals and indictments.

1. First, the plea of *autrefoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment or other prosecution, before any court having competent jurisdiction of the offence,(*j*) he may plead such acquittal in bar of any subsequent accusation for the same crime.[5] Therefore an acquittal on an appeal is a good bar to an indictment on the same offence. And so also was an acquittal on an

(*g*) 2 Hal. P. C. 225.
(*h*) See book iii. page 302.
(*i*) 2 Hawk. P. C. ch. 23.
(*j*) 3 Mod. 194.

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[3] This rule holds good in indictments for felonies, but not for misdemeanours. 8 East, 112.—Chitty.

[4] An affidavit of the truth of the plea must be filed. 4 & 5 Anne, c. 16, s. 11.—Chitty.

[5] But such a plea must be strictly regular both in form and substance; for, in cases of misdemeanour, if it is held bad on demurrer, final judgment may be entered up against the defendant. Rex *vs.* Taylor, 5 D. & R. 422. 3 B. & C 502. And if it is irregularly pleaded, and the acquittal which it sets forth appears to have been obtained by collusion, the court will strike the plea off the file. Rex *vs.* Taylor, 5 D. & R. 521. 3 B. & C. 612. A plea of *autrefois acquit* cannot be pleaded unless the facts charged in the second indictment would, if true, have sustained the first. Rex *vs.* Vandercomb, 2 East, P. C. 519. If in a plea of *autrefois acquit* the prisoner were to insist on two distinct records of acquittal, his plea would be bad for duplicity. But *semble* that if he insisted upon the wrong, the court would, in a capital case, take care that he did not suffer by it. Rex *vs.* Sheen, 2 C. & P. 635. And if the prisoner could have been legally convicted on the first indictment upon any evidence that might have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment: and it is immaterial whether the proper evidence was adduced at the trial of the first indictment or not. Id. ibid. A prisoner indicted for felony may plead not guilty after his special plea of *autrefois acquit* has been found against him. Rex *vs.* Welch, Car. C. L. 56.—Chitty.

indictment a good bar to an appeal, by the common law;(*k*) and therefore, in favour of appeals, a general practice was introduced not to try any person on an indictment of homicide till after the year and day, within which appeals may be brought, were past; by which time it often happened that the witnesses died, or the whole was forgotten. To remedy which inconvenience, the statute 3 Hen. VII. c. 1 enacts, that *indictments shall be proceeded on immediately at the king's suit, for the death of a man, without waiting for [*336 bringing an appeal; and that the plea of *autrefoits acquit* on an indictment shall be no bar to the prosecuting of any appeal.

2. Secondly, the plea of *autrefoits convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be, (being suspended by the benefit of clergy or other causes,) is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime.(*l*) Hereupon it has been held that a conviction of manslaughter, on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment of murder; for the fact prosecuted is the same in both, though the offences differ in colouring and in degree. It is to be observed that the pleas of *autrefoits acquit* and *autrefoits convict*, or a former acquittal and former conviction, must be upon a prosecution for the same identical act and crime But the case is otherwise, in

3. Thirdly, the plea of *autrefoits attaint*, or a former attainder, which is a good plea in bar, whether it be for the same or any other felony. For wherever a man is attainted of felony by judgment of death, either upon a verdict or confession, by outlawry, or heretofore by abjuration, and whether upon an appeal or an indictment, he may plead such attainder in bar to any subsequent indictment or appeal for the same or for any other felony.(*m*) And this because, generally, such proceeding on a second prosecution cannot be to any purpose; for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had; so that it is absurd and superfluous to endeavour to attaint him a second time. But to this general rule, however, as to all others, there are some exceptions; wherein, *cessante ratione, cessat et ipsa lex.* As, 1. Where the former attainder is reversed for error, for then it *is the [*337 same as if it had never been. And the same reason holds where the attainder is reversed by parliament, or the judgment vacated by the king's pardon, with regard to felonies committed afterwards. 2. Where the attainder was upon indictment, such attainder is no bar to an appeal, for the prior sentence is pardonable by the king; and if that might be pleaded in bar of the appeal, the king might in the end defeat the suit of the subject by suffering the prior sentence to stop the prosecution of a second, and then, when the time of appealing is elapsed, granting the delinquent a pardon. 3. An attainder in felony is no bar to an indictment of treason; because not only the judgment and manner of death are different, but the forfeiture is more extensive and the land goes to different persons. 4. Where a person attainted of one felony is afterwards indicted as principal in another, to which there are also accessories, prosecuted at the same time; in this case it is held that the plea of *autrefoits attaint* is no bar, but he shall be compelled to take his trial for the sake of public justice; because the accessories to such second felony cannot be convicted till after the conviction of the principal.(*n*) And from these instances we may collect that a plea of *autrefoits attaint* is never good but when a second trial would be quite superfluous.(*o*)[6]

4. Lastly, a *pardon* may be pleaded in bar; as at once destroying the end and purpose of the indictment by remitting that punishment which the prose-

(*k*) 2 Hawk. P. C. 373.
(*l*) Ibid. 377.
(*m*) Ibid. 375.
(*n*) Poph. 107.
(*o*) Staundf. P. C. 107.

[6] By the 7 & 8 Geo. IV. c. 28, s. 4, it is enacted that no plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment, by which enactment the plea of *autrefois attaint* seems to be at an end.—CHITTY.

cution is calculated to inflict. There is one advantage that attends pleading a pardon in bar, or in arrest of judgment, *before* sentence is passed, which gives it by much the preference to pleading it *after* sentence or attainder. This is, that by stopping the judgment it stops the attainder and prevents the corruption of the blood, which when once corrupted by attainder cannot afterwards be restored otherwise than by act of parliament. But, as the title of pardons is applicable to other stages of prosecution, and they have their respective force and efficacy as well after as before conviction, outlawry, or *attainder, *338] I shall therefore reserve the more minute consideration of them till I have gone through every other title except only that of execution.

Before I conclude this head of special pleas in bar, it will be necessary once more to observe that though in civil actions, when a man has his election what plea in bar to make, he is concluded by that plea, and cannot resort to another if that be determined against him; (as if, on an action of debt, the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue *nil debet*, as he might at first: for he has made his election what plea to abide by, and it was his own folly to choose a rotten defence;) though, I say, this strictness is observed in civil actions, *quia interest reipublicæ ut sit finis litium;* yet in criminal prosecutions *in favorem vitæ*, as well upon appeal as indictment, when a prisoner's plea in bar is found against him upon issue tried by a jury, or adjudged against him in point of law by the court, still he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*, and may plead over to the felony the general issue, not guilty.(*p*) For the law allows many pleas by which a prisoner may escape death; but only one plea in consequence whereof it can be inflicted, viz., on the general issue, after an impartial examination and decision of the fact by the unanimous verdict of a jury.[7] It remains, therefore, that I consider,—

V. The general issue, or plea of *not guilty*,(*q*) upon which plea alone the prisoner can receive his final judgment of death. In case of an indictment of felony or treason, there can be no special justification put in by way of plea. As, on an indictment for murder, a man cannot *plead* that it was in his own defence against a robber on the highway, or a burglar; but he must plead the general issue, not guilty, and give this special matter in evidence. For (besides that these pleas do in effect amount to the general issue, since, if true, the prisoner is most clearly not guilty) as the facts in treason are *laid to *339] be done *proditorie et contra ligeantiæ suæ debitum*, and, in felony, that the killing was done *felonice;* these charges of a traitorous or felonious intent are the points and very *gist* of the indictment, and must be answered, directly, by the general negative, not guilty; and the jury upon the evidence will take notice of any defensive matter and give their verdict accordingly, as effectually as if it were, or could be, specially pleaded. So that this is, upon all accounts, the most advantageous plea for the prisoner.(*r*)[8]

When the prisoner hath thus pleaded not guilty, *non culpabilis*, or *nient culpable*, which was formerly used to be abbreviated upon the minutes thus, "*non*

(*p*) 2 Hal. P. C. 239. (*q*) See Appendix, § 1. (*r*) 2 Hal. P. C. 258.

[7] But this is confined to cases of felony; a defendant having pleaded in bar in all cases of misdemeanour is precluded from the benefit of the plea of not guilty if the plea of bar should be found insufficient. 8 East, 107.—Christian.

1 M. & S. 184. 3 B. & C. 502. 2 B. & C. 512, (unless on demurrer.) Term, P. C. 189. 6 East, 583, 602.—Chitty.

[8] In cases of indictments or informations for *misdemeanours*, the above rule, as to pleading the general issue, does not apply with the same degree of strictness; for there are some cases where a special plea is not only allowable, but even requisite. Thus, if the defendant fall within any exception or proviso which is not contained in the purview of the statute creating the offence, he may, by pleading, show that he is entitled to the benefit of that exception or proviso; and there are many pleas of this description in the ancient entries. 2 Leach, 606. But the principal, and indeed almost the only, cases in which special pleas to the merits are necessary, are in the case of indictments for neglecting to repair highways and bridges. As to these, see, in general, 1 Chitt. C. L. 473 to 477.—Chitty.

(or *nient*) *cul.*," the clerk of the assize, or clerk of the arraigns, on behalf of the crown, replies that the prisoner is guilty, and that he is ready to prove him so. This is done by two monosyllables, in the same spirit of abbreviation, "*cul. prit.*" which signifies, first, that the prisoner is guilty, (*cul. culpable*, or *culpabilis*,) and then, that the king is ready to prove him so, *prît*, *præsto sum*, or *paratus verificare*. This is therefore a replication on behalf of the king *viva voce* at the bar; which was formerly the course in all pleadings, as well in civil as in criminal causes. And that was done in the concisest manner; for when the pleader intended to demur he expressed his demurrer in a single word, "*judgment;*" signifying that he demanded judgment whether the writ, declaration, plea, &c., either in form or matter, were sufficiently good in law: and if he meant to rest on the truth of the facts pleaded, he expressed that also in a single syllable, "*prît;*" signifying that he was ready to prove his assertions: as may be observed from the year-books and other antient repositories of law.(*s*) By this replication the king and the prisoner are therefore at issue; for we may remember, in our strictures upon pleadings in the preceding book,(*t*) it was observed that when the parties come to a fact which is affirmed on one side and denied on the other, then they are said to be at issue in point *of fact: which is evidently the case here in the plea of *non cul.* by the [*340 prisoner and the replication of *cul.* by the clerk. And we may also remember that the usual conclusion of all affirmative pleadings, as this of *cul.* or *guilty* is, was by an averment in these words, "and this he is *ready* to verify, *et hoc paratus est verificare;*" which same thing is here expressed by the single word "*prît.*"

How our courts came to express a matter of this importance in so odd and obscure a manner, "*rem tantam tam negligenter*," can hardly be pronounced with certainty. It may perhaps, however, be accounted for by supposing that these were at first short notes to help the memory of the clerk and remind him what he was to reply; or else it was the short method of taking down in court, upon the minutes, the replication and averment, "*cul. prît;*" which afterwards the ignorance of succeeding clerks adopted for the very words to be by them spoken.(*u*)

But, however it may have arisen, the joining of issue (which, though now usually entered on the record,(*w*) is no otherwise joined(*x*) in any part of the proceedings) seems to be clearly the meaning of this obscure expression;(*y*) which has puzzled our most ingenious etymologists, and is commonly understood as if the clerk of the arraigns, immediately on plea pleaded, had fixed an opprobrious name on the prisoner by asking him, "*culprit*, how wilt thou be tried?" for immediately upon issue joined it is inquired of the prisoner by what trial he will make his innocence appear.[9] This form has at present reference

(*s*) North's Life of Lord Guildford, 98.
(*t*) See book iii. page 312.
(*u*) Of this ignorance we may see daily instances in the abuse of two legal terms of ancient French; one, the prologue to all proclamations, "*oyez*," or hear ye, which is generally pronounced, most unmeaningly, "O yes;" the other, a more pardonable mistake,—viz., when a jury are all sworn, the officer bids the crier number them, for which the word in law-French is "*countez;*" but we now hear it pronounced in very good English, "count these."
(*w*) See Appendix, § 1.
(*x*) 2 Hawk. P. C. 399.
(*y*) 2 Hal. P. C. 258.

[9] The learned judge's explanation of *prît*, from *præsto sum*, or *paratus verificare*, however ingenious, is certainly inconsistent both with the principles and practice of special pleading. After the general issue, or the plea of not guilty, there could be no replication, or the words *paratus verificare* could not possibly have been used. This plea in Latin was entered thus upon the record:—*Non inde est culpabilis, et pro bono et malo ponit se super patriam:* after this the attorney-general, the king's coroner, or clerk of assize could only join issue by *fecit similiter*, or *he doth the like*. See App. p. 3, at the end of this book. If, then, I might be allowed to indulge a conjecture of my own, I should think that *prit* was an easy corruption of *pnt.* written for *ponit* by the clerk, as a minute that issue was joined, or *ponit se super patriam;* or *pnt se* might be converted into *prist* or *prest*, as it is sometimes written. *Cul* was probably intended to denote the plea, and *prit* the issue; and these syllables being pronounced aloud by the clerk to give the court and prisoner an opportunity of hearing the accuracy of the minute, and being immediately followed by the question, How wilt thou be tried? naturally induced the ignorant part of the audience to suppose that *culprit* was an appellation given to the prisoner. As a con-

to appeals and approvements only wherein the appellee has his choice either to try the *accusation by battel or by jury. But upon indictments, since the abolition of ordeal, there can be no other trial but by jury, *per pais*, or by the country: and therefore, if the prisoner refuses to put himself upon the inquest in the usual form, that is, to answer that he will be tried by God and the country,(*z*) if a commoner; and, if a peer, by God and his peers;(*a*) the indictment, if in treason, is taken *pro confesso;* and the prisoner, in cases of felony, is adjudged to stand mute, and if he perseveres in his obstinacy shall now(*b*) be convicted of the felony.[10]

*341]

When the prisoner has thus put himself upon his trial, the clerk answers, in the humane language of the law, which always hopes that the party's innocence, rather than his guilt, may appear, "God send thee a good deliverance." And then they proceed as soon as conveniently may be to the trial; the manner of which will be considered at large in the next chapter.

CHAPTER XXVII.

OF TRIAL AND CONVICTION.

*342] *The several methods of trial and conviction of offenders established by the laws of England were formerly more numerous than at present, through the superstition of our Saxon ancestors; who, like other northern nations, were extremely addicted to divination; a character which Tacitus observes of the antient Germans.(*a*) They therefore invented a considerable number of methods of purgation or trial to preserve innocence from the danger of false witnesses, and in consequence of a notion that God would always interpose miraculously to vindicate the guiltless.

I. The most antient(*b*) species of trial was that by *ordeal*, which was peculiarly distinguished by the appellation of *judicium Dei;* and sometimes *vulgaris purgatio*, to distinguish it from the canonical purgation, which was by the oath of the party. This was of two sorts,(*c*) either *fire*-ordeal, or *water*-ordeal; the former being confined to persons of higher rank, the latter to the common

(*z*) A learned author, who is very seldom mistaken in his conjectures, has observed that the proper answer is "*by God or the country;*" that is, either by *ordeal* or by jury; because the question supposes an option in the prisoner. And certainly it gives some countenance to this observation that the trial by *ordeal* used formerly to be called *judicium Dei.* But it should seem that when the question gives the prisoner an option his answer must be positive, and not in the disjunctive, which returns the option back to the prosecutor.

(*a*) Keylinge, 57. State Trials, *passim.*

(*b*) Stat. 12 Geo. III. c. 20.

(*a*) *De Mor. Germ.* 10.

(*b*) *LL. Inæ*, 3, c. 77

(*c*) Mirr. c. 3, § 23.

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firmation of the conjecture that *prit* is a corruption for *pnt*, the clerk of the arraigns at this day, immediately after the arraignment, writes upon the indictment, over the name of the prisoner, *pnts.* And Roger North informs us that in ancient times, when pleadings in the courts were *ore tenus*, "if a serjeant in the Common Pleas said *judgment*, that was a demurrer; if *prist*, that was an issue to the country." Life of Lord-Keeper North, 98.—Christian.

[10] By 7 & 8 Geo. IV. c. 28, s. 1, it is enacted that if any person not having privilege of peerage, being arraigned upon any indictment for treason, felony, or piracy, shall plead thereto a plea of "not guilty," he shall by such plea, without any further form, be deemed to have put himself upon the country for trial, and the court shall, in the usual manner, order a jury for the trial of such person accordingly. In consequence of this wise enactment, the absurd ceremony of asking a prisoner how he will be tried has been wholly discontinued. By sect. 2 of the same statute, it is enacted that if any person being arraigned upon or charged with any indictment for treason, felony, piracy, or misdemeanour *shall stand mute, or will not answer directly* to the indictment or information, in every such case it shall be lawful for the court, *if it shall so think fit*, to order the proper officer to enter a plea of "not guilty" on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same.—Chitty.

people.(*d*) Both these might be performed by deputy; but the principal was to answer for the success of the trial; the deputy only venturing some corporal pain, for hire, or perhaps for friendship.(*e*) Fire-ordeal was *performed either by taking up in the hand, unhurt, a piece of red-hot iron of one, [*343 two, or three pounds' weight; or else by walking barefoot, and blindfold, over nine red-hot ploughshares laid lengthwise at unequal distances; and if the party escaped being hurt he was adjudged innocent; but if it happened otherwise, as without collusion it usually did, he was then condemned as guilty. However, by this latter method, queen Emma, the mother of Edward the Confessor, is mentioned to have cleared her character when suspected of familiarity with Alwyn, bishop of Winchester.(*f*)

Water-ordeal was performed either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt thereby, or by casting the person suspected into a river or pond of cold water; and if he floated therein without any action of swimming, it was deemed an evidence of his guilt, but if he sunk he was acquitted. It is easy to trace out the traditional relics of this water-ordeal in the ignorant barbarity still practised in many countries to discover witches by casting them into a pool of water and drowning them to prove their innocence. And in the Eastern empire the fire-ordeal was used to the same purpose by the emperor Theodore Lascaris; who, attributing his sickness to magic, caused all those whom he suspected to handle the hot iron: thus joining (as has been well remarked)(*g*) to the most dubious crime in the world the most dubious proof of innocence.

And, indeed, this purgation by ordeal seems to have been very antient and very universal in the times of superstitious barbarity. It was known to the antient Greeks: for, in the *Antigone of Sophocles,(*h*) a person, suspected by Creon of a misdemeanour, declares himself ready "to handle [*344 hot iron and to walk over fire," in order to manifest his innocence, which, the scholiast tells us, was then a very usual purgation. And Grotius(*i*) gives us many instances of water-ordeal in Bithynia, Sardinia, and other places. There is also a very peculiar species of water-ordeal said to prevail among the Indians on the coast of Malabar, where a person accused of any enormous crime is obliged to swim over a large river abounding with crocodiles, and if he escapes unhurt he is reputed innocent. As, in Siam, besides the usual methods of fire and water ordeal, both parties are sometimes exposed to the fury of a tiger let loose for that purpose, and if the beast spare either, that person is accounted innocent; if neither, both are held to be guilty; but if he spares both, the trial is incomplete, and they proceed to a more certain criterion.(*k*)

One cannot but be astonished at the folly and impiety of pronouncing a man guilty unless he was cleared by a miracle, and of expecting that all the powers of nature should be suspended by an immediate interposition of Providence to save the innocent whenever it was presumptuously required. And yet in England so late as king John's time we find grants to the bishops and clergy to use the *judicium ferri, aquæ, et ignis.*(*l*) And, both in England and Sweden, the clergy presided at this trial, and it was only performed in the churches or in other consecrated ground; for which Stiernhook(*m*) gives the reason: "*non defuit illis operæ et laboris pretium; semper enim ab ejusmodi judicio aliquid lucri sacerdotibus obveniebat.*" But, to give it its due praise, we find the canon law very early declaring against trial by ordeal, or *vulgaris purgatio*, as being the fabric of the devil, "*cum sit contra præceptum Domini, non tentabis Dominum Deum tuum.*"(*n*) Upon this authority, though the canons *themselves were of no validity [*345 in England, it was thought proper (as had been done in Denmark above a century before)(*o*) to disuse and abolish this trial entirely in our courts of jus-

(*d*) *Tenetur se purgare is qui accusatur, per Dei judicium; scilicet per calidum ferrum, vel per aquam, pro diversitate conditionis hominum: per ferrum calidum, si fuerit homo liber; per aquam, si fuerit rusticus.* Glanv. l. 14, c. 1.

(*e*) This is still expressed in that common form of speech, "of going through fire and water to serve another."

(*f*) Tho. Rudborne, *Hist. Maj. Winton*, *l.* 4, c. 1.

(*g*) Sp. L. b. xii c. 5.

(*h*) V. 270.

(*i*) On Numb. v. 17.

(*k*) Mod. Un. Hist. vii. 266.

(*l*) Stelm. Gloss. 435.

(*m*) *De jure Sueonum*, *l.* 1, c. 8.

(*n*) *Decretal, part* 2, *caus.* 2, *qu.* 5, *dist.* 7. *Decretal, lib.* 3. *tit.* 50, c. 9, and Gloss. ibid.

(*o*) Mod. Un. Hist. xxxii. 105.

tice by an act of parliament, in 3 Hen. III., according to Sir Edward Coke,(p) or rather by an order of the king in council.(q)

II. Another species of purgation somewhat similar to the former, but probably sprung from a presumptuous abuse of revelation in the ages of dark superstition, was the *corsned*, or morsel of execration: being a piece of cheese or bread of about an ounce in weight, which was consecrated with a form of exorcism; desiring of the Almighty that it might cause convulsions and paleness, and find no passage, if the man was really guilty; but might turn to health and nourishment if he was innocent;(r) as the water of jealousy among the Jews(s) was, by God's special appointment, to cause the belly to swell and the thigh to rot, if the woman was guilty of adultery. This corsned was then given to the suspected person, who at the same time also received the holy sacrament;(t) if, indeed, the corsned was not, as some have suspected, the sacramental bread itself, till the subsequent invention of transubstantiation preserved it from profane uses with a more profound respect than formerly. Our historians assure us that Godwin, earl of Kent, in the reign of king Edward the Confessor, abjuring the death of the king's brother, at last appealed to his corsned, "*per buccellam deglutiendam abjuravit*,"(u) which stuck in his throat and killed him. This custom has long since been gradually abolished, though the remembrance of it still subsists in certain phrases of abjuration retained among the common people.(w)

*346] *However, we cannot but remark, that though in European countries this custom most probably arose from an abuse of revealed religion, yet credulity and superstition will, in all ages and in all climates, produce the same or similar effects. And therefore we shall not be surprised to find that in the kingdom of Pegu there still subsists a trial by the corsned very similar to that of our ancestors, only substituting raw rice instead of bread.(x) And in the kingdom of Monomotapa they have a method of deciding lawsuits equally whimsical and uncertain. The witness for the plaintiff chews the bark of a tree endued with an emetic quality, which, being sufficiently masticated, is then infused in water which is given the defendant to drink. If his stomach rejects it he is condemned; if it stays with him he is absolved, unless the plaintiff will drink some of the same water; and if it stays with him also the suit is left undetermined.(y)

These two antiquated methods of trial were principally in use among our Saxon ancestors. The next, which still remains in force, though very rarely in use, owes its introduction among us to the princes of the Norman line. And that is,

III. The trial by *battel*,[1] duel, or single combat; which was another species of presumptuous appeals to Providence, under an expectation that Heaven would unquestionably give the victory to the innocent or injured party. The nature of this trial in cases of civil injury, upon issue joined in a writ of right, was fully discussed in the preceding book;(z) to which I have only to add that the trial by battel may be demanded at the election of the appellee, in either an appeal or an approvement; and that it is carried on with equal solemnity as that on a writ of right; but with this difference, that there each party might hire a champion, but here they must fight in their proper persons. And therefore, if the *appellant or approver be a woman, a priest, an infant, or of the age of sixty, or lame, or blind, he or she may counterplead and refuse the wager of battel, and compel the appellee to put himself upon the country. Also peers of the realm, bringing an appeal, shall not be challenged to wage battel, on account of the dignity of their persons; nor the citizens of London, by special charter, because fighting seems foreign to their education and em-

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(p) 9 Rep. 32.
(q) 1 Rym. *Fœd.* 228. Spelm. Gloss. 326. 2 Pryn. Rec. Append. 20. Seld. *Eadm.* fol. 48.
(r) Spelm. Gloss. 439.
(s) Numb. ch. v.
(t) *LL. Canut.* c. 6.
(u) Ingulph.
(w) As, "I will take the sacrament upon it; may this morsel be my last;" and the like.
(x) Mod. Un. Hist. vii. 129.
(y) Ibid. xv. 464.
(z) See book iii. page 337.

[1] This species of trial is now entirely abolished, by the 59 Geo. III. c. 46. See 1 B. & A. 405.—Chitty.

ployment. So likewise if the crime be notorious: as if the thief be taken with the *mainour*, or the murderer in the room with a bloody knife, the appellant may refuse the tender of battel from the appellee;(*a*) for it is unreasonable that an innocent man should stake his life against one who is already half convicted.

The form and manner of waging battel upon appeals are much the same as upon a writ of right; only the oaths of the two combatants are vastly more striking and solemn.(*b*) The appellee, when appealed of felony, pleads *not guilty*, and throws down his glove, and declares he will defend the same by his body; the appellant takes up the glove and replies that he is ready to make good the appeal, body for body. And thereupon the appellee, taking the book in his right hand and in his left the right hand of his antagonist, swears to this effect:—"*Hoc audi, homo, quem per manum teneo, &c.,*" "Hear this, O man, whom I hold by the hand, who callest thyself John by the name of baptism, that I, who call myself Thomas by the name of baptism, did not feloniously murder thy father, William by name, nor am any way guilty of the said felony. So help me God and the saints; and this I will defend against thee by my body, as this court shall award." To which the appellant replies, holding the Bible and his antagonist's hand in the same manner as the other:—"Hear this, O man, whom I hold by the hand, who callest thyself Thomas by the name of baptism, that thou art perjured; and therefore perjured because that thou feloniously didst murder my *father, William by name. So help me God and the saints; and this I will prove against thee by my body, as this court shall award."(*c*) The battel is then to be fought with the same weapons, viz., batons, the same solemnity, and the same oath against amulets and sorcery, that are used in the civil combat; and if the appellee be so far vanquished that he cannot or will not fight any longer, he shall be adjudged to be hanged immediately; and then, as well as if he be killed in battle, Providence is deemed to have determined in favour of the truth, and his blood shall be attainted. But if he kills the appellant, or can maintain the fight from sunrising till the stars appear in the evening, he shall be acquitted. So also, if the appellant becomes recreant, and pronounces the horrible word of *craven*, he shall lose his *liberam legem* and become infamous; and the appellee shall recover his damages, and also be forever quit, not only of the appeal, but of all indictments likewise for the same offence.[2] [*348

IV. The fourth method of trial used in criminal cases is that by the peers of Great Britain, in the court of parliament, or the court of the lord high steward, when a peer is capitally *indicted*: for in case of an appeal a peer shall be tried by jury.(*d*)[3] Of this enough has been said in a former chapter;(*e*) to which I shall now only add that, in the method and regulation of its proceedings, it differs little from the trial *per patriam*, or by jury; except that no special verdict can be given in the trial of a peer,(*f*) because the lords of parliament, or the lord high steward, (if the trial be *had in his court,) are judges sufficiently competent of the law that may arise from the fact; and except also that the peers need not all agree in their verdict, but the greater number, consisting of twelve at the least, will conclude and bind the minority.(*g*) [*349

(*a*) 2 Hawk. P. C. 427.

(*b*) Flet. *l.* 1, c. 34. 2 Hawk. P. C. 426.

(*c*) There is a striking resemblance between this process and that of the court of Areopagus at Athens for murder, wherein the prosecutor and prisoner were both sworn in the most solemn manner; the prosecutor, that he was related to the deceased, (for none but near relations were permitted to prosecute in that court,) and that the prisoner was the cause of his death: the prisoner, that he was innocent of the charge against him. Pott. Antiq. b. i. c. 19.

(*d*) 9 Rep. 30. 2 Inst. 49.

(*e*) See page 259.

(*f*) Hatt. 116.

(*g*) Kelynge, 56, stat. 7 W. III. c. 3, § 11. Foster, 247.

[2] The last time that the trial by battel was awarded in this country was in the case of lord Rae and Mr. Ramsay, in the 7 Ch. I. The king, by his commission, appointed a constable of England to preside at the trial, who proclaimed a day for the duel, on which the combatants were to appear with a spear, a long sword, a short sword, and a dagger; but the combat was prorogued to a further day, before which the king revoked the commission. See an account of the proceedings, 11 Harg. St. Tr. 124. See also 3 book, 337. —CHRISTIAN.

[3] The nobility are tried by their peers for treason and felony, and misprision of these; but in all other criminal prosecutions they are tried, like commoners, by a jury. 3 Inst. 30. See 1 book, 401, note 11.—CHRISTIAN.

V. The trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman which, as the grand bulwark of his liberties, is secured to him by the great charter:(*h*) "*nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo alio modo destruatur, nisi per legale judicium parium suorum, vel per legem terræ.*"

The antiquity and excellence of this trial for the settling of civil property has before been explained at large.(*i*) And it will hold much stronger in criminal cases; since in times of difficulty and danger more is to be apprehended from the violence and partiality of judges appointed by the crown in suits between the king and the subject than in disputes between one individual and another to settle the metes and boundaries of private property.* Our law has therefore wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince; and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control by justices of *oyer* and *terminer* occasionally named by the crown; who might then, as in France or Turkey, imprison, despatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have with excellent forecast contrived that no man should be called to answer to the king for any capital crime unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury; and that the truth of every accusation, whether preferred in the shape of an indictment, information, or appeal, *should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours indifferently chosen and superior to all suspicion. So that the liberties of England cannot but subsist so long as this *palladium* remains sacred and inviolate; not only from all open attacks, (which none will be so hardy as to make,) but also from all secret machinations which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And, however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*,) yet let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern.

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What was said of juries in general, and the trial thereby in *civil* cases, will greatly shorten our present remarks with regard to the trial of *criminal* suits; indictments, informations, and appeals; which trial I shall consider in the same method that I did the former: by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

When, therefore, a prisoner on his arraignment hath pleaded *not guilty*, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto;* that is, freeholders, without just exception, and of the *visne* or neighbourhood; which is interpreted to be of the county where the fact is committed.(*j*) If the proceedings are before the court of king's bench, there is time allowed, between the assignment and the trial, for a jury to be *impanelled by a writ of *venire facias* to the sheriff, as in civil causes; and the trial in case of a misdemeanour is had at *nisi prius*, unless it be of such consequence as to merit a trial at bar; which is always invariably had when the prisoner is tried for any capital offence. But before commissioners of *oyer* and *terminer* and gaol-delivery, the sheriff, by virtue of a general precept directed to him beforehand, returns to the court a panel of forty-eight jurors, to try all felons that may be called upon their trial at that session; and therefore

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(*h*) 9 Hen. III. c. 29. (*i*) See book iii. page 379. (*j*) 2 Hal. P. C. 264. 2 Hawk. P. C. 403.

it is there usual to try all felons immediately or soon after their arraignment. But it is not customary, nor agreeable to the general course of proceedings, (unless by consent of parties, or where the defendant is actually in gaol,) to try persons indicted of smaller misdemeanours at the same court in which they have pleaded *not guilty* or *traversed* the indictment. But they usually give security to the court to appear at the next assizes or session, and then and there to try the traverse, giving notice to the prosecutor of the same.[4]

In cases of high treason, whereby corruption of blood may ensue, (except treason in counterfeiting the king's coin or seals,) or misprision of such treason, it is enacted, by statute 7 W. III. c. 3, first, that no person shall be tried for any such treason, except an attempt to assassinate the king, unless the indictment be found within three years after the offence committed; next, that the prisoner shall have a copy of the indictment, (which includes the caption,)(*k*) but not the names of the witnesses, five days at least before the trial; that is, upon the true construction of the act, before his arraignment,(*l*) for then is the time to take any exceptions thereto by way of plea or demurrer; thirdly, that he shall also have a copy of the panel of jurors two days before his trial; and, lastly, that he shall have the same compulsive process to bring in his witnesses *for* him as was usual to compel their appearance *against* him. And, by statute 7 Anne, c. 21, (which did not take place till after the decease of the late pretender,) all persons indicted for high treason or misprision *thereof shall have not only a copy of the indictment, but a list of all the witnesses to [*352 be produced, and of the jurors impanelled, with their professions and places of abode, delivered to him ten days before the trial, and in the presence of two witnesses, the better to prepare him to make his challenges and defence. But this last act, so far as it affected indictments for the inferior species of high treason, respecting the coin and the royal seals, is repealed by the statute 6 Geo. III. c. 53, else it had been impossible to have tried those offences in the same circuit in which they are indicted: for ten clear days between the finding and the trial of the indictment will exceed the time usually allotted for any session of *oyer* and *terminer*.(*m*)[5] And no person indicted for felony is, or (as the law stands) ever can be, entitled to such copies before the time of his trial.(*n*)

(*k*) Fost. 229. Append. i.
(*l*) Ibid. 230.
(*m*) Fost. 250.
(*n*) 2 Hawk. P. C. 410.

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[4] Now, by the 60 Geo. III. and 1 Geo. IV. c. 4, s. 3, if the defendant has been committed to custody, or held to bail for a misdemeanour, twenty days before the session of the peace, session of oyer and terminer, great session, or session of gaol-delivery at which the indictment was found, the defendant shall plead and the trial shall take place at such session, unless a writ of *certiorari* be awarded. And, by sect. 5, where a defendant indicted for a misdemeanour at any session of the peace, session of oyer and terminer, great session, or session of gaol-delivery, not having been committed to custody, or held to bail to appear to answer for such offence, twenty days before the session at which the indictment was found, but who shall have been committed to custody, or held to bail to appear to answer for such offence, at some subsequent session, or shall have received notice of such indictment having been found, twenty days before such subsequent session, he shall plead at such subsequent session, and trial shall take place at such session, unless a *certiorari* be awarded before the jury be sworn for such trial. But, on sufficient cause shown, the court may allow further time for trial. Id. s. 7. In cases of indictments for obtaining goods, &c. by false pretences, and sending threatening letters with intent to extort money, &c., and other misdemeanours punishable under the 30 Geo. III. c. 24, it is enacted by that act (sect. 17) that every such offender, bound over to the general quarter-sessions of the peace, or sessions of oyer and terminer and gaol-delivery of the county where the offence was committed, shall be tried at such general quarter-sessions of the peace, or sessions of oyer and terminer and gaol-delivery, which shall be held next after his apprehension, unless the court shall think fit to put off the trial, on just cause made out to them. So also, by the 39 & 40 Geo. III. c. 87, s. 22, persons indicted for a misdemeanour in receiving stolen goods, under the 2 Geo. III. c. 28, are to be tried immediately, without being allowed the delay of a traverse. 2 East, P. C. 754. As to traverses in general, in criminal proceedings, see 1 Chitt. C. L. 486.—CHITTY.

[5] By 39 & 40 Geo. III. c. 93, in all cases of high treason in compassing or imagining the death of the king, and of misprision of such treason, where the overt act alleged in

When the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve, unless they are challenged by the party.[6]

Challenges may here be made, either on the part of the king, or on that of the prisoner, and either to the whole array, or to the separate polls, for the very same reasons that they may be made in civil causes.(o) For it is here at least as necessary, as there, that the sheriff or returning officer be totally indifferent; that where an alien is indicted the jury should be *de medietate*, or half foreigners, if so many are found in the place,[7] (which does not indeed hold in treasons,(p) aliens being very improper judges of the breach of allegiance;[8] nor

(o) See book iii. page 359.

(p) 2 Hawk. P. C. 420. 2 Hal. P. C. 271.

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the indictment is the assassination of the king or a direct attempt against his life or person, the party accused shall be indicted and tried in the same manner and upon the like evidence as if charged with murder. But the judgment and execution shall remain the same as in other cases of high treason. And, by 6 Geo. IV. c. 50, s. 21, when any person is indicted for high treason or misprision of treason, in any court except King's Bench, a list of the petit jury, with their names, professions, and places of abode, shall be given at the same time that the copy of the indictment is delivered to the party indicted, which shall be ten days before arraignment, and in the presence of two or more credible witnesses; and when any person is so indicted in King's Bench, a copy of the indictment shall be delivered as before mentioned; but the list of the petit jury, made out as before mentioned, may be delivered to the party indicted, after arraignment, so that it be ten days before trial. Proviso, not to extend to interfere with the provisions of 39 & 40 Geo. IV. c. 93, nor to cases of treason relating to the coin.

Where the jury-panel is incorrect, a motion may be made on the part of the crown, in the court of gaol-delivery, for leave to the sheriff to amend the panel. 1 East, P. C. 113. —Chitty.

[6] By 6 Geo. IV. c. 50, s. 27, if any man shall be returned as a juror for the trial of any issue in any of the courts in the act mentioned who shall not be qualified according to the act, the want of such qualification shall be good cause of challenge, and he shall be discharged upon such challenge, if the court shall be satisfied of the fact; and if any man returned as a juror for the trial of any such issue shall be qualified in other respects according to the act, the want of freehold shall not on such trial, in any case, civil or criminal, be accepted as good cause of challenge, either by the crown or the party, nor as cause for discharging the man so returned upon his own application. Proviso, not to extend to any special juror.

By sect. 28, no challenge shall be taken to any panel of jurors for want of a knight being returned in such panel, nor any array quashed by reason of any such challenge.

By sect. 29, in all inquests to be taken before any of the courts in the act mentioned wherein the king is a party, howsoever it be, notwithstanding it be alleged by them that sue for the king that the jurors of those inquests, or some of them, be not indifferent for the king; yet such inquests shall not remain untaken for that cause; but if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court; and it shall be proceeded to the taking of the same inquisition, as it shall be found, if the challenges be true or not, after the discretion of the court; and no person arraigned for murder or felony shall be admitted to any peremptory challenge above the number of twenty.

And, by 7 & 8 Geo. IV. c. 28, s. 3, if any person indicted for any treason, felony, or piracy shall challenge peremptorily a greater number of the men returned to be of the jury than such person is entitled by law so to challenge in any of the said cases, every peremptory challenge beyond the number allowed by law in any of the said cases shall be entirely void, and the trial of such person shall proceed as if no such challenge had been made.—Chitty.

[7] The 6 Geo. IV. c. 50, s. 47 provides that nothing in that act contained shall extend or be construed to extend to deprive any alien indicted or impeached of any felony or misdemeanour of the right of being tried by a jury *de medietate linguæ*, but that, on the prayer of every alien so indicted or impeached, the sheriff, or other proper minister, shall, by command of the court, return for one-half of the jury a competent number of aliens, if so many there be in the town or place where the trial is had, and if not, then so many aliens as shall be found in the same town or place, if any; and that no such alien juror shall be liable to be challenged for want of freehold or of any other qualification required by the act, but every such alien may be challenged for any other cause, in like manner as if he were qualified by the act.—Chitty.

[8] The privilege is taken away from persons indicted of high treason by the 1 & 2 Ph

yet in the case of Egyptians[9] under the statute 22 Hen. VIII. c. 10; that on every panel there should be a competent number of hundredors;[10] and that the particular jurors should be *omni exceptione majores*,—not liable to objection either *propter honoris respectum*, *propter defectum*, *propter affectum*, or *propter delictum*. *Challenges upon any of the foregoing counts are styled challenges *for cause*, which may be without stint in both criminal and civil trials. But [*353 in criminal cases, or at least in capital ones, there is, *in favorem vitæ*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a *peremptory* challenge; a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous.[11] This is grounded on two reasons. 1. As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment, to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

This privilege of peremptory challenges, though granted to the prisoner, is denied to the king by the statute 33 Edw. I. st. 4, which enacts that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. However, it is held that the king need not assign his cause of challenge till all the panel is gone through, and unless there cannot be a full jury without the person so challenged; and then, and not sooner, the king's counsel must show the cause, otherwise the juror shall be sworn.(*q*)[12]

The peremptory challenges of the prisoner must, however, have some reasonable boundary; otherwise he might never *be tried. This reasonable [*354 boundary is settled by the common law to be the number of thirty-five; that is, one under the number of three full juries. For the law judges that five-and-thirty are fully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenges a greater number, or three full juries, has no intention to be tried at all. And therefore it dealt with one who peremptorily challenges above thirty-five, and will not retract his challenge, as with one who stands mute or refuses his trial, by sentencing him to the *peine forte et dure* in felony, and by attainting him in treason.(*r*) And so the law stands at this day with regard to treason of any kind.

(*q*) 2 Hawk. P. C. 413. 2 Hal. P. C. 271. (*r*) 2 Hal. P. C. 268.

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and M. c. 10, which directs that all trials for that offence shall take place as at common law.—CHITTY.

[9] The 28 Edw. III. c. 13, on which this right of aliens was founded, was repealed, as to Egyptians, by the 1 & 2 Ph. and M. c. 4, s. 3 and the 5 Eliz. c. 20, which enacted that they should be tried by the inhabitants of the county where they were arrested, and not *per medietatem linguæ*; but that provision was repealed by the 23 Geo. III. c. 51; and Egyptians are now dealt with under the vagrant acts as rogues and vagabonds.—CHITTY.

[10] The right to challenge for want of hundredors is now taken away, by the 6 Geo. IV. c. 50, s. 13.—CHITTY.

[11] A peremptory challenge is not allowed in the trial of collateral issues, (Fost. 42.) nor in any trial for a misdemeanour. 2 Harg. St. Tr. 808, and 4 Harg. St. Tr. 1.—CHRISTIAN.

[12] And the practice is the same both in trials for misdemeanours and for capital offences. 3 Harg. St. Tr. 519. Where there is a challenge for cause, two persons in court not of the jury are sworn to try whether the juryman challenged will try the prisoner indifferently. Evidence is then produced to support the challenge, and, according to the verdict of the two tryers, the juryman is admitted or rejected. A juryman was thus set aside in O'Coigley's trial for treason, because, upon looking at the prisoners, he had uttered the words "damned rascals." See O'Coigley's Trial.—CHRISTIAN.

But by statute 22 Hen. VIII. c. 14, (which, with regard to felonies, stands unrepealed by statute 1 & 2 Ph. and M. c. 10,) by this statute, I say, no person arraigned for felony can be admitted to make any more than *twenty* peremptory challenges. But how if the prisoner will peremptorily challenge twenty-one? what shall be done? The old opinion was, that judgment of *peine forte et dure* should be given, as where he challenged thirty-six at the common law;(*s*) but the better opinion seems to be(*t*) that such challenge shall only be disregarded and overruled. Because, first, the common law doth not inflict the judgment of penance for challenging twenty-one, neither doth the statute inflict it; and so heavy a judgment (or that of conviction, which succeeds it) shall not be imposed by implication. Secondly, the words of the statute are, "that he be not *admitted* to challenge more than twenty;" the evident construction of which is, that any further challenge shall be disallowed or prevented; and therefore, being null from the beginning, and never in fact a challenge, it can subject the prisoner to no punishment; but the juror shall be regularly sworn.[13]

If, by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel, a *tales* *may be awarded as in civil causes,(*u*) till the number of twelve is sworn, "well and truly to try, and true deliverance make, between our sovereign lord the king and the prisoner whom they have in charge; and a true verdict to give according to their evidence."

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When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshalled, examined, and enforced, by the counsel for the crown or prosecution. But it is a settled rule at common law that no counsel shall be allowed a prisoner upon his trial, upon the general issue in any capital crime, unless some point of law shall arise proper to be debated.(*w*) A rule which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular)(*x*) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man which yet is allowed him in prosecutions for every petty trespass? Nor indeed is it, strictly speaking, a part of our antient law; for the Mirror,(*y*) having observed the necessity of counsel in civil suits, "who know how to forward and defend the cause, by the rules of law and customs of the realm," immediately afterwards subjoins, "and more necessary are they for defence upon indictments and appeals of felony than upon other venial causes."(*z*)[14] And the judges themselves are so sensible of this defect that

(*s*) 2 Hawk. P. C. 414.

(*t*) 3 Inst. 227. 2 Hal. P. C. 270.

(*u*) See book iii. page 364. But in mere commissions of gaol-delivery no *tales* can be awarded, though the court may *ore tenus* order a new panel to be returned *instanter*. 4 Inst. 68. 4 St. Tr. 728. Cooke's case.

(*w*) 2 Hawk. P. C. 400.

(*x*) Sir Edward Coke (3 Inst. 137) gives another additional reason for this refusal,—"because the evidence to convict a prisoner should be so manifest as it could not be contradicted;" which lord Nottingham (when high steward) declared (3 St. Tr. 726) was the only good reason that could be given for it.

(*y*) C. 3, § 1.

(*z*) Father Parsons the Jesuit, and after him bishop Ellys, (of English Liberty, ii. 66.) have imagined that the benefit of counsel to plead for them was first denied to prisoners by a law of Hen. I., meaning, I presume, chapters 47 and 48 of the code which is usually attributed to that prince. "*De causis criminalibus vel capitalibus nemo quærat consilium: quin implacitatus statim perneget, sine omni petitione consilii. In aliis omnibus potest et debet uti consilio.*" But this *consilium*, I conceive, signifies only an *imparlance*, and the *petitio consilii* is *craving leave to imparl*, (see book iii. page 298,) which is not allowable in any criminal prosecution. This will be manifest by comparing this law with a contemporary passage in the *grand coustumier* of Normandy, (ch. 85,) which speaks of imparlances in personal actions. "*Apres ce, est tenu le querelle a respondre; et aura congie de soy conseiller, s'il le demande; et quand il sera conseille, il peut nyer le faict dont ill est accuse.*" Or, as it stands in the Latin text, (edit. 1539,) "*Querelatus autem postea tenetur respondere; et habebit licentiam consulendi, si requirat; habito autem consilio, debet factum negare quo accusatus est.*"

[13] Now the statute 7 & 8 Geo. IV. c. 28, s. 3 has put an end to all doubt on the point, by enacting that every peremptory challenge beyond the number allowed by law shall be entirely void, and the trial of the offender shall proceed as if no such challenge had been made.—Stewart.

[14] The prisoner is not allowed counsel to plead his cause before the jury in any felony, whether it is capital, or within the benefit of clergy; nor in a case of petty larceny. But in misdemeanours the prisoner or defendant is allowed counsel as in civil actions, but even here the defendant cannot have the assistance of counsel to examine the witnesses and reserve to himself the right of addressing the jury. 1 Ry. & M. C. C. 166. 3 Camp. 98.

they never scruple to allow a prisoner counsel to instruct him what questions to ask, or even to *ask questions for him, with respect to matters of fact; for as to matters of law arising on the trial, they are *entitled* to the assistance of counsel. But, lest this indulgence should be intercepted by superior influence in the case of state-criminals, the legislature has directed, by statute 7 W. III. c. 3, that persons *indicted* for such high treason as works a corruption of the blood, or misprision thereof, (except treason in counterfeiting the king's coin or seals,) may make their full defence by counsel, not exceeding two, to be named by the prisoner and assigned by the court or judge: and the same indulgence, by statute 20 Geo. II. c. 30, is extended to parliamentary *impeachments* for high treason which were excepted in the former act.[15] [*356

The maxim that the judge is counsel for the prisoner signified nothing more than that the judge shall take care that the prisoner does not suffer from the want of counsel. The judge is counsel only for public justice, and to promote that object alone all his inquiries and attention ought to be directed. Upon a trial for the murder of a *male* child, the counsel for the prosecution concluded his case without asking the sex of the child; and the judge would not permit him afterwards to call a witness to prove it, but, in consequence of the omission, he directed the jury to acquit the prisoner. But, to the honour of that judge, it ought to be stated that he declared afterwards in private his regret for his conduct. This case is well remembered; but it ought never to be cited but with reprobation.—CHRISTIAN.

[15] And see further, as to the allowance and assigning of counsel, 1 Chitt. C. L. 2d ed. 407 to 411.—CHITTY.

Upon the trial of issues which do not turn upon the question of guilty or not guilty, but upon collateral facts, prisoners under a capital charge, whether for treason or felony, always were entitled to the full assistance of counsel. Fost. 232, 242.

It is very extraordinary that the law of England should have denied the assistance of counsel when it is wanted most,—viz., to defend the life, the honour, and all the property of an individual. It is the extension of that maxim of natural equity, that every one shall be heard in his own cause, that warrants the admission of hired advocates in courts of justice; for there is much greater inequality in the powers of explanation and persuasion in the natural state of the human mind than when it is improved by education and experience. Among professional men of established character, the difference in their skill and management is generally so inconsiderable that the decision of the cause depends only upon the superiority of the justice in the respective cases of the litigating parties. Hence the practice of an advocate is absolutely necessary to the administration of substantial justice. An honourable barrister will never misstate either law or facts within his own knowledge; but he is justified in urging any argument, whatever may be his own opinion of the solidity or justness of it, which he may think will promote the interests of his client; for reasoning in courts of justice and in the ordinary affairs of life seldom admits of geometrical demonstration; but it happens not unfrequently that the same argument which appears sophistry to one is sound logic in the mind of another; and every day's experience proves that the opinions of a judge and an advocate are often diametrically opposite. Many circumstances may occur which will justify or compel an individual member of the profession to refuse the defence of a particular client; but a cause can hardly be conceived which ought to be rejected by all the bar; for such a conduct in the profession would excite so strong a prejudice against the party as to render him in a great degree condemned before his trial. Let the circumstances against a prisoner be ever so atrocious, it is still the duty of the advocate to see that his client is convicted according to those rules and forms which the wisdom of the legislature has established as the best protection of the liberty and the security of the subject. But the conduct of counsel in the prosecution of criminals ought to be very different from that which is required from them in civil actions or when they are engaged on the side of a prisoner: in the latter cases they are the advocates of their client only, and speak but by his instruction and permission: in the former they are the advocates of public justice, or, to speak more professionally, they are the advocates of the king, who in all criminal prosecutions is the representative of the people: and both the king and the country must be better satisfied with the acquittal of the innocent than with the conviction of the guilty. Hence in all criminal prosecutions, especially where the prisoner can have no counsel to plead for him, a barrister is as much bound to disclose all those circumstances to the jury, and to reason upon them as fully, which are favourable to the prisoner, as those which are likely to support the prosecution.

When this note was written, the editor was not aware that the general observations contained in it were sanctioned by so great authorities as Cicero and Panetius. Cicero makes the distinction that it is the duty of the judge to pursue the truth,

The doctrine of evidence upon pleas of the crown is in most respects the same as that upon civil actions. There are, however, a few leading points wherein, by several statutes and resolutions, a difference is made between civil and criminal evidence.

First, in all cases of high treason, petit treason, and misprision of treason, by statutes 1 Edw. VI. c. 12, and 5 & 6 Edw. VI. c. 11, *two* lawful witnesses are required to convict a prisoner; unless he shall willingly and without violence *confess* the same. By statute 1 & 2 Ph. and M. c. 10, a further exception is made to treasons in counterfeiting the king's seals or signatures, and treasons concerning coin current within this realm: and more particularly, by c. 11, the offences of importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting, or forging any current coin. The statutes 8 & 9 W. III. c. 25, and 15 & *16 Geo. II. c. 28, in their subsequent extensions
*357] of this species of treason, do also provide that the offenders may be indicted, arraigned, tried, convicted, and attainted by the like evidence and in such manner and form as may be had and used against offenders for counterfeiting the king's money. But, by statute 7 W. III. c. 3, in prosecutions for those treasons to which that act extends, the same rule (of requiring *two* witnesses) is again enforced; with this addition, that the *confession* of the prisoner, which shall countervail the necessity of such proof, must be in *open court*. In the construction of which act, it hath been holden(*a*) that a confession of the prisoner taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. But hasty, unguarded confessions, made to persons having no such authority, ought not to be admitted as evidence under this statute. And indeed, even in cases of felony at the common law, they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence.[16] By the same statute, 7 W. III., it is declared that both witnesses must be to the same overt act of treason, or one to one overt act and the other to another overt act, of the same species of treason,(*b*) and not of distinct heads or kinds; and no evidence shall be admitted to prove any overt act not

(*a*) Fost. 240–244. (*b*) See St. Tr. ii. 144. Foster, 235.

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but it is permitted to an advocate to urge what has only the semblance of it. He says he would not have ventured himself to have advanced this (especially when he was writing upon philosophy) if it had not also been the opinion of the gravest of the stoics, Panætius. "*Judicis est semper in causis verum sequi; patroni nonnunquam verisimile, etiam si minus sit verum defendere: quod scribere (præsertim cum de philosophiâ scriberem) non auderem, nisi idem placeret gravissimo stoicorum Panætio.*" *Cic. de Off. lib.* 2, *c.* 14.—Christian.

And now this valuable privilege has been extended to all persons accused of felony, by stat. 6 & 7 W. IV. c. 114, by which it is enacted that all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto, by counsel learned in the law, or by attorneys in courts where attorneys practise as counsel.—Stewart.

[16] It seems to be now clearly established that a free and voluntary confession by a person accused of an offence, whether made before his apprehension or after, whether on a judicial examination or after commitment, whether reduced into writing or not,—in short, that any voluntary confession made by a prisoner to any person, at any time or place,—is strong evidence against him, and, if satisfactorily proved, sufficient to convict without any corroborating circumstance. But the confession must be voluntary, not obtained by improper influence, nor drawn from the prisoner by means of a threat or promise; for, however slight the promise or threat may have been, a confession so obtained cannot be received in evidence, on account of the uncertainty and doubt whether it was not made rather from a motive of fear or of interest than from a sense of guilt. Phil. Ev. 86. The prisoner's statement must not be taken upon oath, and, if he has been sworn, it cannot be received in evidence. A confession is evidence only against the person confessing,—not against others, although they are proved to be his accomplices. See Phil. Ev. c. 5, s. 5, and the authorities there collected on this subject. —Chitty.

expressly laid in the indictment.[17] And therefore, in Sir John Fenwick's case, in king William's time, where there was but one witness, an act of parliament(*c*) was made on purpose to attaint him of treason, and he was executed.(*d*) But in almost every other accusation one positive witness is sufficient. Baron Montesquieu lays it down for a rule(*e*) that those laws which condemn a man to death *in any case*, on the deposition of a single witness, are fatal to liberty; and he adds this reason, that the witness who affirms, and the accused who denies, make an equal balance:(*f*) there is a necessity therefore to call *in a third man to incline the scale. But this seems to be carrying matters too far; for there are some crimes in which the very privacy of their nature excludes the possibility of having more than one witness: must these, therefore, escape unpunished? Neither indeed is the bare denial of the person accused equivalent to the positive oath of a disinterested witness. In cases of indictments for perjury this doctrine is better founded; and there our law adopts it: for one witness is not allowed to convict a man for perjury; because then there is only one oath against another.(*g*) In cases of treason also there is the accused's oath of allegiance to counterpoise the information of a single witness; and that may perhaps be one reason why the law requires a double testimony to convict him; though the principal reason undoubtedly is to secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages. [*358

Secondly, though from the reversal of colonel Sidney's attainder by act of parliament, in 1689,(*h*) it may be collected(*i*) that the mere similitude of handwriting in two papers shown to a jury, without other concurrent testimony, is no evidence that both were written by the same person; yet undoubtedly the testimony of witnesses, well acquainted with the party's hand, that they believe the paper in question to have been written by him, is evidence to be left to a jury.(*j*)[18]

Thirdly, by the statute 21 Jac. I. c. 27, a mother of a bastard child, concealing its death, must prove by one witness that the child was born dead; otherwise such concealment shall be evidence of her having murdered it.(*k*)[19]

Fourthly, all presumptive evidence of felony should be admitted cautiously, for the law holds that it is better that ten guilty persons escape than that one innocent suffer. *And Sir Matthew Hale in particular(*l*) lays down two rules most prudent and necessary to be observed: 1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods; and, 2. Never to convict any person of murder or manslaughter till at least the body be found dead; on account of two instances he mentions where persons were executed for the murder of others who were then alive but missing. [*359

Lastly, it was an antient and commonly-received practice(*m*) (derived from the civil law, and which also to this day obtains in the kingdom of France)(*n*) that as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate himself by the testimony of any witnesses. And therefore it deserves to be remembered to the honour of Mary I., (whose early sentiments, till her marriage with Philip of Spain, seem to have been humane and generous,)(*o*) that when she appointed Sir Richard Morgan

(*c*) Stat. 8 W. III. c. 4.
(*d*) St. Tr. v. 40.
(*e*) Sp. L. b. xii. c. 3.
(*f*) Beccar. c. 13.
(*g*) 10 Mod. 194.
(*h*) St. Tr. viii. 472.
(*i*) 2 Hawk. P. C. 431.
(*j*) Lord Preston's case, A.D. 1690. St. Tr. iv. 453. Francis's case, A.D. 1716. St. Tr. vi. 69. Layer's case, A.D. 1722. Ibid. 279. Henzey's case, A.D. 1758. 4 Burr. 644.
(*k*) See page 198.
(*l*) 2 Hal. P. C. 290.
(*m*) St. Tr. i. *passim*.
(*n*) Domat. Publ. Law, b. iii. *t.* 1. Montesq. Sp. L. b. xxix. c. 11.
(*o*) See page 17.

[17] By 5 & 6 Vict. c. 51, where the overt act is an attempt to injure the person of the sovereign, a conviction may be had on the same evidence as if the prisoner were charged with murder: so that in this case *two* witnesses are not required.—STEWART.

[18] But the proof of handwriting is not evidence in high treason unless the papers are found in the custody of the prisoner. 1 Burr. 644.—CHRISTIAN.

[19] Repealed, by 43 Geo. III. c. 58, which is also repealed, by 9 Geo. IV. c. 31.—CHITTY.

chief justice of the common pleas she enjoined him, "that notwithstanding the old error, which did not admit any witness to speak, or any other matter to be heard, in favour of the adversary, her majesty being party; her highness's pleasure was that whatsoever could be brought in favour of the subject should be admitted to be heard, and, moreover, that the justices should not persuade themselves to sit in judgment otherwise for her highness than for her subject."(p) Afterwards, in one particular instance, (when embezzling the queen's military stores was made felony by statute 31 Eliz. c. 4,) it was provided that any person impeached for such felony "should be received and admitted to make any lawful proof that he could, by lawful witness or otherwise, for his discharge and defence;" and in general the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive that a practice was *gradually introduced of examining witnesses for the prisoner, but not upon oath;(q) the consequence of which still was, that the jury gave less credit to the prisoner's evidence than to that produced by the crown. Sir Edward Coke(r) protests very strongly against this tyrannical practice; declaring that he never read in any act of parliament, book-case, or record, that in criminal cases the party accused should not have witnesses sworn for him, and therefore there was not so much as *scintilla juris* against it.(s) And the house of commons were so sensible of this absurdity that, in the bill for abolishing hostilities between England and Scotland,(t) when felonies committed by Englishmen in Scotland were ordered to be tried in one of the three northern counties, they insisted on a clause, and carried it(u) against the efforts of both the crown and the house of lords, against the practice of the courts in England, and the express law of Scotland,(w) "that in all such trials, for the better discovery of the truth, and the better information of the consciences of the jury and justices, there shall be allowed to the party arraigned the benefit of such credible witnesses to be examined upon oath as can be produced for his clearing and justification." At length, by the statute 7 W. III. c. 3, the same measure of justice was established throughout all the realm in cases of treason within the act: and it was afterwards declared, by statute 1 Anne, s. 2, c. 9, that in all cases of treason and felony all witnesses *for* the prisoner should be examined upon oath, in like manner as the witnesses *against* him.

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When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged (unless in cases of evident necessity)(x) till they have given in their verdict;[20] but are to consider of it, and deliver it in, with the same forms as upon civil causes; only they cannot, in a criminal case which touches life or member, give a *privy* verdict.(y) But the judges may adjourn while the jury are withdrawn to confer, and return to receive the verdict in open court.(z) And such public or open verdict may be either general, guilty, or not guilty; *or special, setting forth all the circumstances of the case and praying the judgment of the court, whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they *doubt* the matter of law, and therefore *choose* to leave it to the determination of the court; though they have an unquestionable right of determining upon all the circumstances and finding a general verdict, if they think proper so to hazard a breach of their oaths: and if their verdict be notoriously wrong, they may be punished and the verdict set aside by attaint at the suit of the king, but not at the suit of the prisoner.(a) But the practice heretofore in use of fining, imprisoning, or otherwise punishing

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(p) Hollingsh. 1112. St. Tr. i. 72.
(q) 2 Bulstr. 147. Cro. Car. 292.
(r) 3 Inst. 79.
(s) See also 2 Hal. P. C. 283, and his summary, 264.
(t) Stat. 4 Jac. I. c. 1.
(u) Com. Jour. 4, 5, 12, 13, 15, 29, 30 June, 1607.
(w) Com. Jour. 4 June, 1607.
(x) Co. Litt. 227. 3 Inst. 110. Fost. 27. Gould's case, Hil. 1764.
(y) 2 Hal. P. C. 300. 2 Hawk. P. C. 439.
(z) 3 St. Tr. 731. 4 St. Tr. 231, 455, 485.
(a) 2 Hal. P. C. 310.

[20] It is now settled that when a criminal trial runs to such a length as it cannot be concluded in one day, the court, by its own authority, may adjourn till the next morning: but the jury must be somewhere kept together, that they may have no communication but with each other. Stone's case, 6 T. R. 527.—Christian.

jurors, merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional, and illegal, and is treated as such by Sir Thomas Smith two hundred years ago; who accounted "such doings to be very violent, tyrannical, and contrary to the liberty and custom of the realm of England."(*b*) For, as Sir Matthew Hale well observes,(*c*) it would be a most unhappy case for the judge himself if the prisoner's fate depended upon his directions: unhappy also for the prisoner; for, if the judge's opinion must rule the verdict, the trial by jury would be useless. Yet in many instances(*d*) where, contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside and a new trial granted by the court of king's bench; for in such case, as hath been said, it cannot be set right by attaint. But there hath yet been no instance of granting a new trial where the prisoner was *acquitted* upon the first.(*e*)[21]

If the jury therefore find the prisoner not guilty, he is then forever quit and discharged of the accusation,(*d*) except he be appealed of felony within the time limited by law. And upon such his acquittal, or discharge for want of *prosecution, he shall be immediately set at large without payment of any fee to the gaoler.(*e*) But if the jury find him guilty,(*f*) he is then said to be *convicted* of the crime whereof he stands indicted; which conviction may accrue two ways,—either by his confessing the offence and pleading guilty, or by his being found so by the verdict of his country. [*362

When the offender is thus convicted, there are two collateral circumstances that immediately arise. 1. On a conviction (or even upon an acquittal where there was a reasonable ground to prosecute, and in fact a *bona fide* prosecution) for any grand or petit larceny or other felony, the reasonable expenses of prosecution, and also, if the prosecutor be poor, a compensation for his trouble and loss of time, are, by statutes 25 Geo. II. c. 36 and 18 Geo. III. c. 19, to be allowed him out of the county stock, if he petitions the judge for that purpose; and, by statute 27 Geo. II. c. 3, explained by the same statute, (18 Geo. III. c. 19,) all persons appearing upon recognizance or *subpœna* to give evidence, whether any indictment be preferred or no, and as well without conviction as with it, are entitled to be paid their charges, with a further allowance (if poor) for their trouble and loss of time.[22] 2. On a conviction of larceny in particular, the prosecutor shall have restitution of his goods, by virtue of the statute 21 Hen. VIII. c. 11.[23] For by the common law there was no restitution of goods

(*b*) Smith's Commonw. *l.* 3, c. 1.
(*c*) 2 Hal. P. C. 313.
(*d*) 1 Lev. 9. T. Jones, 163. St. Tr. x. 416.
(*e*) 2 Hawk. P. C. 442.
(*d*) The civil law in such case only discharges him from the same accuser, but not from the same accusation. *Ff.* 48, 2, 7, § 2.
(*e*) Stat. 14 Geo. III. c. 20.
(*f*) In the Roman republic, when the prisoner was convicted of any capital offence by his judges, the form of pronouncing that conviction was something peculiarly delicate,—not that he was guilty, but that he had not been enough upon his guard:—"*parum cavisse videtur.*" Festus, 325.

[21] No new trial can be granted in cases of felony or treason, (Rex *vs.* Mawbey, 6 T. R. 638; and see 13 East, 416, n. b.;) but in cases of misdemeanour it is entirely discretionary in the court whether they will grant or refuse a new trial. Id. ibid. A new trial cannot, in general, be granted on the part of the prosecutor after the defendant has been acquitted, even though the verdict appears to be against evidence. But it seems to be the better opinion that where the verdict was obtained by the fraud of the defendant, or in consequence of irregularity in his proceedings, as by keeping back the prosecutor's witnesses or neglecting to give due notice of trial, a new trial may be granted. 1 Chitt. C. L. 657.—CHITTY.

[22] These acts are now all repealed, and new provisions on the same subject are made, by 7 Geo. IV. c. 64, s. 22, *et seq.*—CHITTY.

[23] Repealed, by 7 & 8 Geo. IV. c. 27; and, by 7 & 8 Geo. IV. c. 29, s. 57, "to encourage the prosecution of offenders," it is enacted that if any person guilty of any felony or misdemeanour under that act in stealing, taking, obtaining, or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for any such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and the court before whom any such person shall be so convicted shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: provided, that if it shall appear before any award or order made that any valuable

upon an indictment, because it is at the suit of the king only; and therefore the party was enforced to bring an appeal of robbery, in order to have his goods again.(g) But, it being considered that the party prosecuting the offender by indictment deserves to the full as much encouragement as he who prosecutes by appeal, this statute was made, which enacts that if any person be convicted of larceny by the evidence of the party robbed, he shall have full restitution of his money, goods, and chattels, or the value of them out of the offender's goods, if he has any, by a writ to be granted by the justices. And, the construction of this act having been in great measure conformable to the law of appeals, it has therefore in practice superseded the use of appeals in larceny. For instance: as formerly upon appeals,(h) so now upon indictments of larceny, this writ of restitution *shall reach the goods so stolen, notwithstanding *363] the property(i) of them is endeavoured to be altered by sale in market-overt.(k) And though this may seem somewhat hard upon the buyer, yet the rule of law is that "*spoliatus debet, ante omnia, restitui*," especially when he has used all the diligence in his power to convict the felon. And, since the case is reduced to this hard necessity, that either the owner or the buyer must suffer, the law prefers the right of the owner, who has done a meritorious act by pursuing a felon to condign punishment, to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction.[24] And it is now usual for the court, upon the conviction of a felon, to order, without any writ, immediate restitution of such goods as are brought into court to be made to the several prosecutors. Or else, secondly, without such writ of restitution, the party may peaceably retake his goods, wherever he happens to find them,(l) unless a new property be fairly acquired therein. Or, lastly, if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover against him for his goods and recover a satisfaction in damages. But such action lies not before prosecution, for so felonies would be made up and healed;(m) and also recaption is unlawful, if it be done with intention to smother or compound the larceny, it then becoming the heinous offence of theft-bote, as was mentioned in a former chapter.(n)

It is not uncommon when a person is convicted of a misdemeanour which principally and more immediately affects some individual, as a battery, imprisonment, or the like, for the court to permit the defendant to *speak with the prosecutor* *before any judgment is pronounced, and, if the prosecutor *364] declares himself satisfied, to inflict but a trivial punishment. This is done to reimburse the prosecutor his expenses, and make him some private amends, without the trouble and circuity of a civil action. But it surely is a dangerous practice; and, though it may be intrusted to the prudence and dis-

(g) 3 Inst. 242.
(h) Bracton *de Coron.* c. 32.
(i) See book ii. page 450.
(k) 1 Hal. P. C. 543.
(l) See book iii. p. 4.
(m) 1 Hal. P. C. 546.
(n) See page 133.

security shall have been *bona fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bona fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect, that the same had by any felony or misdemeanour been stolen, taken, obtained, or converted as aforesaid, in such case the court shall not award or order the restitution of such security.

The proviso in this clause seems to be new; and the enacting part of it makes some very important alterations in the law, as the former act of parliament extended only to cases of prosecutions of thieves, and not receivers, and did not include property lost by false pretences or by other misdemeanours.—Chitty.

[24] It should seem that the sale in market-overt to a *bona fide* purchasor between the original taking and the attainder of the felon does operate a sort of conditional change of the property, for the owner can only sue, for the value of the goods, any person in possession of them, at or after conviction: in the interval they are not the property of the original owner, but of the vendee; and if that vendee dispose of them before attainder, though with notice of the felony, he is not liable. Harwood *vs.* Smith, 2 T. R. 750. Nor does the statute extend to goods obtained from the owner merely by fraud without larceny.—Coleridge.

cretion of the judges in the superior courts of record, it ought never to be allowed in local or inferior jurisdictions, such as the quarter sessions, where prosecutions for assaults are by this means too frequently commenced rather for private lucre than for the great ends of public justice. Above all, it should never be suffered where the testimony of the prosecutor himself is necessary to convict the defendant, for by this means the rules of evidence are entirely subverted: the prosecutor becomes in effect a plaintiff, and yet is suffered to bear witness for himself. Nay, even a voluntary forgiveness by the party injured ought not in true policy to intercept the stroke of justice. "This," says an elegant writer,(o) who pleads with equal strength for the *certainty* as for the *lenity* of punishment, "may be an act of good nature and humanity, but it is contrary to the good of the public. For, although a private citizen may dispense with satisfaction for his private injury, he cannot remove the necessity of public example. The right of punishing belongs not to any one individual in particular, but to the society in general, or the sovereign who represents that society: and a man may renounce his own portion of this right, but he cannot give up that of others."

CHAPTER XXVIII.

OF THE BENEFIT OF CLERGY.

*AFTER trial and conviction, the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstance, [*365 of which the principal is the *benefit of clergy;* a title of no small curiosity as well as use, and concerning which I shall therefore inquire: 1. Into its original, and the various mutations which this privilege of clergy has sustained. 2. To what persons it is to be allowed at this day. 3. In what cases. 4. The consequences of allowing it.

I. Clergy, the *privilegium clericale*, or, in common speech, *the benefit of clergy*, had its original from the pious regard paid by Christian princes to the church in its infant state, and the ill use which the popish ecclesiastics soon made of that pious regard. The exemptions which they granted to the church were principally of two kinds: 1. Exemption of *places* consecrated to religious duties from criminal arrests, which was the foundation of sanctuaries. 2. Exemption of the *persons* of clergymen from criminal process before the secular judge in a few particular cases, which was the true original and meaning of the *privilegium clericale.*

But the clergy, increasing in wealth, power, honour, number, and interest, began soon to set up for themselves; and that which they obtained by the favour of the civil government they now claimed as their inherent right, and as a *right of the highest nature, indefeasible, and *jure divino.*(a) By their [*366 canons therefore and constitutions they endeavoured at, and where they met with easy princes obtained, a vast extension of these exemptions, as well in regard to the crimes themselves, of which the list became quite universal,(b) as in regard to the persons exempted, among whom were at length comprehended not only every little subordinate officer belonging to the church or clergy, but even many that were totally laymen.

In England, however, although the usurpations of the pope were very many and grievous till Henry the Eighth entirely exterminated his supremacy, yet a total exemption of the clergy from secular jurisdiction could never be thoroughly effected, though often endeavoured by the clergy:(c) and, therefore, though the ancient *privilegium clericale* was in *some* capital cases, yet it was not

(o) Becc. ch. 46.
(a) The principal argument upon which they founded this exemption was that text of Scripture, "Touch not mine anointed, and do my prophets no harm." Keilw. 181.
(b) See book iii. page 62.
(c) Keilw. 180.

universally, allowed. And in those particular cases the use was for the bishop or ordinary to demand his clerks to be remitted out of the king's courts as soon as they were indicted: concerning the allowance of which demand there was for many years a great uncertainty;(*d*) till at length it was finally settled in the reign of Henry the Sixth that the prisoner should first be arraigned, and might either *then* claim his benefit of clergy, by way of declinatory plea, or *after conviction*, by way of arresting judgment. This latter way is most usually practised, as it is more to the satisfaction of the court to have the crime previously ascertained by confession or the verdict of a jury; and also it is more advantageous to the prisoner himself, who may possibly be acquitted and so need not the benefit of his clergy at all.

Originally the law was held that no man should be admitted to the privilege of clergy but such as had the *habitum et tonsuram clericalem.(*c*) But in process of time a much wider and more comprehensive criterion was established; every one that could read (a mark of great learning in those days of ignorance and her sister superstition) being accounted a clerk or *clericus*, and allowed the benefit of clerkship, though neither initiated in holy orders nor trimmed with the clerical tonsure. But when learning, by means of the invention of printing and other concurrent causes, began to be more generally disseminated than formerly, and reading was no longer a competent proof of clerkship or being in holy orders, it was found that as many laymen as divines were admitted to the *privilegium clericale;* and therefore, by statute 4 Hen. VII. c. 13, a distinction was once more drawn between mere lay scholars, and clerks that were really in orders. And though it was thought reasonable still to mitigate the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy, being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. Accordingly, the statute directs that no person once admitted to the benefit of clergy shall be admitted thereto a second time unless he produces his orders: and, in order to distinguish their persons, all laymen who are allowed this privilege shall be burned with a hot iron in the brawn of the left thumb. This distinction between learned laymen and real clerks in orders was abolished for a time by the statutes 28 Hen. VIII. c. 1 and 32 Hen. VIII. c. 3; but it is held(*e*) to have been virtually restored by statute 1 Edw. VI. c. 12, which statute also enacts that lords of parliament and peers of the realm, having place and voice in parliament, may have the benefit of their peerage, equivalent to that of clergy, for the first offence, (although they cannot read, and without being burned in the hand,) for all offences then clergyable to commoners, and also for the crimes of house-breaking, highway-robbery, horse-stealing, and robbing of churches.[1]

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*368] *After this burning, the laity, and, before it, the real clergy, were discharged from the sentence of the law in the king's court, and delivered over to the ordinary, to be dealt with according to the ecclesiastical canons. Whereupon the ordinary, not satisfied with the proofs adduced in the profane

(*d*) 2 Hal. P. C. 377.
(*e*) Ibid. 372. M. Paris, A.D. 1259. See book i. page 24.
(*e*) Hob. 294. 2 Hal. P. C. 375.

[1] Upon the conviction of the duchess of Kingston for bigamy, it was argued by the attorney-general Thurlow that peeresses were not entitled, by 1 Edw. VI. c. 12, like peers, to the privilege of peerage; but it was the unanimous opinion of the judges that a peeress convicted of a clergyable felony ought to be immediately discharged without being burned in the hand, or without being liable to any imprisonment. 11 H. St. Tr. 264. If the duchess had been admitted, like a commoner, only to the benefit of clergy, burning in the hand at that time could not have been dispensed with. The argument was that the privilege of peerage was only an extension of the benefit of clergy, and therefore granted only to those who were or might be entitled to that benefit; but as no female—peeress or commoner—at that time was entitled to the benefit of clergy, so it was not the intention of the legislature to grant to any female the privilege of peerage. And in my opinion the argument of the attorney-general is much more convincing and satisfactory, as a legal demonstration, than the arguments of the counsel on the other side, or the reasons stated for the opinions of the judges.—Chitty.

secular court, set himself formally to work to make a purgation of the offender by a new canonical trial; although he had been previously convicted by his country, or perhaps by his own confession.(*f*) This trial was held before the bishop in person or his deputy; and by a jury of twelve clerks: and there, first, the party himself was required to make oath of his own innocence; next, there was to be the oath of twelve compurgators, who swore they believed he spoke the truth; then witnesses were to be examined upon oath, but on behalf of the prisoner only; and lastly, the jury were to bring in their verdict upon oath, which usually acquitted the prisoner; otherwise, if a clerk, he was degraded or put to penance.(*g*) A learned judge, in the beginning of the last century,(*h*) remarks with much indignation the vast complication of perjury and subornation of perjury in this solemn farce of a mock trial; the witnesses, the compurgators, and the jury being all of them partakers in the guilt: the delinquent party also, though convicted before on the clearest evidence, and conscious of his own offence, yet was permitted and almost compelled to swear himself not guilty: nor was the good bishop himself, under whose countenance this scene of wickedness was daily transacted, by any means exempt from a share of it. And yet by this purgation the party was restored to his credit, his liberty, his lands, and his capacity for purchasing afresh, and was entirely made a new and an innocent man.

This scandalous prostitution of oaths and the forms of justice, in the almost constant acquittal of felonious clerks by purgation, was the occasion that, upon very heinous and *notorious circumstances of guilt, the temporal courts would not trust the ordinary with the trial of the offender, but delivered [*369 over to him the convicted clerk, *absque purgatione facienda:* in which situation the clerk convict could not make purgation, but was to continue in prison during life, and was incapable of acquiring any personal property or receiving the profits of his lands, unless the king should please to pardon him. Both these courses were in some degree exceptionable; the latter being perhaps too rigid, as the former was productive of the most abandoned perjury. As, therefore, these mock trials took their rise from factious and popish tenets, tending to exempt one part of the nation from the general municipal law, it became high time, when the reformation was thoroughly established, to abolish so vain and impious a ceremony.

Accordingly, the statute of 18 Eliz. c. 7 enacts that, for the avoiding of such perjuries and abuses, after the offender has been allowed his clergy, he shall not be delivered to the ordinary as formerly; but, upon such allowance and burning in the hand, he shall forthwith be enlarged and delivered out of prison; with proviso that the judge may, if he thinks fit, continue the offender in gaol for any time not exceeding a year. And thus the law continued for above a century unaltered, except only that the statute of 21 Jac. I. c. 6 allowed that women convicted of simple larcenies under the value of ten shillings should (not properly have the benefit of clergy, for they were not called upon to read; but) be burned in the hand and whipped,[2] stocked, or imprisoned for any time not exceeding a year. And a similar indulgence, by the statutes 3 & 4 W. and M. c. 9, and 4 & 5 W. and M. c. 24, was extended to women guilty of any clergyable felony whatsoever; who were allowed once to claim the benefit of the *statute*, in like manner as men might claim the benefit of *clergy*, and to be discharged upon being burned in the hand, and imprisoned for any time not exceeding a year. The punishment of burning in the *hand*, being found ineffectual, was *also [*370 changed, by statute 10 & 11 W. III. c. 23, into burning in the most visible part of the left *cheek* nearest the nose; but, such an indelible stigma being found by experience to render offenders desperate, this provision was repealed about seven years afterwards, by statute 5 Anne, c. 6, and till that period all women, all peers of parliament, and peeresses, and all male commoners who could read, were discharged in all clergyable felonies; the males absolutely, if clerks in

(*f*) Staundf. P. C. 138, b. (*g*) 3 P. Wms. 447. Hob. 289. (*h*) Hob. 291.

[2] Whipping of women is abolished, by 1 Geo. IV. c. 57.—CHITTY.

orders; and other commoners, both male and female, upon branding; and peers and peeresses without branding for the first offence; yet all liable, (excepting peers and peeresses,) if the judge saw occasion, to imprisonment not exceeding a year. And those men who could not read, if under the degree of peerage, were hanged.

Afterwards, indeed, it was considered that education and learning were no extenuations of guilt, but quite the reverse; and that, if the punishment of death for simple felony was too severe for those who had been liberally instructed, it was, *a fortiori*, too severe for the ignorant also. And thereupon, by the same statute, 5 Anne, c. 6, it was enacted that the benefit of clergy should be granted to all those who were entitled to ask it, without requiring them to read by way of conditional merit.[3] And experience having shown that so very universal a lenity was frequently inconvenient, and an encouragement to commit the lower degrees of felony, and that, though capital punishments were too rigorous for these inferior offences, yet no punishment at all (or next to none) was as much too gentle, it was further enacted, by the same statute, that when any person is convicted of any theft or larceny, and burned in the hand for the same, according to the antient law, he shall also, at the discretion of the judge, be committed to the house of correction or public workhouse, to be there kept to hard labour for any time not less than six months and not exceeding two years; with a power of inflicting a double confinement in case of the party's escape from the first. And it was also enacted, by the statutes 4 Geo. I. c. 11, and 6 Geo. I. c. 23, that *371] when any person shall be convicted of any larceny, *either grand or petit, or any felonious stealing or taking of money, or goods and chattels, either from the person or the house of any other, or in any other manner, and who by the law shall be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping, the court, in their discretion, instead of such burning in the hand or whipping, may direct such offenders to be transported to America (or, by the statute 19 Geo. III. c. 74, to any other parts beyond the seas) for seven years; and if they return, or are seen at large in this kingdom, within that time, it shall be felony without benefit of clergy. And by the subsequent statutes, 16 Geo. II. c. 15, and 8 Geo. III. c. 15, many wise provisions are made for the more speedy and effectual execution of the laws relating to transportation, and the conviction of such as transgress them. But now, by the statute 19 Geo. III. c. 74, all offenders liable to transportation may in lieu thereof, at the discretion of the judges, be employed, if males, [except in the case of petty larceny,] in hard labour for the benefit of some public navigation; or, whether males or females, may in all cases be confined to hard labour in certain penitentiary houses, to be erected by virtue of the said act, for the several terms therein specified, but in no case exceeding seven years; with a power of subsequent mitigation, and even of reward, in case of their good behaviour. But if they escape and are retaken, for the first time an addition of three years is made to the term of their confinement; and a second escape is felony without benefit of clergy.

In forming the plan of these penitentiary houses, the principal objects have been, by sobriety, cleanliness, and medical assistance, by a regular series of labour, by solitary confinement during the intervals of work, and by due religious instruction, to preserve and amend the health of the unhappy offenders, to inure them to habits of industry, to guard them from pernicious company, to accustom

[3] The statute enacts that, if a person convicted of a clergyable offence *shall pray the benefit of this act*, he shall not be required to read, but shall be taken to be, and punished as, a clerk convict. Hence persons convicted of manslaughters, bigamies, and simple grand larcenies, &c. are still asked what they have to say why judgment of death should not be pronounced upon them. And they are then told to kneel down and pray the benefit of the statute. It would perhaps have been more consistent with the dignity of a court of justice to have granted the benefit of clergy without requiring an unnecessary form, the meaning of which very few comprehend. And if the prisoner should obstinately refuse to pray the benefit of the statute, it seems to be an unavoidable consequence that the judge must pronounce sentence of death upon him.—CHITTY.

them to serious reflection, and to teach them both the principles and practice of every Christian and moral duty. And if the whole of this plan be properly executed, and its defects be timely supplied, there is reason to hope that such a reformation may be *effected in the lower classes of mankind, and such a gradual scale of punishment be affixed to all gradations of guilt, as [*372 may in time supersede the necessity of capital punishment except for very atrocious crimes.

It is also enacted by the same statute, 19 Geo. III. c. 74, that, instead of burning in the hand, (which was sometimes too slight and sometimes too disgraceful a punishment,) the court in all clergyable felonies may impose a pecuniary fine, or (except in the case of manslaughter) may order the offender to be once or oftener, but not more than thrice, either publicly or privately whipped; such private whipping (to prevent collusion or abuse) to be inflicted in the presence of two witnesses, and, in case of female offenders, in the presence of females only. Which fine or whipping shall have the same consequences as burning in the hand; and the offender so fined or whipped shall be equally liable to a subsequent detainer or imprisonment.

In this state does the benefit of clergy at present stand; very considerably different from its original institution: the wisdom of the English legislature having, in the course of a long and laborious process, extracted, by a noble alchemy, rich medicines out of poisonous ingredients, and converted, by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics into a merciful mitigation of the general law with respect to capital punishment.

From the whole of this detail we may collect, that however in times of ignorance and superstition that monster in true policy may for a while subsist, of a body of men residing in the bowels of a state and yet independent of its laws; yet, when learning and rational religion have a little enlightened men's minds, society can no longer endure an absurdity so gross as must destroy its very fundamentals. For, by the original contract of government, the price of protection by the united force of individuals is that of obedience to *the [*373 united will of the community. This united will is declared in the laws of the land; and that united force is exerted in their due and universal execution.

II. I am next to inquire to what *persons* the benefit of clergy is to be allowed at this day; and this must be chiefly collected from what has been observed in the preceding article. For, upon the whole, we may pronounce that all clerks in orders are, without any branding, and of course without any transportation, fine, or whipping, (for those are only substituted in lieu of the other,) to be admitted to this privilege and immediately discharged; and this as often as they offend.(*i*) Again, all lords of parliament and peers of the realm having place and voice in parliament, by the statute 1 Edw. VI. c. 12, (which is likewise held to extend to peeresses,)(*k*) shall be discharged in all clergyable and other felonies provided for by the act, without any burning in the hand or imprisonment, or other punishment substituted in its stead, in the same manner as real clerks convict; but this is only for the first offence. Lastly, all the commons of the realm not in orders, whether male or female, shall for the first offence be discharged of the capital punishment of felonies within the benefit of clergy, upon being burned in the hand, whipped, or fined, or suffering a discretionary imprisonment in the common gaol, the house of correction, one of the penitentiary houses, or in the places of labour for the benefit of some navigation; or, in case of larceny, upon being transported for seven years, if the court shall think proper It hath been said that Jews, and other infidels and heretics, were not capable of the benefit of clergy till after the statute 5 Anne, c. 6, as being under a legal incapacity for orders.(*l*) But I much question whether this was ever ruled for law since the reintroduction of the Jews into England in the time of Oliver

(*i*) 2 Hal. P. C. 375.
(*k*) Duchess of Kingston's case in Parliament, April 22, 1776.
(*l*) 2 Hal. P. C. 373. 2 Hawk. P. C. 338. Fost. 306.

*374] Cromwell. For, if that were the case, the Jews are *still in the same predicament, which every day's experience will contradict: the statute of queen Anne having certainly made no alteration in this respect; it only dispensing with the necessity of reading in those persons who, in case they could read, were before the act entitled to the benefit of their clergy.

III. The third point to be considered is, for what *crimes* the *privilegium clericale* or benefit of clergy is to be allowed. And it is to be observed that neither in high treason, nor in petit larceny, nor in any mere misdemeanours, it was indulged at the common law; and therefore we may lay it down for a rule that it was allowable only in petit treason and capital felonies, which for the most part became legally entitled to this indulgence by the statute *de clero*, 25 Edw. III. st. 3, c. 4, which provides that clerks convict for treasons or felonies, touching other persons than the king himself or his royal majesty, shall have the privilege of holy church. But yet it was not allowable in all felonies whatsoever; for in some it was denied even by the common law,—viz., *insidiatio viarum*, or lying in wait for one on the highway; *depopulatio agrorum*, or destroying and ravaging a country;(*m*) and *combustio domorum*, or arson,—that is, the burning of houses:(*n*) all which are a kind of hostile acts, and in some degree border upon treason. And, further, all these identical crimes, together with petit treason, and very many other acts of felony, are ousted of clergy by particular acts of parliament, which have in general been mentioned under the particular offences to which they belong, and therefore need not be here recapitulated. Upon all which statutes for excluding clergy I shall only observe that they are nothing else but the restoring of the law to the same rigour of capital punishment in the first offence that is exerted before the *privilegium clericale* was at all indulged, and which it still exerts upon a second offence in almost all kinds of felonies, unless committed by clerks actually in orders. But so tender is the law of inflicting capital punishment in the first instance for any inferior felony, that notwithstanding by the marine law, as declared in statute **373] 28 Hen. VIII. c. 15, the benefit of clergy is not allowed in **any case whatsoever; yet, when offences are committed within the admiralty-jurisdiction which would be clergyable if committed by land, the constant course is to acquit and discharge the prisoner.(*o*)[4] And, to conclude this head of inquiry, we may observe the following rules:—1. That in all felonies, whether new-created or by common law, clergy is now allowable, unless taken away by express words of an act of parliament.(*p*) 2. That where clergy is taken away from the principal, it is not of course taken away from the accessory, unless he be also particularly included in the words of the statute.(*q*) 3. That when the benefit of clergy is taken away from the *offence*, (as in case of murder, buggery, robbery, rape, and burglary,) a principal in the second degree being present, aiding and abetting the crime, is as well excluded from his clergy as he that is principal in the first degree: but, 4. That where it is only taken away from the *person committing* the offence, (as in the case of stabbing, or committing larceny in a dwelling-house, or privately from the person,) his aider and abettors are not excluded, through the tenderness of the law, which hath determined that such statutes shall be taken literally.(*r*)

IV. Lastly, we are to inquire what the consequences are to the party of allowing him this benefit of clergy. I speak not of the branding, fine, whipping, imprisonment, or transportation, which are rather concomitant conditions than consequences of receiving this indulgence. The consequences are such as affect his present interest and future credit and capacity, as having been once a felon, but now purged from that guilt by the privilege of clergy, which operates as a kind of statute pardon.

(*m*) 2 Hal. P. C. 333.
(*n*) 1 Hal. P. C. 346.
(*o*) Moor. 756. Fost. 288.
(*p*) 2 Hal. P. C. 330.
(*q*) 2 Hawk. P. C. 342.
(*r*) 1 Hal. P. C. 529. Fost. 356, 357.

[4] But now, by 39 Geo. III. c. 37, offences committed on the high seas are to be considered and treated in the same manner as if committed on shore; and see the 43 Geo. III. c. 113, s. 6; 56 Geo. III. c. 27, s. 3.—Chitty.

And we may observe, 1. That by this conviction he forfeits all his goods to the king, which, being once vested in the crown, shall not afterwards be restored to the offender.(s) **2. That after conviction, and till he receives the judgment of the law, by branding, or some of its substitutes, or else is pardoned by the king, he is to all intents and purposes a felon, and subject to all the disabilities and other incidents of a felon.(t) 3. That after burning, or its substitute, or pardon, he is discharged forever of that and all other felonies before committed within the benefit of clergy, but not of felonies from which such benefit is excluded: and this by statutes 8 Eliz. c. 4 and 18 Eliz. c. 7. 4. That by burning, or its substitute, or the pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted.(u) 5. That what is said with regard to the advantages of commoners and laymen subsequently to the burning in the hand is equally applicable to all peers and clergymen, although never branded at all, or subjected to other punishment in its stead. For they have the same privileges without any burning, or any substitute for it, which others are entitled to after it.(w)[5] [**374

CHAPTER XXIX.

OF JUDGMENT AND ITS CONSEQUENCES.

*WE are now to consider the next stage of criminal prosecution, after trial and conviction are past, in such crimes and misdemeanours as are either too high or too low to be included within the benefit of clergy, which is that of *judgment*. For when, upon a capital charge, the jury have brought in their verdict guilty, in the presence of the prisoner, he is, either immediately, or at a convenient time soon after, asked by the court if he has any thing to offer why judgment should not be awarded against him. And in case the defendant be found guilty of a misdemeanour, (the trial of which may, and does usually, happen in his absence, after he has once appeared,) a *capias* is awarded and issued to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry. But whenever he appears in person, upon either [*375

(s) 2 Hal. P. C. 388.
(t) 3 P. Wms. 487.
(u) 2 Hal. P. C. 389. 5 Rep. 110.
(w) 2 Hal. P. C. 389, 390.

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[5] The various statutes mentioned in the course of this chapter, as relating to benefit of clergy, have been either expressly repealed, or rendered inoperative, by the passing of the recent statute 7 & 8 Geo. IV. c. 28; sect. 6 of which enacts that benefit of clergy with respect to persons convicted of felony shall be abolished, but that nothing therein contained shall prevent the joinder in any indictment of any counts which might have been joined before the passing of the act.

Section 7 of the same statute enacts that no person convicted of felony shall suffer death, unless it be for some felony which was excluded from the benefit of clergy before or on the first day of the (then) present session of parliament, or which has been or shall be made punishable with death by some statute passed after that day.

The 6 Geo. IV. c. 25, entitled "An act for defining the rights of capital convicts who receive pardon, and of convicts after having been punished for clergyable felonies, for placing clerks in orders on the same footing with other persons as to felonies, and for limiting the effect of the benefit of clergy," had previously enacted, by section 1, that in case of free pardons the prisoner's discharge, and in case of conditional pardons the performance of the condition, should have the effect of a pardon under the great seal; by section 2, that offenders convicted of clergyable felonies enduring the punishment adjudged, such punishment should have the effect of burning in the hand; by section 3, that clerks should be liable to punishment as if not in orders; and, by section 4, that the allowance of the benefit of clergy to any person who should, after the passing of that act, be convicted of any felony, should not render the person to whom such benefit was allowed dispunishable for any other felony by him or her committed before the time of such allowance, any law, custom, or usage to the contrary notwithstanding.—CHITTY.

a capital or inferior conviction, he may at this period, as well as at his arraignment, offer any exceptions to the indictment in *arrest* or stay of judgment; as for want of sufficient certainty in setting forth either the person, the time, the place, or the offence. And if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again.(*a*) And we may take notice, 1. That none of the statutes of *jeofails*,(*b*) for amendment of errors, extend to indictments or proceedings in criminal cases; and therefore a defective indictment is not aided by a verdict, as defective pleadings in civil cases are. 2. That in favour of life great strictness has at all times been observed in *every *376] point of an indictment. Sir Matthew Hale indeed complains "that this strictness is grown to be a blemish and inconvenience in the law and the administration thereof; for that more offenders escape by the over-easy ear given to exceptions in indictments than by their own innocence."(*c*) And yet no man was more tender of life than this truly excellent judge.[1]

A pardon also, as has been before said, may be pleaded in arrest of judgment, and it has the same advantage when pleaded here as when pleaded upon arraignment, viz: the saving the attainder, and of course the corruption of blood; which nothing can restore but parliament, when a pardon is not pleaded till after sentence. And certainly, upon all accounts, when a man hath obtained a pardon he is in the right to plead it as soon as possible.

Praying the benefit of clergy may also be ranked among the motions in arrest of judgment; of which we spoke largely in the preceding chapter.

If all these resources fail, the court must pronounce that judgment which the law hath annexed to the crime, and which hath been constantly mentioned, together with the crime itself, in some or other of the former chapters. Of these some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead; though in very atrocious crimes, other circumstances of terror, pain, or disgrace are superadded; as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason affecting the king's person or government, embowelling alive, beheading, and quartering; and in murder, a public dissection. And, in case of any treason committed by a female, the judgment is to be burned alive. But the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such parts of these judgments as savour of torture or cruelty; a sledge or hurdle being usually allowed to such traitors as are con- *377] demned to be drawn; and there being very few instances (and those accidental or by negligence) of any person's being embowelled or burned till previously deprived of sensation by strangling. Some punishments consist in exile or banishment, by abjuration of the realm, or transportation; others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands, or movables, or both, or of the profits of lands for

(*a*) 4 Rep. 45. (*b*) See book iii. page 407. (*c*) 2 Hal. P. C. 193.

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[1] The law upon this subject has been materially altered by the statute 7 Geo. IV. c. 64, s. 20, and by sect. 21 of the same statute, which enacts that no judgment after verdict upon any indictment or information of any felony or misdemeanour shall be stayed or reversed for want of a *similiter;* nor by reason that the jury-process has been awarded to a wrong officer upon an insufficient suggestion; nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors; nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer; and that where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.—Chitty.

Many of the grounds of objections enumerated in this statute have been, moreover, by subsequent provisions, either wholly removed, by rendering the averments either wholly unnecessary, (14 & 15 Vict. c. 100,) by allowing amendments at the trial, (11 & 12 Vict. c. 46, 12 & 13 Vict. c. 45, 14 & 15 Vict. c. 100,) or by requiring all objections for formal defects apparent on the face of an indictment to be taken before the jury are sworn. 14 & 15 Vict. c. 100.—Stewart.

life: others induce a disability of holding offices or employments, being heirs, executors, and the like. Some, though rarely, occasion a mutilation or dismembering, by cutting off the hand or ears; others fix a lasting stigma on the offender, by slitting the nostrils, or branding in the hand or cheek. Some are merely pecuniary, by stated or discretionary fines: and lastly, there are others that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain; and these are inflicted chiefly for such crimes as either arise from indigence or render even opulence disgraceful; such as whipping, hard labour in the house of correction or otherwise, the pillory, the stocks, and the ducking-stool.

Disgusting as this catalogue may seem, it will afford pleasure to an English reader, and do honour to the English law, to compare it with that shocking apparatus of death and torment to be met with in the criminal codes of almost every other nation in Europe. And it is moreover one of the glories of our English law that the species, though not always the quantity or degree, of punishment is *ascertained* for every offence; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained for every subject alike, without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates, and would live in society without knowing exactly the conditions and obligations which it lays them under. And besides, as this prevents oppression on the one hand, so on *the other it stifles all hopes of impunity [*378
or mitigation: with which an offender might flatter himself, if his punishment depended on the humour or discretion of the court. Whereas, where an established penalty is annexed to crimes, the criminal may read their certain consequence in that law; which ought to be the unvaried rule, as it is the inflexible judge, of his actions.

The discretionary fines and discretionary length of imprisonment which our courts are enabled to impose may seem an exception to this rule. But the general nature of the punishment, viz., by fine or imprisonment, is in these cases fixed and determinate; though the duration and quantity of each must frequently vary, from the aggravations, or otherwise, of the offence, the quality and condition of the parties, and from innumerable other circumstances. The *quantum*, in particular, of pecuniary fines neither can nor ought to be ascertained by an invariable law. The value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune may be matter of indifference to another's. Thus, the law of the twelve tables at Rome fined every person that struck another five-and-twenty *denarii:* this, in the more opulent days of the Empire, grew to be a punishment of so little consideration that Aulus Gellius tells a story of one Lucius Neratius, who made it his diversion to give a blow to whomsoever he pleased and then tender them the legal forfeiture. Our statute law has not therefore often ascertained the quantity of fines, nor the common law ever; it directing such an offence to be punished by fine in general, without specifying the certain sum; which is fully sufficient when we consider that, however unlimited the power of the court may seem, it is far from being wholly arbitrary; but its discretion is regulated by law. For the bill of rights(*d*) has particularly declared that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted, (which had a retrospect to some unprecedented proceedings in the court of king's bench in the reign of king James the Second;) *and the same statute further declares that all grants and promises of [*379
fines and forfeitures of particular persons before conviction are illegal and void. Now, the bill of rights was only declaratory of the old constitutional law; and accordingly we find it expressly holden long before,(*e*) that all such previous grants are void; since thereby many times undue means and more violent prosecution would be used for private lucre than the quiet and just proceeding of law would permit.

The reasonableness of fines in criminal cases has also been usually regulated by the determination of *magna carta*, c. 14, concerning amercements for misbe-

(*d*) Stat. 1 W. and M. st. 2, c. 2.

(*e*) 2 Inst. 48.

haviour by the suitors in matters of civil right. "*Liber homo non amercietur pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto, secundum magnitudinem delicti; salvo contenemento suo; et mercator eodem modo, salva mercandisa sua; et villanus eodem modo amercietur, salvo wainagio suo.*" A rule that obtained even in Henry the Second's time,(*f*) and means only that no man shall have a larger amercement imposed upon him than his circumstances or personal estate will bear; saving to the landholder his contenement[2] or land; to the trader his merchandise; and to the countryman his wainage, or team and instruments of husbandry. In order to ascertain which, the great charter also directs that the amercement, which is always inflicted in general terms, ("*sit in misericordia,*") shall be set, *ponatur*, or reduced to a certainty, by the oath of good and lawful men of the neighbourhood. Which method of liquidating the amercement to a precise sum was usually performed in the superior courts by the assessment or *affeerment* of the coroner, a sworn officer chosen by the neighbourhood, under the equity of the statute Westm. 1, c. 18; and then the judges estreated them into the exchequer.(*g*) But in the court-leet and court-baron it is still performed by *affeerors*, or suitors sworn to *affeere*, that is, tax and moderate the *general* amercement according to the *particular* circumstances of the offence *and the offender.(*h*) Amercements imposed by the superior courts on their own officers and ministers were affeered by the judges themselves; but when a peculiar mulct was inflicted by them on a stranger (not being party to any suit) it was then denominated a *fine;* (*i*) and the antient practice was, when any such fine was imposed, to inquire by a jury "*quantum inde regi dare valeat per annum, salva sustentatione sua, et uxoris, et liberorum suorum.*"(*j*) And since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay without touching the implements of his livelihood; but to inflict corporal punishment, or a limited imprisonment, instead of such fine as might amount to imprisonment for life. And this is the reason why fines in the king's court are frequently denominated ransoms, because the penalty must otherwise fall upon a man's person unless it be redeemed or ransomed by a pecuniary fine;(*k*) according to an antient maxim, *qui non habet in crumena luat in corpore.* Yet, where any statute speaks both of fine and ransom, it is holden that the ransom shall be treble to the fine at least.(*l*)

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When sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence from the common law is *attainder*. For when it is now clear beyond all dispute that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of its protection, and takes no further care of him than barely to see him executed.[3] He is then called attaint, *attinctus*, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man; for, by an anticipation of his punishment, he is already dead in law.(*m*) This is after *judgment;* for there is great difference between a man *convicted* and *attainted:* though they are frequently through inaccuracy confounded together. After conviction *only a man is liable to none of these disabilities; for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment; the indictment may be erroneous, which

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(*f*) Glanv. *l.* 9, c. 8 and 11.
(*g*) F. N. B. 76.
(*h*) The affeeror's oath is conceived in the very terms of *magna charta.* Fitzh. Survey, c. 11.
(*i*) 8 Rep. 40.
(*j*) Gilb. Exch. c. 5.
(*k*) Mirr. c. 5, § 3. Lamb. *Eirenarch.* 575.
(*l*) Dyer, 232.
(*m*) 3 Inst. 213.

[2] Lord Coke says that "*contenement* signifieth his countenance, as the armour of a soldier is his countenance, the books of a scholar his countenance, and the like." 2 Inst. 28. He also adds that "the *wainagium* is the countenance of the villein; and it was great reason to save his wainage, for otherwise the miserable creature was to carry the burden on his back." Ibid.—Christian.

[3] This must be taken with some qualification; for the person of an attainted felon is still under the protection of the law and to kill him without warrant would be murder. Post. 73.—Chitty.

will render his guilt uncertain, and thereupon the present conviction may be quashed; he may obtain a pardon, or be allowed the benefit of clergy; both which suppose some latent sparks of merit which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of any thing to be said in his favour. Upon judgment, therefore, of death, and not before, the attainder of a criminal commences; or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore, either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted.

The consequences of attainder are forfeiture and corruption of blood.

1. Forfeiture is twofold,—of real and personal estates. First, as to real estates. By attainder in high treason(*n*) a man forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his rights of entry on lands or tenements which he had at the time of the offence committed, or at any time afterwards, to be forever vested in the crown; and also the profits of all lands and tenements which he had in his own right for life or years, so long as such interest shall subsist. This forfeiture relates backwards to the time of the treason committed, so as to avoid all intermediate sales and encumbrances,(*o*) but not those before the fact; and therefore a wife's jointure is not forfeitable for the treason of her husband, because settled upon her previous to the treason committed. But her dower *is forfeited, by the express provision of statute 5 & 6 Edw. VI. c. 11. And yet the [*382 husband shall be tenant by the curtesy of the wife's lands if the wife be attainted of treason,(*p*) for that is not prohibited by the statute. But, though after attainder the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits; and therefore if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no forfeiture of his lands, for he never was attainted of treason.(*q*) But if the chief justice of the king's bench (the supreme coroner of all England) in person, upon the view of the body of one killed in open rebellion, records it, and returns the record into his own court, both lands and goods shall be forfeited.(*r*)

The natural justice of forfeiture or confiscation of property for treason(*s*) is founded on this consideration: that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connections with society, and hath no longer any right to those advantages which before belonged to him purely as a member of the community; among which *social* advantages the right of transferring or transmitting property to others is one of the chief. Such forfeitures, moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by the sense of his duty and dread of personal punishment, but also by his passions and natural affections, and will interest every dependant and relation he has, to keep him from offending, according to that beautiful sentiment of Cicero,(*t*) "*nec vero me fugit quam sit acerbum, parentum scelera filiorum pœnis lui; sed hoc præclare legibus comparatum est, ut caritas liberorum amiciores parentes reipublicæ redderet.*" And therefore Aulus Cascellius, a Roman lawyer in the time of the triumvirate, used to boast that he had two reasons for *despising the power of the tyrants,—his old age and his [*383 want of children; for children are pledges to the prince of the father's obedience.(*t*) Yet many nations have thought that this posthumous punishment savours of hardship to the innocent, especially for crimes that do not strike at the very root and foundation of society, as treason against the government expressly does. And therefore, though confiscations were very frequent in the times of the earlier emperors, yet Arcadius and Honorius, in every other

(*n*) Co. Litt. 392. 3 Inst. 319. 1 Hal. P. C. 240. 2 Hawk. P. C. 448.
(*o*) 3 Inst. 211.
(*p*) 1 Hal. P. C. 359.
(*q*) Co. Litt. 13.
(*r*) 4 Rep. 57.
(*s*) See book i. page 259.
(*t*) *Ad Brutum, ep.* 12.
(*t*) Gravin. 1, § 68.

instance but that of treason, thought it more just, "*ibi esse pœnam, ubi noxa est*," and ordered that "*peccata suos teneant auctores, nec ulterius progrediatur metus, quam reperiatur delictum:*"(*u*) and Justinian also made a law to restrain the punishment of relations,(*v*) which directs the forfeiture to go, except in the case of *crimen majestatis*, to the next of kin to the delinquent. On the other hand, the Macedonian law extended even the capital punishment of treason, not only to the children, but to all the relations, of the delinquent:(*w*) and of course their estates must be also forfeited, as no man was left to inherit them. And in Germany, by the famous golden bulle,(*x*) (copied almost *verbatim* from Justinian's code,)(*y*) the lives of the sons of such as conspire to kill an elector are spared, as it is expressed, by the emperor's *particular bounty*. But they are deprived of all their effects and rights of succession, and are rendered incapable of any honour, ecclesiastical or civil: "to the end that, being always poor and necessitous, they may forever be accompanied by the infamy of their father; may languish in continual indigence; and may find (says this merciless edict) their punishment in living, and their relief in dying."

With us in England, forfeiture of lands and tenements to the crown for treason is by no means derived from the feodal policy, (as has been already observed,)(*z*) but was antecedent to the establishment of that system in this island, *being transmitted from our Saxon ancestors,(*a*) and forming a part of the antient Scandinavian constitution.(*b*) But in certain treasons relating to the coin (which, as we formerly observed, seem rather a species of the *crimen falsi* than the *crimen læsæ majestatis*) it is provided by some of the modern statutes(*c*) which constitute the offence, that it shall work no forfeiture of lands, save only for the life of the offender; and, by all, that it shall not deprive the wife of her dower.(*d*) And, in order to abolish such hereditary punishment entirely, it was enacted, by statute 7 Anne, c. 21, that after the decease of the late pretender no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of any person other than the traitor himself; by which the law of forfeitures for high treason would by this time have been at an end, had not a subsequent statute intervened to give them a longer duration. The history of this matter is somewhat singular, and worthy observation. At the time of the union, the crime of treason in Scotland was, by the Scots law, in many respects different from that of treason in England, and particularly in its consequence of forfeitures of entailed estates, which was more peculiarly English; yet it seemed necessary that a crime so nearly affecting government should, both in its essence and consequences, be put on the same footing in both parts of the united kingdoms. In new-modelling these laws, the Scotch nation and the English house of commons struggled hard, partly to maintain, and partly to acquire, a total immunity from forfeiture and corruption of blood, which the house of lords as firmly resisted. At length a compromise was agreed to, which is established by this statute,—viz., that the same crimes, and no other, should be treason in Scotland that are so in England; and that the English forfeitures and corruption of blood should take place in Scotland till the death of the then pretender, and then cease throughout the whole of Great Britain:(*e*) the lords artfully proposing this temporary clause, in *hopes, it is said,(*f*) that the prudence of succeeding parliaments would make it perpetual.(*g*) This has partly been done by the statute 17 Geo. II. c. 39, (made in the year preceding the late rebellion,) the operation of these indemnifying clauses being thereby still further suspended till the death of the sons of the pretender.(*h*)[4]

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(*u*) *Cod.* 9, 47, 22.
(*v*) *Nov.* 134, c. 13.
(*w*) Qu. Curt. *l.* 6.
(*x*) *Cap.* 24.
(*y*) *L.* 9, *t.* 8, *l.* 5.
(*z*) See book ii. page 251.
(*a*) *LL. Alfr.* c. 4. *Canut.* c. 54.
(*b*) Stiernh. *de jure Goth. l.* 2, c. 6, and *l.* 3, c. 3.
(*c*) Stat. 5 Eliz. c. 11. 18 Eliz. c. 1.
(*d*) Ibid. 8 & 9 W. III. c. 26. 15 & 16 Geo. II. c. 28.
(*e*) Burnet's Hist. A.D. 1709.
(*f*) Considerations on the Law of Forfeiture, 6.
(*g*) See Fost. 250.
(*h*) The justice and expediency of this provision were defended at the time with much learning and strength of argument in the Considerations on the Law of Forfeiture, first published A.D. 1744. See book i. page 244.

[4] By the 39 Geo. III. c. 93, the clause in the 7 Anne, c. 21, and that in the 17 Geo. II.

In petit treason and felony, the offender also forfeits all his chattel interests absolutely, and the profits of all estates of freehold during life; and, after his death, all his lands and tenements in fee-simple (but not those in tail) to the crown, for a very short period of time; for the king shall have them for a year and a day, and may commit therein what waste he pleases, which is called the king's *year, day* and *waste.*(*i*) Formerly the king had only liberty of committing waste on the lands of felons by pulling down their houses, extirpating their gardens, ploughing their meadows, and cutting down their woods. And a punishment of a similar spirit appears to have obtained in the Oriental countries, from the decrees of Nebuchadnezzar and Cyrus in the books of Daniel(*k*) and Ezra,(*l*) which, besides the pain of death inflicted on the delinquents there specified, ordain "that their houses shall be made a dunghill." But, this tending greatly to the prejudice of the public, it was agreed, in the reign of Henry the First, in this kingdom, that the king should have the profits of the land for one year and a day, in lieu of the destruction he was otherwise at liberty to commit;(*m*) and therefore *magna carta*(*n*) provides that the king shall only hold such lands for a year and a day, and then restore them to the lord of the fee, without any mention made of waste. But the statute 17 Edw. II. *de prærogativa regis* seems to suppose that the king shall have his year, day, *and* waste, and not the *year and day *instead of* waste; which Sir Edward Coke (and the author of the Mirror, before him) very justly look upon as an encroachment, though a very antient one, of the royal prerogative.(*o*) This year, day, and waste are now usually compounded for, but otherwise they regularly belong to the crown; and, after their expiration, the land would have naturally descended to the heir, (as in gavelkind tenure it still does,) did not its feodal quality intercept such descent and give it by way of escheat to the lord. These forfeitures for felony (*p*) also arise only upon attainder; and therefore a *felo de se* forfeits no land of inheritance or freehold, for he never is attainted as a felon.(*p*) They likewise relate back to the time of the offence committed, as well as forfeitures for treason, so as to avoid all intermediate charges and conveyances. This may be hard upon such as have unwarily engaged with the offender; but the cruelty and reproach must lie on the part, not of the law, but of the criminal, who has thus knowingly and dishonestly involved others in his own calamities. [*386

These are all the forfeitures of real estates created by the common law, as consequential upon attainders by judgment of death or outlawry. I here omit the particular forfeitures created by the statutes of *præmunire* and others, because I look upon them rather as a *part* of the judgment and penalty inflicted by the respective statutes than as *consequences* of such judgment, as in treason and felony they are. But I shall just mention, as a part of the forfeiture of real estates, the forfeiture of the profits of lands during life, which extends to two other instances besides those already spoken of,—misprision of treason,(*q*) and striking in Westminster hall, or drawing a weapon upon a judge there sitting in the king's courts of justice.(*r*)

The forfeiture of goods and chattels accrues in every one of the higher kinds

(*i*) 2 Inst. 37.
(*k*) Ch. iii. v. 29.
(*l*) Ch. vi. v. 11.
(*m*) Mirr. c. 4, § 16. Flet. l. 1, c. 28.
(*n*) 9 Hen. III. c. 22.
(*o*) Mirr. c. 5, § 2. 2 Inst. 37.
(*p*) 3 Inst. 55.
(*q*) Ibid. 218.
(*r*) Ibid. 141.

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c. 39, limiting the periods when forfeiture for treason should be abolished, are repealed. So that the law of forfeiture in cases of high treason is now the same as it was by the common law, or as it stood prior to the seventh year of the reign of queen Anne.—CHRISTIAN.

Also, by 54 Geo. III. c. 145, no attainder for felony, except in high treason, petit treason, murder, or abetting, &c. the same, shall extend to the disinheriting any heir, nor to the prejudice of the right or title of any person, except the offender during his life only; and every person to whom the right or interest of any lands or tenements should or might after the death of such offender have appertained, if no such attainder had been, may enter thereon.—CHITTY.

*387] of offence: in high treason or misprision *thereof, petit treason, felonies of all sorts, whether clergyable or not, self-murder or felony *de se*, petit larceny, standing mute, and the above-mentioned offences of striking, &c. in Westminster hall. For *flight*, also, on an accusation of treason, felony, or even petit larceny, whether the party be found guilty or acquitted, if the jury find the flight, the party shall forfeit his goods and chattels; for the very flight is an offence carrying with it a strong presumption of guilt, and is at least an endeavour to elude and stifle the course of justice prescribed by the law. But the jury very seldom find the flight,(*s*) forfeiture being looked upon, since the vast increase of personal property of late years, as too large a penalty for an offence to which a man is prompted by the natural love of liberty.[5]

There is a remarkable difference or two between the forfeiture of lands and of goods and chattels. 1. Lands are forfeited upon *attainder*, and not before: goods and chattels are forfeited by *conviction*. Because in many of the cases where goods are forfeited there never is any attainder, which happens only where judgment of death or outlawry is given: therefore in those cases the forfeiture must be upon conviction or not at all; and, being necessarily upon conviction in those, it is so ordered in all other cases; for the law loves uniformity. 2. In outlawries for treason or felony, lands are forfeited only by the judgment; but the goods and chattels are forfeited by a man's being first put in the *exigent*, without staying till he is *quinto exactus*, or finally outlawed; for the secreting himself so long from justice is construed a flight in law.(*t*) The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and encumbrances; but the forfeiture of goods and chattels has no relation backwards, so that those only which a man has at the time of conviction shall be forfeited. Therefore a traitor or felon may *bona fide* sell any of his chattels, real or personal, for the sustenance of himself and family be-
*388] tween the fact and conviction;(*u*) for personal property is of *so fluctuating a nature that it passes through many hands in a short time; and no buyer could be safe if he were liable to return the goods which he had fairly bought provided any of the prior vendors had committed a treason or felony. Yet if they be collusively and not *bona fide* parted with, merely to defraud the crown, the law (and particularly the statute 13 Eliz. c. 5) will reach them, for they are all the while truly and substantially the goods of the offender; and as he, if acquitted, might recover them himself, as not parted with for a good consideration, so in case he happens to be convicted the law will recover them for the king.

II. Another immediate consequence of attainder is the *corruption of blood*, both upwards and downwards, so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture: and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor.(*v*)

This is one of those notions which our laws have adopted from the feodal constitutions at the time of the Norman conquest, as appears from its being unknown in those tenures which are indisputably Saxon, or gavelkind: wherein, though by treason, according to the antient Saxon laws, the land is forfeited to the king, yet no corruption of blood, no impediment of descents, ensues; and, on judgment of mere felony, no escheat accrues to the lord. And therefore, as every other oppressive mark of feodal tenure is now happily worn away in these kingdoms, it is to be hoped that this *corruption of blood*, with all

(*s*) Staundf. P. C. 183, b.
(*t*) 3 Inst. 232.
(*u*) 2 Hawk. P. C. 454.
(*v*) See book ii. p. 251.

[5] By 7 & 8 Geo. IV. c. 28, s. 5, it is enacted "that where any person shall be indicted for treason or felony, the jury impanelled to try such person shall not be charged to inquire concerning his lands, tenements, or goods, nor whether he fled for such treason or felony." The practice had been wholly discontinued for some years.—Chitty.

its connected consequences, not only of present escheat, but of future incapacities of inheritance even to the twentieth generation, may in process of time be abolished by act of parliament, as it stands upon a very different footing from the forfeiture of lands for high *treason, affecting the king's person or government. And indeed the legislature has, from [*389 time to time, appeared very inclinable to give way to so equitable a provision, by enacting that in certain treasons respecting the papal supremacy(*w*) and the public coin,(*x*) and in many of the new-made felonies created since the reign of Henry the Eighth by act of parliament, corruption of blood shall be saved. But as in some of the acts for creating felonies (and those not of the most atrocious kind) this saving was neglected or forgotten to be made, it seems to be highly reasonable and expedient to antiquate the whole of this doctrine by one undistinguishing law: especially as, by the afore-mentioned statute of 7 Anne, c. 21, (the operation of which is postponed by statute 17 Geo. II. c. 39,) after the death of the sons of the late pretender no attainder for treason will extend to the disinheriting any heir nor the prejudice of any person, other than the offender himself, which virtually abolishes all corruption of blood for treason, though (unless the legislature should interpose) it will still continue for many sorts of felony.[6]

CHAPTER XXX.

OF REVERSAL OF JUDGMENT.

*WE are next to consider how judgments, with their several connected consequences of attainder, forfeiture, and corruption of blood, [*390 may be set aside. There are two ways of doing this; either by falsifying or reversing the judgment, or else by reprieve or pardon.

A judgment may be falsified, reversed, or avoided, in the first place, *without a writ of error*, for matters foreign to or *dehors* the record,—that is, not apparent upon the face of it; so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself; and therefore if the whole record be not certified, or not truly certified, by the inferior court, the party injured thereby (in both civil and criminal cases) may allege a *diminution* of the record, and cause it to be rectified. Thus, if any judgment whatever be given by persons who had no good commission to proceed against the person condemned, it is void, and may be falsified by showing the special matter without writ of error.[1] As where a commission issues to A. and B. and twelve others, or any of them, of which A. or B. shall be one, to take and try indictments, and any of the other twelve proceed without the interposition or

(*w*) Stat. 5 Eliz. c. 1.

(*x*) Stat. 5 Eliz. c. 11. 18 Eliz. c. 1. 8 & 9 W. III. c. 26. 15 & 16 Geo. II. c. 28.

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[6] These statutes were, however, repealed, by stat. 39 Geo. III. c. 93; but, by stat. 54 Geo. III. c. 145, corruption of blood was abolished in all cases except the crimes of high treason and murder; and, by statute 3 & 4 W. IV. c. 106, s. 10, it is enacted that corruption of blood on attainder shall not obstruct descents to the posterity of the offender where they are obliged to derive a title through him or her to a remoter ancestor.—STEWART.

[1] That is, if such judgment comes collaterally in question in any other cause or court, the party against whom it is used may so avoid it. But I do not see how it can be directly reversed, except by writ of error, either for error in fact—in which case it would lie before the same court, and the fact would be alleged—or for error in law. The case put of persons proceeding to judgment without a good commission is one of those decided illegalities for which the law seems to afford no preventive remedy: they who do so subject themselves, indeed, to punishments afterwards; but in the mean time they are acting in defiance of law, and are not, indeed, a court, to or from which any appeal can be formally made.—COLERIDGE.

*391] presence *of either A. or B.,—in this case all proceedings, trials, convictions, and judgments are void for want of a proper authority in the commissioners, and may be falsified upon bare inspection without the trouble of a writ of error;(a) it being a high misdemeanour in the judges so proceeding, and little, if any thing, short of murder in them all, in case the person so attainted be executed and suffer death. So likewise if a man purchases land of another, and afterwards the vendor is, either by outlawry or his own confession, convicted and attainted of treason or felony previous to the sale or alienation, whereby such land becomes liable to forfeiture or escheat, now, upon any trial, the purchasor is at liberty, without bringing any writ of error, to falsify not only the time of the felony or treason supposed, but the very point of the felony or treason itself, and is not concluded by the confession or the outlawry of the vendor, though the vendor himself is concluded, and not suffered now to deny the fact, which he has by confession or flight acknowledged. But if such attainder of the vendor was by verdict, on the oath of his peers, the alienee cannot be received to falsify or contradict the *fact* of the crime committed, though he is at liberty to prove a mistake in *time*, or that the offence was committed after the alienation, and not before.(b)

Secondly, a judgment may be reversed *by writ of error;*[2] which lies from all inferior criminal jurisdictions to the court of king's bench, and from the king's bench to the house of peers; and may be brought for notorious mistakes in the judgment or other parts of the record: as where a man is found guilty of perjury and receives the judgment of felony; or for other less palpable errors, such as any irregularity, omission, or want of form in the process of outlawry, or proclamations; the want of a proper *addition* to the defendant's name, according to the statute of additions; for not properly naming the sheriff or other officer of the court, or not duly describing where his county court was held; for laying *392] an offence committed in the time of the late king to be done *against the peace of the present; and for other similar causes, which (though allowed out of tenderness to life and liberty) are not much to the credit or advancement of the national justice. These writs of error to reverse judgments in case of misdemeanours are not to be allowed, of course, but on sufficient probable cause shown to the attorney-general; and then they are understood to be grantable of common right and *ex debito justitiæ*. But writs of error to reverse attainders in capital cases are only allowed *ex gratia;* and not without express warrant under the king's sign-manual, or at least by the consent of the attorney-general.(c) These, therefore, can rarely be brought by the party himself, especially where he is attainted for an offence against the state; but they may be brought by his heir or executor after his death, in more favourable times; which may be some consolation to his family. But the easier and more effectual way is,

Lastly, to reverse the attainder by act of parliament. This may be and hath been frequently done upon motives of compassion, or perhaps from the zeal of the times, after a sudden revolution in the government, without examining too closely into the truth or validity of the errors assigned. And sometimes, though the crime be universally acknowledged and confessed, yet the merits of the criminal's family shall after his death obtain a restitution in blood, honours, and estate, or some or one of them, by act of parliament; which (so far as it extends) has all the effect of reversing the attainder without casting any reflections upon the justice of the preceding sentence.

The effect of falsifying or reversing an outlawry is, that the party shall be in the same plight as if he had appeared upon the *capias;* and, if it be before plea pleaded, he shall be put to plead to the indictment; if after conviction, he shall receive the sentence of the law; for all the other proceedings, except only the

(a) 2 Hawk. P. C. 459. (b) 3 Inst. 231. 1 Hal. P. C. 361. (c) 1 Vern. 170, 175.

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[2] See the history and nature of writs of error in criminal cases stated by lord Mansfield with great ability and clearness, in 4 Burr. 2550, 2551, 2552. As to the mode and practice of obtaining the writ, see 1 Chitt. C. L. 2d ed. 749 to 751.—Chitty.

process of outlawry for his non-appearance, *remain good and effectual as before. But when judgment pronounced upon conviction is falsified [*393 or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused; restored in his credit, his capacity, his blood, and his estates; with regard to which last, though they may be granted away by the crown, yet the owner may enter upon the grantee with as little ceremony as he might enter upon a disseisor.(*d*) But he still remains liable to another prosecution for the same offence; for the first being erroneous, he never was in jeopardy thereby.

CHAPTER XXXI.

OF REPRIEVE AND PARDON.

*THE only other remaining ways of avoiding the execution of the judgment are by a reprieve or a pardon; whereof the former is tempo- [*394 rary only, the latter permanent.

I. A reprieve[1] (from *reprendre*, to take back) is the withdrawing of a sentence for an interval of time, whereby the execution is suspended. This may be, first, *ex arbitrio judicis*, either before or after judgment; as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes, if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol-delivery, although their session be finished and their commission expired: but this rather by common usage than of strict right.(*a*)

Reprieves may also be *ex necessitate legis*: as where a woman is capitally convicted and pleads her pregnancy: though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy *dictated by the law of nature, *in favorem prolis;* and therefore no part [*395 of the bloody proceedings in the reign of queen Mary hath been more justly detested than the cruelty that was exercised in the island of Guernsey of burning a woman big with child; and when, through the violence of the flames, the infant sprang forth at the stake and was preserved by the bystanders, after some deliberation of the priests who assisted at the sacrifice, they cast it again into the fire as a young heretic.(*b*) A barbarity which they never learned from the laws of *antient* Rome; which direct,(*c*) with the same humanity as our own, "*quod prægnantis mulieris damnatæ pœna differatur, quod pariat:*" which doctrine has also prevailed in England as early as the first memorials of our law will reach.(*d*) In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to inquire the fact; and if they bring in their verdict *quick with child*, (for barely *with child*, unless it be alive in the womb, is not sufficient,) execution shall be stayed generally till the next session; and so from session to session till either she is delivered or proves by the course of nature not to have been with child at all. But if she once hath had

(*a*) 2 Hawk. P. C. 462.
(*b*) Fox, Acts and Mon.
(*c*) *Ff.* 48, 19, 3.
(*d*) Flet. *l.* 1, c. 38.

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[1] As to reprieves in general, see 1 Hale, 368 to 370. 2 Hale, 411 to 412. Hawk. b. ii. c. 51, ss. 8, 9, 10. Williams, J., Execution and Reprieve. 1 Chitt. C. L. 757 to 762.

In addition to the reprieves mentioned by the learned commentator is that *ex mandato regis*, or from the mere pleasure of the crown, expressed in any way to the court by whom the execution is to be awarded. 2 Hale, 412. 1 Hale, 368. Hawk. b. ii. c. 51, s. 8.—CHITTY.

the benefit of this reprieve and been delivered, and afterwards becomes pregnant again, she shall not be entitled to the benefit of a further respite for that cause.(*e*) For she may now be executed before the child is quick in the womb, and shall not, by her own incontinence, evade the sentence of justice.[2]

Another cause of regular reprieve is, if the offender becomes *non compos* between the judgment and the award of execution;(*f*) for regularly, as was formerly(*g*) observed, though a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he *shall not be ordered for execution: for "*furiosus solo furore punitur,*" and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is therefore an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to allege why execution should not be awarded against him; and if he appears to be insane, the judge in his discretion may and ought to reprieve him.[3] Or the party may *plead* in bar of execution; which plea may be either pregnancy, the king's pardon, an act of grace, or diversity of person, viz., that he is not the same as was attainted and the like. In this last case a jury shall be impanelled to try this collateral issue, namely, the identity of his person; and not whether guilty or innocent; for that has been decided before. And in these collateral issues the trial shall be *instanter*,(*h*) and no time allowed the prisoner to make his defence or produce his witnesses, unless he will make oath that he is not the person attainted:(*i*) neither shall any peremptory challenges of the jury be allowed the prisoner;(*j*) though formerly such challenges were held to be allowable whenever a man's life was in question.(*k*)

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II. If neither pregnancy, insanity, non-identity, nor other plea will avail to avoid the judgment and stay the execution consequent thereupon, the last and surest resort is in the king's most gracious *pardon;* the granting of which is the most amiable prerogative of the crown. Law (says an able writer) cannot be framed on principles of compassion to guilt; yet justice, by the constitution of England, is bound to be administered in mercy: this is promised by the king in his coronation-oath, and it is that act of his government which is the most personal and most entirely his own.(*l*) The king himself condemns no man; that rugged task he leaves to his courts of justice: the great operation of his sceptre is *mercy. His power of pardoning was said by our Saxon ancestors(*m*) to be derived *a lege suæ dignitatis:* and it is declared in parliament, by statute 27 Hen. VIII. c. 24, that no other person hath power to pardon or remit any treason or felonies whatsoever: but that the king hath the whole and sole power thereof, united and knit to the imperial crown of this realm.(*n*)

*397]

This is indeed one of the great advantages of monarchy in general above any other form of government: that there is a magistrate who has it in his power to extend mercy wherever he thinks it is deserved; holding a court of equity in his own breast to soften the rigour of the general law in such criminal cases as

(*e*) 1 Hal. P. C. 369.
(*f*) Ibid. 370.
(*g*) See page 24.
(*h*) 1 Sid. 72. See Appendix, § 3.
(*i*) Fost. 42.
(*j*) 1 Lev. 61. Fost. 42, 46.
(*k*) Staundf. P. C. 163. Co. Litt. 157. Hall. Sum. 259.
(*l*) Law of Forfeit, 99.
(*m*) *LL. Edw. Conf.* c. 18.
(*n*) And this power belongs only to a king *de facto*, and not to a king *de jure* during the time of usurpation. Bro. Abr. tit. *charter de pardon*, 22.

[2] It is usual for the clerk of assize to ask women who receive sentence of death if they have any thing to say why execution shall not be awarded according to the judgment. As the execution of the law in the first instance is respited not from a regard for the mother, but from tenderness towards the innocent infant, if, then, it should happen that she become quick of a second child, this surely is as much an object of compassion and humanity as the first.—Christian.

[3] The law is more precisely stated at page 25. Supposing the party to have been sane at the commission of the crime, there can be no objection to indicting him though he may become insane before the bill is preferred: because if he were in his senses he could not be heard to allege any thing against the indictment before the grand jury. See the provisions on this subject now made by the 39 & 40 Geo. III. c. 94.—Coleridge.

merit an exemption from punishment. Pardons (according to some theorists)(o) should be excluded in a perfect legislation where punishments are mild but certain; for that the clemency of the prince seems a tacit disapprobation of the laws. But the exclusion of pardons must necessarily introduce a very dangerous power in the judge or jury, that of construing the criminal law by the spirit instead of the letter;(p) or else it must be holden, what no man will seriously avow, that the situation and circumstances of the offender (though they alter not the essence of the crime) ought to make no distinction in the punishment. In democracies, however, this point of pardon can never subsist, for there nothing higher is acknowledged than the magistrate who administers the laws; and it would be impolitic for the power of judging and of pardoning to centre in one and the same person. This (as the president Montesquieu observes)(q) would oblige him very often to contradict himself, to make and to unmake his decisions: it would tend to confound all ideas of right among the mass of the people; as they would find it difficult to tell whether a prisoner were discharged by his innocence or obtained a pardon through favour. In *Holland, therefore, if there be no stadtholder, there is no power of pardoning lodged in any [*398 other member of the state. But in monarchies the king acts in a superior sphere; and though he regulates the whole government as the first mover, yet he does not appear in any of the disagreeable or invidious parts of it. Whenever the nation see him personally engaged, it is only in works of legislature, magnificence, or compassion. To him, therefore, the people look up as the fountain of nothing but bounty and grace; and these repeated acts of goodness, coming immediately from his own hand, endear the sovereign to his subjects, and contribute more than any thing to root in their hearts that filial affection and personal loyalty which are the sure establishment of a prince.

Under this head of pardons, let us briefly consider, 1. The *object* of pardon; 2. The *manner* of pardoning; 3. The method of *allowing* a pardon; 4. The *effect* of such pardon when allowed.

1. And, first, the king may pardon all offences merely against the crown or the public; excepting. 1. That, to preserve the liberty of the subject, the committing any man to prison out of the realm is, by the *habeas corpus* act, 31 Car. II. c. 2, made a *præmunire*, unpardonable even by the king. Nor, 2. can the king pardon where private justice is principally concerned in the prosecution of offenders: "*non potest rex gratiam facere cum injuria et damno aliorum.*"(r) Therefore, in appeals of all kinds, (which are the suit not of the king but of the party injured,) the prosecutor may release, but the king cannot pardon.(s) Neither can he pardon a common nuisance while it remains unredressed, or so as to prevent an abatement of it, though afterwards he may remit the fine: because, though the prosecution is vested in the king to avoid multiplicity of suits, yet (during its continuance) this offence savours more of the nature of a private *injury to each individual in the neighbourhood than of a *public* [*399 wrong.(t) Neither, lastly, can the king pardon an offence against a popular or penal statute after information brought; for thereby the informer hath acquired a private property in his part of the penalty.(u)

There is also a restriction of a peculiar nature that affects the prerogative of pardoning in case of parliamentary impeachments: viz., that the king's pardon cannot be *pleaded* to any such impeachment so as to impede the inquiry and stop the prosecution of great and notorious offenders. Therefore, when, in the reign of Charles the Second, the earl of Danby was impeached by the house of commons of high treason and other misdemeanours, and pleaded the king's pardon in bar of the same, the commons alleged(v) "that there was no precedent that ever any pardon was granted to any persons impeached by the commons of high treason or other high crimes, *depending the impeachment;*" and thereupon resolved(w) "that the pardon so pleaded was illegal and void, and ought

(o) Beccar. ch. 46.
(p) Ibid. ch. 4.
(q) Sp. L. b. vi. c. 5.
(r) 3 Inst. 236.
(s) Ibid. 237.
(t) 2 Hawk. P. C. 391.
(u) 3 Inst. 238.
(v) Com. Jour. April 28, 1679.
(w) Ibid. May 5, 1679.

not to be allowed *in bar* of the impeachment of the commons of England;" for which resolution they assigned(*x*) this reason to the house of lords,—"that the setting up a pardon to be a *bar* of an impeachment defeats the whole use and effect of impeachments: for, should this point be admitted or stand doubted, it would totally discourage the exhibiting any for the future; whereby the chief institution for the preservation of the government would be destroyed." Soon after the revolution, the commons renewed the same claim, and voted(*y*) "that a pardon is not *pleadable in bar* of an impeachment." And at length it was enacted by the act of settlement, 12 & 13 W. III. c. 2, "that no pardon under the great seal of England shall be *pleadable* to an impeachment by the commons in parliament." But, after the impeachment has been solemnly heard and determined, it is not understood that the *king's royal grace is further restrained or abridged; for, after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's most gracious pardon.[4]

*400]

2. As to the *manner* of pardoning. 1. First, it must be under the *great* seal. A warrant under the privy seal, or sign-manual, though it may be a sufficient authority to admit the party to bail in order to plead the king's pardon, when obtained in proper form, yet is not of itself a complete irrevocable pardon.(*z*)[5]

(*x*) Com. Jour. May 26, 1679. (*y*) Ibid. June 6, 1689. (*z*) 5 State Trials, 166, 173.

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[4] The following remarkable record, in which it is both acknowledged by the commons and asserted by the king, proves that the king's prerogative to pardon delinquents convicted in impeachments is as ancient as the constitution itself:—

Item prie la commune a nostre dit seigneur le roi que nul pardon soit grante a nully persone, petit ne grande, q'ont est de son counseil et sermentez, et sont empeschez en cest present parlement de vie ne de membre, fyn ne de raunceon, de forfaiture des terres, tennemenz, biens, ou chateaux, lesqueux sont ou serront trovez en aieun defaut encontre leur ligeance, et la tenure de leur dit serement: mais q'ils ne serront jammes conseillers ne officers du roi, mais en tout oustez de la courte le roi et de conseil as touz jours. Et sur ceo soit en present parlement fait estatut s'il plest au roi, et de touz autres en temps a venir en cas semblables, pur profit du roi et du roialme.

Responsio.—Le roi ent fra sa volente, come mieltz lui semblera. Rot. Parl. 50 Edw. III. n. 181.

After the lords have delivered their sentence of guilty, the commons have the power of pardoning the impeached convict, by refusing to demand judgment against him: for no judgment can be pronounced by the lords till it is demanded by the commons. Lord Macclesfield was found guilty without a dissenting voice in the house of lords; but when the question was afterwards proposed in the house of commons *that this house will demand judgment of the lords against Thomas earl of Macclesfield*, it occasioned a warm debate; but (the previous question being first moved) it was carried in the affirmative by a majority of 136 voices against 65. Com. Jour. May 27, 1725. 6 H. T. R. 762. In lord Strafford's trial, the commons sent the following message to the lords:—"That this house hold it necessary and fit that all the members of the house may be present at trial: to the end every one may satisfy his own conscience in the giving of their vote to demand judgment." Commons' Journal, 11th of March, 1640.

In the impeachment of Warren Hastings, Esq., it was decided, after much serious and learned investigation and discussion, by a very great majority in each house of parliament, that an impeachment was not abated by a dissolution of the parliament, though almost all the legal characters of each house voted in the minorities.—Christian.

[5] By 7 & 8 Geo. IV. c. 28, s. 13, it is enacted "that where the king's majesty shall be pleased to extend his royal mercy to any offender convicted of felony, punishable with death or otherwise, and by warrant under his royal sign-manual, countersigned by one of his principal secretaries of state, shall grant to such offender either a free or conditional pardon, the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon under the great seal for such offender as to the felony for which such pardon shall be so granted. Provided, always, that no free pardon, nor any such discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof in any of the cases aforesaid, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any felony committed after the granting of any such pardon." This section is in substance a re-enactment of sect. 1 of the unrepealed statute 6 Geo. IV. c. 25, with the exception of the proviso, which is new.

By 39 Geo. III. c. 47, the king may authorize the governor of any place to which convicts are transported to remit, either absolutely or conditionally, the whole or any part

2. Next, it is a general rule that wherever it may reasonably be presumed the king is deceived, the pardon is void.(*a*) Therefore any suppression of truth, or suggestion of falsehood, in a charter of pardon will vitiate the whole; for the king was misinformed.(*b*) 3. General words have also a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder of felony, (for it is presumed the king knew not of those proceedings,) but the conviction or attainder must be particularly mentioned;(*c*) and a pardon of felonies will not include piracy,(*d*) for that is no felony punishable at the common law. 4. It is also enacted, by statute 13 Ric. II. st. 2, c. 1, that no pardon for treason, murder, or rape shall be allowed unless the offence be particularly specified therein; and particularly in murder it shall be expressed whether it was committed by lying in wait, assault, or malice prepense. Upon which Sir Edward Coke observes(*e*) that it was not the intention of the parliament that the king should ever pardon murder under these aggravations; and therefore they prudently laid the pardon under these restrictions, because they did not conceive it possible that the king would ever excuse an offence by name, which was attended with such high aggravations. And it is remarkable enough, that there is no precedent of a pardon in the register for any other homicide than that *which happens *se defendendo* or *per infortunium*: to which two species the king's pardon was expressly confined by the statutes 2 Edw. III. c. 2 and 14 Edw. III. c. 15, which declare that no pardon of homicide shall be granted but only where the king may do it *by the oath of his crown;* that is to say, where a man slayeth another in his own defence or by misfortune. But the statute of Richard the Second, before mentioned, enlarges, by implication, the royal power, provided the king is not deceived in the intended object of his mercy. And therefore pardons of murder were always granted with a *non obstante* of the statute of king Richard, till the time of the revolution, when, the doctrine of *non obstante's* ceasing, it was doubted whether murder could be pardoned generally; but it was determined by the court of king's bench (*f*) that the king may pardon on an indictment of murder as well as a subject may discharge an appeal. Under these and a few other restrictions, it is a general rule that a pardon shall be taken most beneficially *for* the subject, and most strongly against the king. [*401

A pardon may also be *conditional;* that is, the king may extend his mercy upon what terms he pleases, and may annex to his bounty a condition, either precedent or subsequent, on the performance whereof the validity of the pardon will depend; and this by the common law.(*g*) Which prerogative is daily exerted in the pardon of felons on condition of being confined to hard labour for a stated time, or of transportation to some foreign country for life or for a term of years; such transportation or banishment(*h*) being allowable and warranted by the *habeas corpus* act, 31 Car. II. c. 2, § 14, and both the imprisonment and transportation rendered more easy and effectual by statutes 8 Geo. III. c. 15, and 19 Geo. III. c. 74.[6]

(*a*) 2 Hawk. P. C. 383.
(*b*) 3 Inst. 238.
(*c*) 2 Hawk. P. C. 383.
(*d*) 1 Hawk. P. C. 99.
(*e*) 3 Inst. 236.
(*f*) Salk. 499.
(*g*) 2 Hawk. P. C. 394.
(*h*) Transportation is said (Bar. 352) to have been first inflicted as a punishment by statute 39 Eliz. c. 4.

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of their term of transportation; which remission shall be of the same effect as if his majesty had signified his intention of mercy under the sign-manual; and the names of such convicts are to be inserted in the next general pardon which shall pass the great seal.

And, by sect. 26 of the 5 Geo. IV. c. 84, it is enacted that a felon under sentence or order of transportation, receiving a remission of the sentence from the governor of New South Wales, or any other colony, who may be authorized to grant the same while such felon shall reside in a place where he may lawfully reside under such sentence, order, or remission, may sue for the recovery of any property acquired by him since his conviction, or for any damage or injury sustained by him. This enactment was introduced shortly after the decision of the court of King's Bench in the case of Bullock *vs.* Dodds, 2 B. & A. 258.—CHITTY.

[6] The 8 Geo. III. c. 15 is repealed by the 5 Geo. IV. c. 84, and the 19 Geo. III. c. 74 by the 7 & 8 Geo. IV. c. 27. And, by 9 Geo. IV. c. 32, s. 3, reciting that it is expedient to

3. With regard to the manner of *allowing* pardons, we may observe that a pardon by act of parliament is more *beneficial than by the king's charter; for a man is not bound to plead it, but the court must *ex officio* take notice of it;(*i*) neither can he lose the benefit of it by his own *laches* or negligence, as he may of the king's charter of pardon.(*k*) The king's charter of pardon must be specially pleaded, and that at a proper time; for if a man is indicted, and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waived the benefit of such pardon.(*l*) But if a man avails himself thereof as soon as by course of law he may, a pardon may either be pleaded upon arraignment, or in arrest of judgment, or, in the present stage of proceedings, in bar of execution. Antiently, by statute 10 Edw. III. c. 2, no pardon of felony could be allowed unless the party found sureties for the good behaviour before the sheriff and coroners of the county.(*m*) But that statute is repealed by the statute 5 & 6 W. and M. c. 13, which, instead thereof, gives the judges of the court a discretionary power to bind the criminal pleading such pardon to his good behaviour, with two sureties, for any term not exceeding seven years.

*402]

4. Lastly, the *effect* of such pardon by the king is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him a new, credit and capacity. But nothing can restore or purify the blood when once corrupted, if the pardon be not allowed till after attainder, but the high and transcendent power of parliament. Yet if a person attainted receives the king's pardon, and afterwards hath a son, that son may be heir to his father, because the father, being made a new man, might transmit new inheritable blood; though had he been born before the pardon he could never have inherited at all.(*n*)[7]

CHAPTER XXXII.

OF EXECUTION.

*403] *There now remains nothing to speak of but *execution;* the completion of human punishment. And this, in all cases, as well capital as otherwise, must be performed by the legal officer, the sheriff or his deputy; whose warrant for so doing was antiently by precept under the hand and seal of the judge, as it is still practised in the court of the lord high steward upon the execution of a peer;(*a*) though in the court of the peers in parliament it is done by writ from the king.(*b*) Afterwards it was established(*c*) that in case of life the judge may command execution to be done without any writ. And

(*i*) Fost. 43.
(*k*) 2 Hawk. P. C. 397.
(*l*) Ibid. 396.
(*m*) Salk. 499.
(*n*) See book ii. page 254.
(*a*) 2 Hal. P. C. 409.
(*b*) See Appendix, § 5.
(*c*) Finch, L. 478.

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prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged, it is enacted that where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great seal as to the felony whereof the offender was so convicted: provided, always, that nothing therein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony.

[7] A son born after the attainder may inherit if he has no elder brother living born before the attainder; otherwise the land will escheat *pro defectu hæredis.* 1 Hal. P. C. 358. —Christian.

now the usage is for the judge to sign the calendar, or list of all the prisoners' names, with their separate judgments in the margin, which is left with the sheriff. As for a capital felony, it is written opposite to the prisoner's name, "let him be hanged by the neck;" formerly, in the days of Latin and abbreviation,(*d*) "*sus per col.*" for "*suspendatur per collum.*"—And this is the only warrant that the sheriff has for so material an act as taking away the life of another.(*e*) It may certainly afford matter of speculation that in civil causes there should be such a variety of writs of execution to recover a trifling debt, issued in the king's name and under the seal of the court, without which the sheriff *cannot legally stir one step; and yet that the execution of a man, the most important and terrible task of any, should depend upon a marginal note.[1] [*404

The sheriff, upon receipt of his warrant, is to do execution within a convenient time; which in the country is also left at large. In London, indeed, a more solemn and becoming exactness is used, both as to the warrant of execution and the time of executing thereof: for the recorder, after reporting to the king in person the case of the several prisoners, and receiving his royal pleasure that the law must take its course, issues his warrant to the sheriffs, directing them to do execution on the day and at the place assigned.(*f*)[2] And in the court of king's bench, if the prisoner be tried at the bar, or brought there by *habeas corpus*, a rule is made for his execution, either specifying the time and place,(*g*) or leaving it to the discretion of the sheriff.(*h*) And throughout the kingdom, by statute 25 Geo. II. c. 37, it is enacted that, in case of murder, the judge shall in his sentence direct execution to be performed on the next day but one after sentence passed.(*i*) But, otherwise, the time and place of execution are by law no part of the judgment.(*k*)[3] It has been well observed,(*l*) that it is of great importance that the punishment should follow the crime as early as possible; that the prospect of gratification or advantage which tempts a man to commit the crime should instantly awake the attendant idea of punishment. Delay of execution serves only to separate these ideas; and then the execution itself affects the minds of the spectators rather as a terrible sight than as the necessary consequence of transgression.

The sheriff cannot alter the manner of the execution by substituting one death

(*d*) Staundf. P. C. 182.
(*e*) 5 Mod. 22.
(*f*) See Appendix, § 4.
(*g*) State Trials, vi. 332. Fost. 43.
(*h*) See Appendix, § 3.
(*i*) See page 202.
(*k*) So held by the twelve judges, Mich. 10 Geo. III.
(*l*) Beccar. ch. 19.

[1] Though it be true that a marginal note of a calendar, signed by the judge, is the only warrant that the sheriff has for the execution of a convict, yet it is made with more caution and solemnity than is represented by the learned commentator. At the end of the assizes the clerk of assize makes out in writing four lists of all the prisoners, with separate columns, containing their crimes, verdicts, and sentences, leaving a blank column, in which, if the judge has reason to vary the course of the law, he writes opposite the names of the capital convicts, *to be reprieved, respited, transported*, &c. These four calendars, being first carefully compared together by the judge and the clerk of assize, are signed by them, and one is given to the sheriff, one to the gaoler, and the judge and the clerk of assize each keep another. If the sheriff receives afterwards no special order from the judge, he executes the judgment of the law in the usual manner, agreeably to the directions of his calendar. In every county this important subject is settled with great deliberation by the judge and the clerk of assize before the judge leaves the assize-town; but probably in different counties, with some slight variations, as in Lancashire, no calendar is left with the gaoler, but one is sent to the secretary of state.

If the judge thinks it proper to reprieve a capital convict, he sends a memorial or certificate *to the king's most excellent majesty*, directed to the secretary of state's office, stating that, from favourable circumstances appearing at the trial, he recommends him to his majesty's mercy, and to a pardon, upon condition of transportation or some slight punishment. This recommendation is always attended to.—CHRISTIAN.

[2] But now, by stat. 1 Vict. c. 77, s. 1, no report is to be made to her majesty of the case of any capital convict at the central criminal court; but, by sect. 5, the court shall of its own authority direct execution to be done on offenders.—STEWART.

[3] See 3 Burr. 1812. And even the above statute is only directory as to awarding the day of execution and does not render it an essential requisite. Russ. & R. C. C. 230.—CHITTY.

for another, without being guilty of felony himself, as has been formerly said.(*m*)

*405] It is held also *by Sir Edward Coke(*n*) and Sir Matthew Hale(*o*) that even the king cannot change the punishment of the law by altering the hanging or burning into beheading; though when beheading is part of the sentence the king may remit the rest. And, notwithstanding some examples to the contrary, Sir Edward Coke stoutly maintains that "*judicandum est legibus, non exemplis.*" But others have thought,(*p*) and more justly, that this prerogative, being founded in mercy, and immemorially exercised by the crown, is part of the common law. For hitherto, in every instance, all these exchanges have been for more merciful kinds of death; and how far this may also fall within the king's power of granting conditional pardons—viz., by remitting a severe kind of death, on condition that the criminal submits to a milder—is a matter that may bear consideration. It is observable that when lord Stafford was executed for the popish plot in the reign of king Charles the Second, the then sheriffs of London, having received the king's writ for beheading him, petitioned the house of lords for a command or order from their lordships how the said judgment should be executed; for, he being prosecuted by impeachment, they entertained a notion (which is said to have been countenanced by lord Russel) that the king could not pardon any part of the sentence.(*q*) The lords resolved(*r*) that the scruples of the sheriffs were unnecessary, and declared that the king's writ ought to be obeyed. Disappointed of raising a flame in that assembly, they immediately signified(*s*) to the house of commons, by one of the members, that they were not satisfied as to the power of the said writ. That house took two days to consider of it, and then(*t*) sullenly resolved that the house was *content* that the sheriff do execute lord Stafford, by severing his head from his body. It is further related, that when afterwards the same lord Russel was condemned for high treason upon indictment, the king, while he remitted

*406] the ignominious part of the *sentence, observed "that his lordship would now find that he was possessed of that prerogative which in the case of lord Stafford he had denied him."(*u*) One can hardly determine (at this distance from those turbulent times) which most to disapprove of, the indecent and sanguinary zeal of the subject, or the cool and cruel sarcasm of the sovereign.

To conclude: it is clear that if, upon judgment to be hanged by the neck till he is dead, the criminal be not thoroughly killed, but revives, the sheriff must hang him again.(*w*) For the former hanging was no execution of the sentence; and, if a false tenderness were to be indulged in such cases, a multitude of collusions might ensue. Nay, even while abjurations were in force,(*x*) such a criminal, so reviving, was not allowed to take sanctuary and abjure the realm; but his fleeing to sanctuary was held an escape in the officer.(*y*)

And, having thus arrived at the *last* stage of criminal proceedings, or execution, the end and completion of human *punishment*, which was the sixth and last head to be considered under the division of *public wrongs*, the fourth and last object of the laws of England, it may now seem high time to put a period to these commentaries, which the author is very sensible have already swelled to too great length. But he cannot dismiss the student, for whose use alone these rudiments were originally compiled, without endeavouring to recall to his memory some principal outlines of the legal constitution of this country, by a short historical review of the most considerable revolutions that have happened in the laws of England from the earliest to the present times. And this task he will attempt to discharge, however imperfectly, in the next or concluding chapter.

(*m*) See page 179.
(*n*) 3 Inst. 52.
(*o*) 2 Hal. P. C. 412.
(*p*) Fost. 270. F. N. B. 244, h. 19 Rym. *Fœd.* 234.
(*q*) 2 Hume, Hist of G. B. 328.
(*r*) Lords' Jour. Dec. 21, 1680.
(*s*) Com. Jour. Dec. 21, 1680.
(*t*) Ibid. Dec. 23, 1680.
(*u*) 2 Hume, 360.
(*w*) 2 Hal. P. C. 412. 2 Hawk. P. C. 463.
(*x*) See page 326.
(*y*) Fitz. Abr. tit. *Corone*, 33. Finch, L. 467.

CHAPTER XXXIII.

OF THE RISE, PROGRESS, AND GRADUAL IMPROVEMENTS OF THE LAWS OF ENGLAND.

*BEFORE we enter on the subject of this chapter, in which I propose, by way of supplement to the whole, to attempt an historical review of the most remarkable changes and alterations that have happened in the laws of England, I must first of all remind the student that the rise and progress of many principal points and doctrines have been already pointed out in the course of these commentaries under their respective divisions; these having therefore been particularly discussed already, it cannot be expected that I should re-examine them with any degree of minuteness, which would be a most tedious undertaking. What I therefore at present propose is, only to mark out some outlines of our English juridical history, by taking a chronological view of the state of our laws and their successive mutations at different periods of time. [*407

The several periods under which I shall consider the state of our legal polity are the following six: 1. From the earliest times to the Norman conquest; 2. From the Norman conquest to the reign of king Edward the First; 3. From thence to the reformation; 4. From the reformation to the *restoration of king Charles the Second; 5. From thence to the revolution in 1688; 6. From the revolution to the present time. [*408

I. And, first, with regard to the antient Britons, the *aborigines* of our island, we have so little handed down to us concerning them with any tolerable certainty that our inquiries here must needs be very fruitless and defective. However, from Cæsar's account of the tenets and discipline of the antient Druids in Gaul, in whom centred all the learning of these western parts, and who were, as he tells us, sent over to Britain (that is, to the island of Mona or Anglesey) to be instructed; we may collect a few points which bear a great affinity and resemblance to some of the modern doctrines of our English law. Particularly the very notion itself of an oral, unwritten law, delivered down from age to age by custom and tradition merely, seems derived from the practice of the Druids, who never committed any of their instructions to writing, possibly for want of letters; since it is remarkable that in all the antiquities, unquestionably British, which the industry of the moderns has discovered, there is not in any of them the least trace of any character or letter to be found. The partible quality also of lands by the custom of gavelkind, which still obtains in many parts of England, and did universally over Wales till the reign of Henry VIII., is undoubtedly of British original. So likewise is the antient division of the goods of an intestate between his widow and children or next of kin; which has since been revived by the statute of distributions. And we may also remember an instance of a slighter nature mentioned in the present volume, where the same custom has continued from Cæsar's time to the present; that of burning a woman guilty of the crime of petit treason by killing her husband.[1]

The great variety of nations that successively broke in upon and destroyed both the British inhabitants and *constitution, the Romans, the Picts, and after them the various clans of Saxons and Danes, must necessarily have caused great confusion and uncertainty in the laws and antiquities of the kingdom; as they were very soon incorporated and blended together, and therefore, we may suppose, mutually communicated to each other their respective usages,(a) in regard to the rights of property and the punishment of crimes. So that it is morally impossible to trace out with any degree of accuracy *when* the several mutations of the common law were made, or what was the respective original of those several customs we at present use, by any chemical resolution [*409

(a) Hal. Hist. C. L. 62.

[1] But this is now altered, by 9 Geo. IV. c. 31. See *ante*, p. 204.—CHRISTIAN.

of them to their first and component principles. We can seldom pronounce that *this* custom was derived from the Britons; *that* was left behind by the Romans; *this* was a necessary precaution against the Picts; *that* was introduced by the Saxons, discontinued by the Danes, but afterwards restored by the Normans.

Wherever this can be done, it is matter of great curiosity and some use; but this can very rarely be the case, not only from the reason above mentioned, but also from many others. First, from the nature of traditional laws in general, which, being accommodated to the exigencies of the times, suffer by degrees insensible variations in practice;(b) so that though upon comparison we plainly discern the alteration of the law from what it was five hundred years ago, yet it is impossible to define the precise period in which that alteration accrued, any more than we can discern the changes of the bed of a river which varies its shores by continual decreases and alluvions. Secondly, this becomes impracticable from the antiquity of the kingdom and its government, which alone, though it had been disturbed by no foreign invasions, would make it impossible to search out the original of its laws, unless we had as authentic monuments thereof as the Jews had by the hand of Moses.(c) Thirdly, *this uncertainty of the true origin of particular customs must also in part have arisen from the means whereby Christianity was propagated among our Saxon ancestors in this island, by learned foreigners brought over from Rome and other countries, who undoubtedly carried with them many of their own national customs, and probably prevailed upon the state to abrogate such usages as were inconsistent with our holy religion, and to introduce many others that were more conformable thereto. And this perhaps may have partly been the cause that we find not only some rules of the Mosaical, but also of the imperial and pontifical, laws, blended and adopted into our own system.

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A further reason may also be given for the great variety, and, of course, the uncertain original, of our antient established customs, even after the Saxon government was firmly established in this island,—viz., the subdivision of the kingdom into an heptarchy, consisting of seven independent kingdoms, peopled and governed by different clans and colonies. This must necessarily create an infinite diversity of laws, even though all those colonies of Jutes, Angles, Anglo-Saxons, and the like originally sprung from the same mother-country, the great Northern hive, which poured forth its warlike progeny, and swarmed all over Europe, in the sixth and seventh centuries. This multiplicity of laws will necessarily be the case in some degree where any kingdom is cantoned out into any provincial establishments, and not under one common dispensation of laws, though under the same sovereign power. Much more will it happen where seven unconnected states are to form their own constitution and superstructure of government, though they all begin to build upon the same or similar foundations.

When therefore the West Saxons had swallowed up all the rest, and king Alfred succeeded to the monarchy of England, whereof his grandfather Egbert was the founder, his mighty genius prompted him to undertake a most great and necessary work, which he is said to have executed in as *masterly a manner, no less than to new-model the constitution, to rebuild it on a plan that should endure for ages, and out of its old discordant materials, which were heaped upon each other in a vast and rude irregularity, to form one uniform and well-connected whole. This he effected by reducing the whole kingdom under one regular and gradual subordination of government, wherein each man was answerable to his immediate superior for his own conduct and that of his nearest neighbours: for to him we owe that master-piece of judicial polity, the subdivision of England into tithings and hundreds, if not into counties, all under the influence and administration of one supreme magistrate, the king; in whom, as in a general reservoir, all the executive authority of the law was lodged, and from whom justice was dispersed to every part of the nation by distinct yet communicating ducts and channels; which wise insti-

*411]

(b) Hal. Hist. C. L. 57.

(c) Ibid. 59.

tution has been preserved for near a thousand years unchanged, from Alfred's to the present time. He also, like another Theodosius, collected the various customs that he found dispersed in the kingdom, and reduced and digested them into one uniform system or code of laws, in his Dom-bec, or *liber judicialis*. This he compiled for the use of the court-baron, hundred, and county court, the court-leet, and sheriff's tourn, tribunals which he established for the trial of all causes, civil and criminal, in the very districts wherein the complaint arose; all of them subject, however, to be inspected, controlled, and kept within the bounds of the universal or common law by the king's own courts, which were then itinerant, being kept in the king's palace, and removing with his household in those royal progresses, which he continually made from one end of the kingdom to the other.

The Danish invasion and conquest, which introduced new foreign customs, was a severe blow to this noble fabric; but a plan so excellently concerted could never be long thrown aside. So that upon the expulsion of these intruders the English returned to their antient law, retaining, however, some few of the customs of their late visitants, which went *under the name of *Dane-Lage*: as the code compiled by Alfred was called the *West-Saxon-Lage*; [*412 and the local constitutions of the antient kingdom of Mercia, which obtained in the countries nearest to Wales, and probably abounded with many British customs, were called the *Mercen-Lage*. And these three laws were, about the beginning of the eleventh century, in use in different counties of the realm, the provincial polity of counties and their subdivisions having never been altered or discontinued through all the shocks and mutations of government from the time of its first institution, though the laws and customs therein used have (as we shall see) often suffered considerable changes.

For king Edgar, (who, besides military merit, as founder of the English navy, was also a most excellent civil governor,) observing the ill effects of three distinct bodies of laws prevailing at once in separate parts of his dominions, projected and begun what his grandson king Edward the Confessor afterwards completed,—viz., one uniform digest or body of laws to be observed throughout the whole kingdom; being probably no more than a revival of king Alfred's code, with some improvements suggested by necessity and experience, particularly the incorporating some of the British or rather Mercian customs, and also such of the Danish as were reasonable and approved, into the *West-Saxon-Lage*, which was still the groundwork of the whole. And this appears to be the best-supported and most plausible conjecture (for certainty is not to be expected) of the rise and original of that admirable system of maxims and unwritten customs, which is now known by the name of the *common* law, as extending its authority universally over all the realm, and which is doubtless of Saxon parentage.

Among the most remarkable of the Saxon laws we may reckon,—1. The constitution of parliaments, or, rather, general assemblies of the principal and wisest men in the nation; the *witten-a-gemote*, or *commune consilium*, of the antient Germans, which was not yet reduced to the forms and *distinctions of our modern parliament, without whose concurrence, however, no new [*413 law could be made or old one altered. 2. The election of their magistrates by the people,—originally even that of their kings, till dear-bought experience evinced the convenience and necessity of establishing an hereditary succession to the crown. But that of all subordinate magistrates, their military officers or heretochs, their sheriffs, their conservators of the peace, their coroners, their portreeves, (since changed into mayors and bailiffs,) and even their tithing-men and borshôlders at the leet, continued, some till the Norman conquest, others for two centuries after, and some remain to this day. 3. The descent of the crown, when once a royal family was established, upon nearly the same hereditary principles upon which it has ever since continued; only that perhaps, in case of minority, the next of kin of full age would ascend the throne as king, and not as protector, though after his death the crown immediately reverted back to the heir. 4. The great paucity of capital punishments for the

first offence, even the most notorious offenders being allowed to commute it for a fine or *weregild*, or, in default of payment, perpetual bondage; to which our benefit of clergy has now in some measure succeeded. 5. The prevalence of certain customs, as heriots and military services in proportion to every man's land, which much resembled the feodal constitution, but yet were exempt from all its rigorous hardships; and which may be well enough accounted for by supposing them to be brought from the continent by the first Saxon invaders, in the primitive moderation and simplicity of the feodal law, before it got into the hands of the Norman jurists, who extracted the most slavish doctrines and oppressive consequences out of what was originally intended as a law of liberty. 6. That their estates were liable to forfeiture for treason, but that the doctrine of escheats and corruption of blood for felony, or any other cause, was utterly unknown amongst them. 7. The descent of their lands to all the males equally, without any right of primogeniture; a custom which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons till the Norman conquest: *though really inconvenient, and more especially destructive to antient families, which are in monarchies necessary to be supported, in order to form and keep up a nobility or intermediate state between the prince and the common people.* 8. The courts of justice consisted principally of the county courts, and, in cases of weight or nicety, the king's court held before himself in person, at the time of his parliaments, which were usually holden in different places, according as he kept the three great festivals of Christmas, Easter, and Whitsuntide; an institution which was adopted by king Alfonso VII. of Castile, about a century after the conquest, who at the same three great feasts was wont to assemble his nobility and prelates in his court, who there heard and decided all controversies, and then, having received his instructions, departed home.(*d*) These county courts, however, differed from the modern ones in that the ecclesiastical and civil jurisdiction were blended together, the bishop and the ealdorman or sheriff sitting in the same county court; and also that the decisions and proceedings therein were much more simple and unembarrassed: an advantage which will always attend the infancy of any laws, but wear off as they gradually advance to antiquity. 9. Trials among a people who had a very strong tincture of superstition were permitted to be by *ordeal*, by the *corsned*, or morsel of execration, or by *wager of law* with compurgators, if the party chose it; but frequently they were also by *jury:* for, whether or no their juries consisted precisely of twelve men or were bound to a strict unanimity, yet the general constitution of this admirable criterion of truth and most important guardian both of public and private liberty we owe to our Saxon ancestors. Thus stood the general frame of our polity at the time of the Norman invasion, when the second period of our legal history commences.

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II. This remarkable event wrought as great an alteration in our laws as it did in our antient line of kings; and though the alteration of the former was effected rather by the *consent of the people than any right of conquest, yet that consent seems to have been partly extorted by fear, and partly given without any apprehension of the consequences which afterwards ensued.

*415]

1. Among the first of these alterations we may reckon the separation of the ecclesiastical courts from the civil, effected in order to ingratiate the new king with the popish clergy, who for some time before had been endeavouring all over Europe to exempt themselves from the secular power, and whose demands the Conqueror, like a politic prince, thought it prudent to comply with, by reason that their reputed sanctity had a great influence over the minds of the people, and because all the little learning of the times was engrossed into their hands, which made them necessary men and by all means to be gained over to his interests. And this was the more easily effected, because the disposal of all the episcopal sees being then in the breast of the king, he had taken care to fill them with Italian and Norman prelates.

2. Another violent alteration of the English constitution consisted in the

(*d*) Mod. Un. Hist. xx. 114.

depopulation of whole counties for the purposes of the king's royal diversion, and subjecting both them and all the antient forests of the kingdom to the unreasonable severities of forest-laws imported from the continent, whereby the slaughter of a beast was made almost as penal as the death of a man. In the Saxon times, though no man was allowed to kill or chase the king's deer, yet he might start any game, pursue and kill it upon his own estate. But the rigour of these new constitutions vested the sole property of all the game in England in the king alone;[2] and no man was entitled to disturb any fowl of the air, or any beast of the field, of such kinds as were specially reserved for the royal amusement of the sovereign, without express license from the king by a grant of a chase or free-warren; and those franchises were granted as much with a view to preserve the breed of animals as to indulge the subject. From a similar principle to which, though the forest-laws are now mitigated, and by degrees *grown entirely obsolete, yet from this root has sprung a bastard slip, known by the name of the game-law, now arrived to and [*416 wantoning in its highest vigour: both founded upon the same unreasonable notions of permanent property in wild creatures, and both productive of the same tyranny to the commons, but with this difference, that the forest-laws established only one mighty hunter throughout the land, the game-laws have raised a little Nimrod in every manor. And in one respect the antient law was much less unreasonable than the modern; for the king's grantee of a chase or free-warren might kill game in every part of his franchise; but now, though a freeholder of less than 100*l.* a year is forbidden to kill a partridge upon his own estate, yet nobody else (not even the lord of the manor, unless he hath a grant of free-warren) can do it without committing a trespass and subjecting himself to an action.

3. A third alteration in the English laws was by narrowing the remedial influence of the county courts, the great seats of Saxon justice, and extending the *original* jurisdiction of the king's justiciars to all kinds of causes arising in all parts of the kingdom. To this end the *aula regis*, with all its multifarious authority, was erected, and a capital justiciary appointed, with powers so large and boundless that he became at length a tyrant to the people and formidable to the crown itself. The constitution of this court, and the judges themselves who presided there, were fetched from the duchy of Normandy; and the consequence naturally was, the ordaining that all proceedings in the king's courts should be carried on in the Norman instead of the English language; a provision the more necessary, because none of his Norman justiciars understood English, but as evident a badge of slavery as ever was imposed upon a conquered people. This lasted till king Edward the Third obtained a double victory, over the armies of France in their own country, and their language in our courts here at home. But there was one mischief too deeply rooted thereby, and which this caution of *king Edward came too late to eradicate. Instead of the plain and easy method of determining suits in the county [*417 courts, the chicanes and subtleties of Norman jurisprudence had taken possession of the king's courts, to which every cause of consequence was drawn. Indeed, that age and those immediately succeeding it were the era of refinement and subtility. There is an active principle in the human soul that will ever be exerting its faculties to the utmost stretch, in whatever employment, by the accidents of time and place, the general plan of education, or the customs and manners of the age and country, it may happen to find itself engaged. The Northern conquerors of Europe were then emerging from the grossest ignorance in point of literature; and those who had leisure to cultivate its progress were such only as were cloistered in monasteries, the rest being all soldiers or peasants. And, unfortunately, the first rudiments of science which they imbibed were those of Aristotle's philosophy, conveyed through the medium of his Arabian commentators, which were brought from the East by the Saracens into Palestine and Spain, and translated into barbarous Latin. So that, though the

[2] See this controverted, *ante*, 2 book, p. 419.—CHRISTIAN.

materials upon which they were naturally employed in the infancy of a rising state were those of the noblest kind, the establishment of religion and the regulations of civil polity, yet, having only such tools to work with, their execution was trifling and flimsy. Both the divinity and the law of those times were therefore frittered into logical distinctions, and drawn out into metaphysical subtleties, with a skill most amazingly artificial, but which serves no other purpose than to show the vast powers of the human intellect, however vainly or preposterously employed. Hence the law in particular, which (being intended for universal reception) ought to be a plain rule of action, became a science of the greatest intricacy, especially when blended with the new refinements engrafted upon feodal property: which refinements were from time to time gradually introduced by the Norman practitioners, with a view to supersede (as they did in great measure) the more homely, but more intelligible, maxims of distributive justice among the Saxons. And, to say the truth, these *418] *scholastic reformers have transmitted their dialect and finesses to posterity so interwoven in the body of our legal polity that they cannot now be taken out without a manifest injury to the substance. Statute after statute has in later times been made to pare off these troublesome excrescences and restore the common law to its pristine simplicity and vigour: and the endeavour has greatly succeeded; but still the scars are deep and visible; and the liberality of our modern courts of justice is frequently obliged to have recourse to unaccountable fictions and circuities in order to recover that equitable and substantial justice which for a long time was totally buried under the narrow rules and fanciful niceties of metaphysical and Norman jurisprudence.

4. A fourth innovation was the introduction of the trial by combat, for the decision of all civil and criminal questions of fact in the last resort. This was the immemorial practice of all the Northern nations, but first reduced to regular and stated forms among the Burgundii, about the close of the fifth century; and from them it passed to other nations, particularly the Franks and Normans, which last had the honour to establish it here, though clearly an unchristian, as well as most uncertain, method of trial. But it was a sufficient recommendation of it to the Conqueror and his warlike countrymen that it was the usage of their native duchy of Normandy.

5. But the last and most important alteration, both in our civil and military polity, was the engrafting on all landed estates—a few only excepted—the fiction of feodal tenure, which drew after it a numerous and oppressive train of servile fruits and appendages, aids, reliefs, primer seisins, wardships, marriages, escheats, and fines for alienation,—the genuine consequences of the maxim then adopted, that all the lands in England were derived from and holden, mediately or immediately, of the crown.

The nation at this period seems to have groaned under as absolute a slavery *419] as was in the power of a warlike, an *ambitious, and a politic prince to create. The consciences of men were enslaved by four ecclesiastics, devoted to a foreign power, and unconnected with the civil state under which they lived, who now imported from Rome for the first time the whole *farrago* of superstitious novelties which had been engendered by the blindness and corruption of the times between the first mission of Augustin the monk and the Norman conquest, such as transubstantiation, purgatory, communion in one kind, and the worship of saints and images, not forgetting the universal supremacy and dogmatical infallibility of the holy see. The laws, too, as well as the prayers, were administered in an unknown tongue. The antient trial by jury gave way to the impious decision by battel. The forest-laws totally restrained all rural pleasures and manly recreations. And in cities and town the case was no better, all company being obliged to disperse, and fire and candle to be extinguished, by eight at night, at the sound of the melancholy *curfeu*. The ultimate property of all lands, and a considerable share of the present profits, were vested in the king, or by him granted out to his Norman favourites, who, by a gradual progression of slavery, were absolute vassals to

the crown, and as absolute tyrants to the commons. Unheard-of forfeitures, talliages, aids, and fines were arbitrarily extracted from the pillaged landholders, in pursuance of the new system of tenure. And, to crown all, as a consequence of the tenure by knight-service, the king had always ready at his command an army of sixty thousand knights or *milites*, who were bound, upon pain of confiscating their estates, to attend him in time of invasion or to quell any domestic insurrection. Trade, or foreign merchandise, such as it then was, was carried on by the Jews and Lombards, and the very name of an English fleet, which king Edgar had rendered so formidable, was utterly unknown to Europe: the nation consisting wholly of the clergy, who were also the lawyers; the barons, or great lords of the land; the knights, or soldiery, who were the subordinate landholders; and the burghers, or inferior tradesmen, who from their insignificance happily retained, in their socage and burgage tenure, some *points of their antient freedom. All the rest were villeins or bondmen. [*420

From so complete and well-concerted a scheme of servility it has been the work of generations for our ancestors to redeem themselves and their posterity into that state of liberty which we now enjoy, and which therefore is not to be looked upon as consisting of mere encroachments on the crown and infringements on the prerogative, as some slavish and narrow-minded writers in the last century endeavoured to maintain, but as, in general, a gradual restoration of that antient constitution whereof our Saxon forefathers had been unjustly deprived, partly by the policy and partly by the force of the Norman. How that restoration has in a long series of years been step by step effected, I now proceed to inquire.

William Rufus proceeded on his father's plan, and in some points extended it, particularly with regard to the forest-laws. But his brother and successor, Henry the First, found it expedient, when first he came to the crown, to ingratiate himself with the people, by restoring (as our monkish historians tell us) the laws of king Edward the Confessor. The ground whereof is this: that by charter he gave up the great grievances of marriage, ward, and relief, the beneficial pecuniary *fruits* of his feodal tenures, but reserved the tenures themselves, for the same military purposes that his father introduced them. He also abolished the *curfew*;(e) for, though it is mentioned in our laws a full century afterwards,(f) yet it is rather spoken of as a known *time* of night (so denominated from that abrogated usage) than as a still subsisting custom. There is extant a code of laws in his name, consisting partly of those of the Confessor, but with great additions and alterations of his own, and chiefly calculated for the regulation of the county courts. It contains some directions as to crimes and their punishments, (that of theft being made capital in his reign,) and a few things relating to estates, *particularly as to the descent of lands: which being by the Saxon laws equally to all the sons, by the feodal or [*421 Norman to the eldest only, king Henry here moderated the difference, directing the eldest son to have only the principal estate, "*primum patris feudum*," the rest of his estates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of bishops and mitred abbots, reserving, however, these ensigns of patronage, *conge d'eslire*, custody of the temporalities when vacant, and homage upon their restitution. He, lastly, united again for a time the civil and ecclesiastical courts, which union was soon dissolved by his Norman clergy; and, upon that final dissolution, the cognizance of testamentary causes seems to have been first given to the ecclesiastical court. The rest remained as in his father's time; from whence we may easily perceive how far short this was of a thorough restitution of king Edward's or the Saxon laws.

The usurper Stephen, as the manner of usurpers is, promised much at his accession, especially with regard to redressing the grievances of the forest-laws, but performed no great matter either in that or in any other point. It is from his reign, however, that we are to date the introduction of the Roman civil and

(e) Spelm. Cod. LL. W. I. 238. Hen. I. 299. (f) Stat. Civ. Lond. 13 Edw. I.

canon laws into this realm; and at the same time was imported the doctrine of appeals to the court of Rome, as a branch of the canon law.

By the time of king Henry the Second, if not earlier, the charter of Henry the First seems to have been forgotten, for we find the claim of marriage, ward, and relief then flourishing in full vigour. The right of primogeniture seems also to have tacitly revived, being found more convenient for the public than the parcelling of estates into a multitude of minute subdivisions. However, in this prince's reign much was done to methodize the laws and reduce them into a regular order, as appears from that excellent treatise of Glanvil, which, though some of it be now antiquated and altered, yet, when compared with the code of Henry the First, *it carries a manifest superiority.(g) Throughout his reign also was continued the important struggle, which we have had occasion so often to mention, between the laws of England and Rome: the former supported by the strength of the temporal nobility, when endeavoured to be supplanted in favour of the latter by the popish clergy; which dispute was kept on foot till the reign of Edward the First, when the laws of England, under the new discipline introduced by that skilful commander, obtained a complete and permanent victory. In the present reign of Henry the Second there are four things which peculiarly merit the attention of a legal antiquarian: 1. The constitutions of the parliament at Clarendon, A.D. 1164, whereby the king checked the power of the pope and his clergy, and greatly narrowed the total exemption they claimed from the secular jurisdiction, though his further progress was unhappily stopped by the fatal events of the disputes between him and archbishop Becket. 2. The institution of the office of justices in eyre,—*in itinere;* the king having divided the kingdom into six circuits, (a little different from the present,) and commissioned these new-created judges to administer justice and try writs of assize in the several counties. These remedies are said to have been then first invented; before which all causes were usually terminated in the county courts, according to the Saxon custom, or before the king's justiciaries in the *aula regis*, in pursuance of the Norman regulations. The latter of which tribunals, travelling about with the king's person, occasioned intolerable expense and delay to the suitors; and the former, however proper for little debts or minute actions, where even injustice is better than procrastination, were now become liable to too much ignorance of the law and too much partiality as to facts to determine matters of considerable moment. 3. The introduction and establishment of the grand assize, or trial by special kind of jury in a writ of right, at the option of the tenant or defendant, instead of the barbarous and Norman trial by battel. 4. To this time must also be referred the introduction of escuage, or pecuniary *commutation for personal military service, which in process of time was the parent of the antient subsidies granted to the crown by parliament, and the land-tax of later times.

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Richard the First, a brave and magnanimous prince, was a sportsman as well as a soldier, and therefore enforced the forest-laws with some rigour, which occasioned many discontents among his people: though (according to Matthew Paris) he repealed the penalties of castration, loss of eyes, and cutting off the hands and feet, before inflicted on such as transgressed in hunting, probably finding that their severity prevented prosecutions. He also, when abroad, composed a body of naval laws at the isle of Oleron, which are still extant, and of high authority; for in his time we began again to discover that (as an island) we were naturally a maritime power. But with regard to civil proceedings we find nothing very remarkable in this reign, except a few regulations regarding the Jews and the justices in eyre, the king's thoughts being chiefly taken up by the knight-errantry of a croisade against the Saracens in the holy land.

In king John's time, and that of his son Henry the Third, the rigours of the feodal tenures and the forest-laws were so warmly kept up that they occasioned many insurrections of the barons or principal feudatories: which at last had this effect, that first king John, and afterwards his son, consented to the two famous charters of English liberties, *magna carta* and *carta de foresta*. Of these

(g) Hal. Hist. C. L. 138.

the latter was well calculated to redress many grievances and encroachments of the crown in the exertion of forest-law; and the former confirmed many liberties of the church, and redressed many grievances incident to feodal tenures, of no small moment at the time, though now, unless considered attentively and with this retrospect, they seem but of trifling concern. But, besides these feodal provisions, care was also taken therein to protect the subject against other oppressions, then frequently arising from unreasonable amercements, from illegal distresses, or other process for debts or services due to the crown, and *from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the same manner [*424 as it still remains; prohibited for the future the grants of exclusive fisheries, and the erection of new bridges, so as to oppress the neighbourhood. With respect to private rights, it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children; it laid down the law of dower as it hath continued ever since, and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern it enjoined a uniformity of weights and measures, gave new encouragements to commerce, by the protection of merchant strangers, and forbade the alienation of lands in mortmain. With regard to the administration of justice, besides prohibiting all denials or delays of it, it fixed the court of common pleas at Westminster, that the suitors might no longer be harassed with following the king's person in all his progresses, and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assizes to be taken in the proper counties, and establishing annual circuits; it also corrected some abuses then incident to the trials by wager of law and of battel, directed the regular awarding of inquest for life or member, prohibiting the king's inferior ministers from holding pleas of the crown or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer, and regulated the time and place of holding the inferior tribunals of justice, the county-court, sheriff's tourn, and court-leet. It confirmed and established the liberties of the city of London and all other cities, boroughs, towns, and ports of the kingdom. And, lastly, (which alone would have merited the title that it bears, of the *great* charter,) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land.[3]

*However, by means of these struggles, the pope in the reign of king John gained a still greater ascendant here than he ever had before en- [*425 joyed; which continued through the long reign of his son Henry the Third, in the beginning of whose time the old Saxon trial by ordeal was also totally abolished. And we may by this time perceive, in Bracton's treatise, a still further improvement in the method and regularity of the common law, especially in the point of pleadings.(*h*) Nor must it be forgotten that the first traces which remain of the separation of the greater barons from the less, in the constitutions of parliaments, are found in the great charter of king John, though omitted in that of Henry III.; and that, towards the end of the latter of these reigns, we find the first record of any writ for summoning knights, citizens, and burgesses to parliament. And here we conclude the second period of our English legal history.

III. The third commences with the reign of Edward the First, who hath justly been styled our English Justinian. For in his time the law did receive so sudden a perfection, that Sir Matthew Hale does not scruple to affirm(*i*) that

(h) Hal. Hist. C. L. 156. (i) Ibid. 158.

[3] The following is the celebrated 29th chapter of *magna carta*, the foundation of the liberty of Englishmen:—

"*Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terræ. Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam.*"—CHRISTIAN.

more was done in the first thirteen years of his reign to settle and establish the distributive justice of the kingdom than in all the ages since that time put together.

It would be endless to enumerate all the particulars of these regulations; but the principal may be reduced under the following general heads:—1. He established, confirmed, and settled the great charter and charter of forests. 2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and establishing the bounds of ecclesiastical jurisdiction, and by obliging the ordinary, to whom all the goods of intestates at that time belonged, to discharge the debts of the deceased. 3. He defined the limits of the several temporal courts of the highest jurisdiction,—those of the king's bench, common pleas, and exchequer,—so as *they might not interfere with *426] each other's proper business: to do which they must now have recourse to a fiction,—very necessary and beneficial in the present enlarged state of property. 4. He settled the boundaries of the inferior courts in counties, hundred, and manors, confining them to causes of no great amount, according to their primitive institution, though of considerably greater than by the alteration of the value of money they are now permitted to determine. 5. He secured the property of the subject, by abolishing all arbitrary taxes and talliages levied without consent of the national council. 6. He guarded the common justice of the kingdom from abuses, by giving up the royal prerogative of sending mandates to interfere in private causes. 7. He settled the form, solemnities, and effect of fines levied in the court of common pleas, though the thing in itself was of Saxon original. 8. He first established a repository for the public records of the kingdom, few of which are antienter than the reign of his father, and those were by him collected. 9. He improved upon the laws of king Alfred, by that great and orderly method of watch and ward, for preserving the public peace and preventing robberies, established by the statute of Winchester. 10. He settled and reformed many abuses incident to tenures, and removed some restraints on the alienation of landed property, by the statute of *quia emptores*. 11. He instituted a speedier way for the recovery of debts, by granting execution, not only upon goods and chattels, but also upon lands, by writ of *elegit*, which was of signal benefit to a trading people: and upon the same commercial ideas he also allowed the charging of lands in a statute merchant, to pay debts contracted in trade, contrary to all feodal principles. 12. He effectually provided for the recovery of advowsons as temporal rights, in which, before, the law was extremely deficient. 13. He also effectually closed the great gulf, in which all the landed property of the kingdom was in danger of being swallowed, by his reiterated statutes of mortmain; most admirably adapted to meet the frauds that had then been devised, though afterwards contrived to be evaded by the invention of uses. *14. He established a new limitation of pro- *427] perty by the creation of estates-tail, concerning the good policy of which modern times have, however, entertained a very different opinion. 15. He reduced all Wales to the subjection, not only of the crown, but in great measure of the laws, of England, (which was thoroughly completed in the reign of Henry the Eighth,) and seems to have entertained a design of doing the like by Scotland, so as to have formed an entire and complete union of the island of Great Britain.

I might continue this catalogue much further; but upon the whole we may observe that the very scheme and model of the administration of common justice between party and party was entirely settled by this king,(*k*) and has continued nearly the same in all succeeding ages to this day, abating some few alterations which the humour or necessity of subsequent times hath occasioned. The forms of writs, by which actions are commenced, were perfected in his reign, and established as models for posterity. The pleadings consequent upon the writs were then short, nervous, and perspicuous, not intricate, verbose, and formal. The legal treatises written in his time, as Britton, Fleta, Hengham, and the rest, are, for the most part, law at this day; or at least *were* so till the

(*k*) Hal. Hist. C. L. 162.

alteration of tenures took place. And, to conclude, it is from this period—from the exact *observation* of *magna carta*, rather than from its *making* or *renewal*, in the days of his grandfather and father—that the liberty of Englishmen began again to rear its head, though the weight of the military tenures hung heavy upon it for many ages after.

I cannot give a better proof of the excellence of his constitutions than that from his time to that of Henry the Eighth there happened very few, and those not very considerable, alterations in the legal *forms* of proceedings. As to matter of *substance*, the old Gothic powers of electing the principal subordinate magistrates, the sheriffs, and *conservators of the peace were taken from the people in the reigns of Edward II. and Edward III., and justices of [*428 the peace were established instead of the latter. In the reign also of Edward the Third the parliament is supposed most probably to have assumed its present form, by a separation of the commons from the lords. The statute for defining and ascertaining treasons was one of the first productions of this new-modelled assembly, and the translation of the law proceedings from French into Latin another. Much also was done, under the auspices of this magnanimous prince, for establishing our domestic manufactures, by prohibiting the exportation of English wool, and the importation or wear of foreign cloth or furs, and by encouraging cloth-workers from other countries to settle here. Nor was the legislature inattentive to many other branches of commerce, or indeed to commerce in general; for, in particular, it enlarged the credit of the merchant, by introducing the statute staple, whereby he might the more readily pledge his lands for the security of his mercantile debts. And, as personal property now grew by the extension of trade to be much more considerable than formerly, care was taken, in case of intestacies, to appoint administrators particularly nominated by the law to distribute that personal property among the creditors and kindred of the deceased, which before had been usually applied, by the officers of the ordinary, to uses then denominated pious. The statutes also of *præmunire*, for effectually depressing the civil power of the pope, were the work of this and the subsequent reign. And the establishment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown possessions of the monasteries, added lustre to the close of the fourteenth century, though the seeds of the general reformation, which were thereby first sown in the kingdom, were almost overwhelmed by the spirit of persecution introduced into the laws of the land by the influence of the regular clergy.

From this time to that of Henry the Seventh the civil wars and disputed titles to the crown gave no leisure for further *juridical improvement: "*nam silent leges inter arma.*" And yet it is to these very disputes that [*429 we owe the happy loss of all the dominions of the crown on the continent of France, which turned the minds of our subsequent princes entirely to domestic concerns. To these likewise we owe the method of barring entails by the fiction of *common recoveries*, invented originally by the clergy to evade the statutes of mortmain, but introduced under Edward the Fourth for the purpose of unfettering estates and making them more liable to forfeiture; while, on the other hand, the owners endeavoured to protect them by the universal establishment of *uses*,—another of the clerical inventions.

In the reign of king Henry the Seventh, his ministers (not to say the king himself) were more industrious in hunting out prosecutions upon old and forgotten penal laws, in order to extort money from the subject, than in framing any new beneficial regulations. For the distinguishing character of this reign was that of amassing treasure in the king's coffers by every means that could be devised: and almost every alteration in the laws, however salutary or otherwise in their future consequences, had this and this only for their great and immediate object. To this end the court of starchamber was new-modelled and armed with powers the most dangerous and unconstitutional over the persons and properties of the subject. Informations were allowed to be received, in lieu of indictments, at the assizes and sessions of the peace, in order to multiply fines and pecuniary penalties. The statute of fines for landed property was craftily

and covertly contrived, to facilitate the destruction of entails and make the owners of real estates more capable to forfeit as well as to alien. The benefit of clergy (which so often intervened to stop attainders and save the inheritance) was now allowed only once to lay offenders, who only could have inheritances to lose. A writ of *capias* was permitted in all actions on the case, and the defendant might in consequence be outlawed, because upon such outlawry his goods became the property of the crown. In short, there is hardly a statute in this reign *introductive of a new law or modifying the old but what
*430] either directly or obliquely tended to the emolument of the exchequer.

IV. This brings us to the fourth period of our legal history,—viz., the reformation of religion, under Henry the Eighth and his children; which opens an entire new scene in ecclesiastical matters; the usurped power of the pope being now forever routed and destroyed, all his connections with this island cut off, the crown restored to its supremacy over spiritual men and causes, and the patronage of bishoprics being once more indisputably vested in the king. And had the spiritual courts been at this time reunited to the civil, we should have seen the old Saxon constitution with regard to the *ecclesiastical* polity completely restored.

With regard also to our *civil* polity, the statute of wills and the statute of uses (both passed in the reign of this prince) made a great alteration as to property: the former by allowing the *devise* of real estates by will, which before was in general forbidden; the latter by endeavouring to destroy the intricate nicety of *uses*, though the narrowness and pedantry of the courts of common law prevented this statute from having its full beneficial effect. And thence the courts of equity assumed a jurisdiction dictated by common justice and common sense, which, however arbitrarily exercised or productive of jealousies in its infancy, has at length been matured into a most elegant system of rational jurisprudence, the principles of which (notwithstanding they may differ in forms) are now equally adopted by the courts of both law and equity. From the statute of uses, and another statute of the same antiquity, (which protected estates for years from being destroyed by the reversioner,) a remarkable alteration took place in the mode of conveyancing: the antient assurance by feoffment and livery upon the land being now very seldom practised, since the more easy and more private invention of transferring property, by secret conveyances to uses and long terms of years, being now continually created in mortgages
*431] *and family settlements, which may be moulded to a thousand useful purposes by the ingenuity of an able artist.

The further attacks in this reign upon the immunity of estates-tail, which reduced them to little more than the conditional fees at the common law before the passing of the statute *de donis;* the establishment of recognizances in the nature of a statute-staple, for facilitating the raising of money upon landed security; and the introduction of the bankrupt-laws, as well for the punishment of the fraudulent as the relief of the unfortunate trader,—all these were capital alterations of our legal polity, and highly convenient to that character, which the English began now to reassume, of a great commercial people. The incorporation of Wales with England, and the more uniform administration of justice, by destroying some counties palatine and abridging the unreasonable privileges of such as remained, added dignity and strength to the monarchy; and, together with the numerous improvements before observed upon, and the redress of many grievances and oppressions which had been introduced by his father, will ever make the administration of Henry VIII. a very distinguished era in the annals of juridical history.

It must be, however, remarked that (particularly in his latter years) the royal prerogative was then strained to a very tyrannical and oppressive height; and, what was the worst circumstance, its encroachments were established by law, under the sanction of those pusillanimous parliaments, one of which, to its eternal disgrace, passed a statute whereby it was enacted that the king's proclamations should have the force of acts of parliament; and others concurred in the creation of that amazing heap of wild and new-fangled treasons, which were

slightly touched upon in a former chapter.(l) Happily for the nation, this arbitrary reign was succeeded by the minority of an amiable prince, during the short sunshine of which great part of these extravagant laws were repealed. And to do justice to the shorter reign of queen Mary, *many salutary and popular laws in civil matters were made under her administration, [*432 perhaps the better to reconcile the people to the bloody measures which she was induced to pursue for the re-establishment of religious slavery: the well-concerted schemes for effecting which were (through the providence of God) defeated by the seasonable accession of queen Elizabeth.

The religious liberties of the nation being by that happy event established (we trust) on an eternal basis, (though obliged in their infancy to be guarded against papists and other non-conformists by laws of too sanguinary a nature,) the forest-laws having fallen into disuse, and the administration of civil rights in the courts of justice being carried on in a regular course, according to the wise institutions of king Edward the First, without any material innovations, all the principal grievances introduced by the Norman conquest seem to have been gradually shaken off, and our Saxon constitution restored, with considerable improvements, except only in the continuation of the military tenures, and a few other points, which still armed the crown with a very oppressive and dangerous prerogative. It is also to be remarked that the spirit of enriching the clergy and endowing religious houses had (through the former abuse of it) gone over to such a contrary extreme, and the princes of the house of Tudor and their favourites had fallen with such avidity upon the spoils of the church, that a decent and honourable maintenance was wanting to many of the bishops and clergy. This produced the *restraining* statutes, to prevent the alienations of lands and tithes belonging to the church and universities. The number of indigent persons being also greatly increased, by withdrawing the alms of the monasteries, a plan was formed in the reign of queen Elizabeth, more humane and beneficial than even feeding and clothing of millions, by affording them the means (with proper industry) to feed and to clothe themselves. And the further any subsequent plans for maintaining the poor have departed from this institution, the more impracticable and even pernicious their visionary attempts have proved.

*However, considering the reign of queen Elizabeth in a great and political view, we have no reason to regret many subsequent alterations [*433 in the English constitution. For though in general she was a wise and excellent princess, and loved her people; though in her time trade flourished, riches increased, the laws were duly administered, the nation was respected abroad, and the people happy at home: yet the increase of the power of the star-chamber and the erection of the high-commission court in matters ecclesiastical were the work of her reign. She also kept her parliament at a very awful distance; and in many particulars she at times would carry the prerogative as high as her most arbitrary predecessors. It is true she very seldom exerted this prerogative so as to oppress individuals, but still she had it to exert; and therefore the felicity of her reign depended more on her want of opportunity and inclination than want of power to play the tyrant. This is a high encomium on her merit, but at the same time it is sufficient to show that these were not those golden days of genuine liberty that we formerly were taught to believe; for surely the true liberty of the subject consists not so much in the gracious behaviour as in the limited power of the sovereign.

The great revolutions that had happened in manners and in property had paved the way, by imperceptible yet sure degrees, for as great a revolution in government; yet, while that revolution was effecting, the crown became more arbitrary than ever, by the progress of those very means which afterwards reduced its power. It is obvious to every observer that till the close of the Lancastrian civil wars the property and the power of the nation were chiefly divided between the king, the nobility, and the clergy. The commons were generally in a state of great ignorance; their personal wealth before the ex-

(l) See page 80.

tension of trade was comparatively small; and the nature of their landed property was such as kept them in continual dependence upon their feodal lord, being usually some powerful baron, some opulent abbey, *or sometimes
*434] the king himself. Though a notion of general liberty had strongly pervaded and animated the whole constitution, yet the particular liberty, the natural equality, and personal independence of individuals were little regarded or thought of; nay, even to assert them was treated as the height of sedition and rebellion. Our ancestors heard with detestation and horror those sentiments rudely delivered and pushed to most absurd extremes, by the violence of a Cade and a Tyler, which have since been applauded, with a zeal almost rising to idolatry, when softened and recommended by the eloquence, the moderation, and the arguments of a Sidney, a Locke, and a Milton.

But when learning, by the invention of printing and the progress of religious reformation, began to be universally disseminated,—when trade and navigation were suddenly carried to an amazing extent by the use of the compass and the consequent discovery of the Indies,—the minds of men, thus enlightened by science and enlarged by observation and travel, began to entertain a more just opinion of the dignity and rights of mankind. An inundation of wealth flowed in upon the merchants and middling rank; while the two great estates of the kingdom, which formerly had balanced the prerogative, the nobility and clergy, were greatly impoverished and weakened. The popish clergy, detected in their frauds and abuses, exposed to the resentment of the populace, and stripped of their lands and revenues, stood trembling for their very existence. The nobles, enervated by the refinements of luxury (which knowledge, foreign travel, and the progress of the politer arts are too apt to introduce with themselves) and fired with disdain at being rivalled in magnificence by the opulent citizens, fell into enormous expenses; to gratify which, they were permitted, by the policy of the times, to dissipate their overgrown estates and alienate their antient patrimonies. This gradually reduced their power and their influence within a very moderate bound, while the king, by the spoil of the monasteries and the great increase of the customs, grew rich, independent, and haughty: and the
*435] *commons were not yet sensible of the strength they had acquired, nor urged to examine its extent by new burdens or oppressive taxations, during the sudden opulence of the exchequer. Intent upon acquiring new riches, and happy in being freed from the insolence and tyranny of the orders more immediately above them, they never dreamed of opposing the prerogative to which they had been so little accustomed, much less of taking the lead in opposition, to which by their weight and their property they were now entitled. The latter years of Henry the Eighth were therefore the times of the greatest despotism that have been known in this island since the death of William the Norman: the prerogative as it then stood by common law (and much more when extended by act of parliament) being too large to be endured in a land of liberty.

Queen Elizabeth and the intermediate princes of the Tudor line had almost the same legal powers, and sometimes exerted them as roughly, as their father king Henry the Eighth. But the critical situation of that princess with regard to her legitimacy, her religion, her enmity with Spain, and her jealousy of the queen of Scots, occasioned greater caution in her conduct. She probably, or her able advisers, had penetration enough to discern how the power of the kingdom had gradually shifted its channel, and wisdom enough not to provoke the commons to discover and feel their strength. She therefore threw a veil over the odious part of prerogative, which was never wantonly thrown aside, but only to answer some important purpose; and though the royal treasury no longer overflowed with the wealth of the clergy, which had been all granted out and had contributed to enrich the people, she asked for supplies with such moderation, and managed them with so much economy, that the commons were happy in obliging her. Such, in short, were her circumstances, her necessities, her wisdom, and her good disposition, that never did a prince so long and so

entirely, for the space of half a century together, reign in the affections of the people.

*On the accession of king James I., no new degree of royal power was added to or exercised by him; but such a sceptre was too weighty [*436 to be wielded by such a hand. The unreasonable and imprudent exertion of what was then deemed to be prerogative, upon trivial and unworthy occasions, and the claim of a more absolute power inherent in the kingly office than had ever been carried into practice, soon awakened the sleeping lion. The people heard with astonishment doctrines preached from the throne and the pulpit subversive of liberty and property and all the natural rights of humanity. They examined into the divinity of this claim, and found it weakly and fallaciously supported; and common reason assured them that, if it were of human origin, no constitution could establish it without power of revocation, no precedent could sanctify, no length of time could confirm it. The leaders felt the pulse of the nation, and found they had ability as well as inclination to resist it; and accordingly resisted and opposed it, whenever the pusillanimous temper of the reigning monarch had courage to put it to the trial; and they gained some little victories in the cases of concealments, monopolies, and the dispensing power. In the mean time, very little was done for the improvement of private justice, except the abolition of sanctuaries and the extension of the bankrupt-laws, the limitation of suits and actions, and the regulating of informations upon penal statutes. For I cannot class the laws against witchcraft and conjuration under the head of improvements; nor did the dispute between lord Ellesmere and Sir Edward Coke, concerning the powers of the court of chancery, tend much to the advancement of justice.

Indeed, when Charles the First succeeded to the crown of his father, and attempted to revive some enormities which had been dormant in the reign of king James, the loans and benevolences extorted from the subject, the arbitrary imprisonments for refusal, the exertion of martial law in time of peace, and other domestic grievances, clouded the morning of that *misguided [*437 prince's reign, which, though the noon of it began a little to brighten, at last went down in blood and left the whole kingdom in darkness. It must be acknowledged that by the petition of right, enacted to abolish these encroachments, the English constitution received great alteration and improvement. But there still remained the latent power of the forest-laws, which the crown most unseasonably revived. The legal jurisdiction of the starchamber and high-commission courts was extremely great, though their usurped authority was greater. And if we add to these the disuse of parliaments, the ill-timed zeal and despotic proceedings of the ecclesiastical governors in matters of mere indifference, together with the arbitrary levies of tonnage and poundage, ship-money, and other projects, we may see grounds most amply sufficient for seeking redress in a legal constitutional way. This redress, when sought, was also constitutionally given; for all these oppressions were actually abolished by the king in parliament, before the rebellion broke out, by the several statutes for triennial parliaments, for abolishing the starchamber and high-commission courts, for ascertaining the extent of forests and forest-laws, for renouncing ship-money and other exactions, and for giving up the prerogative of knighting the king's tenants *in capite* in consequence of their feodal tenures; though it must be acknowledged that these concessions were not made with so good a grace as to conciliate the confidence of the people. Unfortunately, either by his own mismanagement, or by the arts of his enemies, the king had lost the reputation of sincerity,—which is the greatest unhappiness that can befall a prince. Though he formerly had strained his prerogative, not only beyond what the genius of the present times would bear, but also beyond the examples of former ages, he had now consented to reduce it to a lower ebb than was consistent with monarchical government. A conduct so opposite to his temper and principles, joined with some rash actions and unguarded expressions, made the people suspect that this condescension was merely temporary. Flushed therefore with the success they had gained, fired with resentment for past

*438] oppressions, *and dreading the consequences if the king should regain his power, the popular leaders (who in all ages have called themselves the *people*) began to grow insolent and ungovernable; their insolence soon rendered them desperate; and despair at length forced them to join with a set of military hypocrites and enthusiasts, who overturned the church and monarchy, and proceeded with deliberate solemnity to the trial and murder of their sovereign.

I pass by the crude and abortive schemes for amending the laws in the times of confusion which followed, the most promising and sensible whereof (such as the establishment of new trials, the abolition of feodal tenures, the act of navigation, and some others) were adopted in the

V. Fifth period, which I am next to mention,—viz., after the restoration of king Charles II. Immediately upon which, the principal remaining grievance, the doctrine and consequences of military tenures, were taken away and abolished, except in the instance of corruption of inheritable blood, upon attainder of treason and felony. And though the monarch in whose person the regal government was restored, and with it our antient constitution, deserves no commendation from posterity, yet in his reign (wicked, sanguinary, and turbulent as it was) the concurrence of happy circumstances was such that from thence we may date not only the re-establishment of our church and monarchy, but also the complete restitution of English liberty, for the first time since its total abolition at the conquest. For therein not only these slavish tenures—the badge of foreign dominion, with all their oppressive appendages—were removed from encumbering the estates of the subject, but also an additional security of his person from imprisonment was obtained by that great bulwark of our constitution, the *habeas corpus* act. These two statutes, with regard to our property and persons, form a second *magna carta*, as beneficial and effectual as that of Running-Mead. That only pruned the luxuriances of the feodal system; but the statute of Charles the Second extirpated all its *slaveries, *439] except perhaps in copyhold tenure; and there also they are now in great measure enervated by gradual custom and the interposition of our courts of justice. *Magna carta* only, in general terms, declared that no man shall be imprisoned contrary to law: the *habeas corpus* act points him out effectual means, as well to release himself, though committed even by the king in council, as to punish all those who shall thus unconstitutionally misuse him.

To these I may add the abolition of the prerogatives of purveyance and preemption; the statute for holding triennial parliaments; the test and corporation acts, which secure both our civil and religious liberties; the abolition of the writ *de hæretico comburendo;* the statute of frauds and perjuries, a great and necessary security to private property; the statute for distribution of intestates' estates, and that of amendments and *jeofails*, which cut off those superfluous niceties which so long had disgraced our courts; together with many other wholesome acts that were passed in this reign for the benefit of navigation and the improvement of foreign commerce: and the whole, when we likewise consider the freedom from taxes and armies which the subject then enjoyed, will be sufficient to demonstrate this truth, "that the constitution of England had arrived to its full vigour, and the true balance between liberty and prerogative was happily established by *law*, in the reign of king Charles the Second."

It is far from my intention to palliate or defend many very iniquitous proceedings, *contrary to all law*, in that reign, through the artifice of wicked politicians, both in and out of employment. What seems incontestable is this: that *by the law*,(m) as it then stood, (notwithstanding some invidious, nay, dangerous, *440] branches of the prerogative have since been lopped *off, and the rest more clearly defined,) the people had as large a portion of real liberty as is consistent with a state of society, and sufficient power, residing in their own hands, to assert and preserve that liberty if invaded by the royal pre-

(m) The point of time at which I would choose to fix this *theoretical* perfection of our public law is in the year 1679, after the *habeas corpus* act was passed and that for licensing the press had expired, though the years which immediately followed it were times of great *practical* oppression.

rogative. For which I need but appeal to the memorable catastrophe of the next reign. For when king Charles's deluded brother attempted to enslave the nation, he found it was beyond his power: the people both could and did resist him, and, in consequence of such resistance, obliged him to quit his enterprise and his throne together. Which introduces us to the last period of our legal history,—viz.,

VI. From the revolution in 1688 to the present time. In this period many laws have passed, as the bill of rights, the toleration-act, the act of settlement with its conditions, the act for uniting England with Scotland, and some others: which have asserted our liberties in more clear and emphatical terms; have regulated the succession of the crown by parliament, as the exigencies of religious and civil freedom required; have confirmed and exemplified the doctrine of resistance when the executive magistrate endeavours to subvert the constitution; have maintained the superiority of the laws above the king, by pronouncing his dispensing power to be illegal; have indulged tender consciences with every religious liberty consistent with the safety of the state; have established triennial (since turned into septennial) elections of members to serve in parliament; have excluded certain officers from the house of commons; have restrained the king's pardon from obstructing parliamentary impeachments; have imparted to all the lords an equal right of trying their fellow-peers; have regulated trials for high treason; have afforded our posterity a hope that corruption of blood may one day be abolished and forgotten; have (by the desire of his present majesty) set bounds to the civil list, and placed the administration of that revenue in hands that are accountable to parliament; and have (by the like desire) made the judges completely independent of the king, his ministers, and his successors. Yet, though these provisions have, in appearance and *nominally, reduced the strength of the executive power to a much lower ebb than in the preceding period; if, on the other hand, we throw [*441] into the opposite scale (what perhaps the immoderate reduction of the antient prerogative may have rendered in some degree necessary) the vast acquisition of force arising from the riot-act and the annual expedience of a standing army, and the vast acquisition of personal attachment arising from the magnitude of the national debt, and the manner of levying those yearly millions that are appropriated to pay the interest; we shall find that the crown has, gradually and imperceptibly, gained almost as much in influence as it has apparently lost in prerogative.

The chief alterations of moment (for the time would fail me to descend to *minutiæ*) in the administration of private justice during this period are the solemn recognition of the law of nations with respect to the rights of ambassadors; the cutting off, by the statute for the amendment of the law, a vast number of excrescences that in process of time had sprung out of the practical part of it; the protection of corporate rights, by the improvements in writs of *mandamus* and informations in nature of *quo warranto;* the regulations of trials by jury, and the admitting witnesses for prisoners upon oath; the further restraints upon alienation of lands in mortmain; the annihilation of the terrible judgment of *peine fort et dure;* the extension of the benefit of clergy, by abolishing the pedantic criterion of reading; the counterbalance to this mercy, by the vast increase of capital punishment; the new and effectual methods for the speedy recovery of rents; the improvements which have been made in ejectments for the trying of titles; the introduction and establishment of paper-credit, by endorsements upon bills and notes which have shown the legal possibility and convenience (which our ancestors so long doubted) of assigning a *chose in action;* the translation of all legal proceedings into the English language; the erection of courts of conscience for recovering small debts, and (which is much the better plan) the reformation of county courts; the great system of marine jurisprudence, of which the foundations have been laid, by clearly *developing the principles on which policies of insurance are founded, and by happily applying those principles to particular cases; [*442] and, lastly, the liberality of sentiment which (though late) has now taken pos-

session of our courts of common law and induced them to adopt (where facts can be clearly ascertained) the same principles of redress as have prevailed in our courts of equity from the time that lord Nottingham presided there; and this not only where specially empowered by particular statutes, (as in the case of bonds, mortgages, and set-offs,) but by extending the remedial influence of the equitable writ of trespass on the case, according to its primitive institution by king Edward the First, to almost every instance of injustice not remedied by any other process. And these, I think, are all the material alterations that have happened with respect to private justice in the course of the present century.

Thus, therefore, for the amusement and instruction of the student, I have endeavoured to delineate some rude outlines of a plan for the history of our laws and liberties, from their first rise and gradual progress among our British and Saxon ancestors till their total eclipse at the Norman conquest, from which they have gradually emerged and risen to the perfection they now enjoy at different periods of time. We have seen, in the course of our inquiries, in this and the former books, that the fundamental maxims and rules of the law, which regard the rights of persons, and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and are every day improving, and are now fraught with the accumulated wisdom of ages; that the forms of administering justice came to perfection under Edward the First, and have not been much varied, nor always for the better, since; that our religious liberties were fully established at the reformation, but that the recovery of our civil and political liberties was a work of longer time, they not being thoroughly and completely regained till after the restoration of king Charles, nor fully and explicitly acknowledged and defined till the era of the happy revolution. Of a constitution so wisely contrived, *so strongly *443] raised, and so highly finished, it is hard to speak with that praise which is justly and severely its due: the thorough and attentive contemplation of it will furnish its best panegyric. It hath been the endeavour of these commentaries, however the execution may have succeeded, to examine its solid foundations, to mark out its extensive plan, to explain the use and distribution of its parts, and, from the harmonious concurrence of those several parts, to demonstrate the elegant proportion of the whole. We have taken occasion to admire at every turn the noble monuments of ancient simplicity and the more curious refinements of modern art. Nor have its faults been concealed from view; for faults it has; lest we should be tempted to think it of more than human structure; defects chiefly arising from the decays of time or the rage of unskilful improvements in later ages. To sustain, to repair, to beautify, this noble pile, is a charge intrusted principally to the nobility and such gentlemen of the kingdom as are delegated by their country to parliament. The protection of THE LIBERTY OF BRITAIN is a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright and noblest inheritance of mankind.[4]

[4] I wish it were in my power to finish this sketch of our legal history in the same faithful and spirited manner in which the author has begun and carried it down to his own time. Since the year 1780, in which he died, the legislature has provided ample materials for one who saw things in so liberal and comprehensive a spirit and arranged them in such striking and lucid order. In regard to legal and judicial matters, he might have pointed out the restraint imposed on the arrest of the person, and the right given to a discharge on making a deposit with the arresting officer; the assistance afforded to inferior courts by arming them with the process of the superior where necessary; the prevention of delay in the trial of misdemeanours, and the salutary increase of severity in their punishment; the great general diminution of the number of capital offences, and the necessary and wise addition made to the severity of substituted and inferior punishments; the making capital certain aggravated attempts at murder, and the simplifying the trial of certain enormous treasons; the abolition of many punishments, as that of the pillory and the burning or whipping of females, and of the barbarous and shocking parts of others, as that of embowelling in treason; the suppression of appeals

in treason, murder, or felony, and of the trial by battel in civil suits; the taking away corruption of blood, except in cases of treason or murder; the provision for the expenses of prosecutions in felony and for the care and disposal of lunatic offenders; the great improvements in the system of gaols and houses of correction; the declaration of the functions of the jury in the case of libel; the regulation of the ecclesiastical courts; the trial and punishment of offences committed on the high seas or in the colonies; and last, not least, the revision and consolidation of the laws which regulate that great bulwark of our liberties, the trial by jury.

As measures calculated to secure the integrity of the representative body, Sir W. Blackstone would probably have noticed the act for securing the independence of the speaker, those which prevent public contractors and certain public officers from sitting in the house, which suspend or remove bankrupt members from their seats, and prohibit persons filling offices in the revenue from voting at elections.

In matters of general or internal polity, he would have pointed out the formation of a regular system and jurisdiction for the punishment as well as relief of insolvent debtors; the many amendments, and finally the consolidation, of the bankrupt-law; the great diminution of the disabilities of Roman Catholics and Dissenters; the liberal alterations in the spirit of the navigation-laws; the attempts to estimate accurately the increase of population, by a census taken at stated intervals and a more careful keeping of parochial registers; the sensible and humane attempts to modify and improve the poor-laws; the protection and encouragement afforded to friendly societies, and the institution of banks for the savings of the poor; the grand measure of the union with Ireland; the honest renunciation of the slave-trade for ourselves, and the sincere and repeated endeavours to procure its abolition by all other nations.

These might form some of the features of the picture with which the Commentaries might have closed if they had been written in the present day. The system is still imperfect, and many things remain to be done which the author might, perhaps, have suggested with something of judicial authority. Without thinking myself entitled to do so, I may venture to express not only my wishes for the gradual perfecting of the English laws and constitution, but my strong conviction that they will continue to be improved with the increasing lights of the age. It is our great blessing to have the machinery of improvement always ready to work in a legislature, which, though almost permanently sitting, is yet drawn from the general body of the people, forms part of it, mixes in all its business and amusements, and is acted upon by all its hopes, fears, and interests. The very facility of legislation perhaps leads to inconvenience in the multiplying of laws, and in provoking attempts to remedy inconveniences which must be borne, or prevent evils which the unassisted prudence of individuals might more wisely be left to guard against. But these are comparatively slight evils, not counterbalancing the great good of possessing a power of improvement perpetually advancing with the age. It becomes not the commentator on the laws to indulge in a spirit of indiscriminate approbation: perhaps it was the leaning of Sir W. Blackstone's mind to take too favourable a view of his subject,—a more excusable failing than the opposite one of a captious and querulous spirit; but I think he might have reasonably indulged the conviction which I have expressed above, because the characteristic of the legislature for the last fifty years has been a sincere desire of general improvement and a particular zeal for the bettering the condition of the lower or unfortunate classes of society. Fewer measures purely aristocratic have passed into laws than heretofore; while no proposition has been coldly received that was sensible in its details, and had for its object the reformation of the criminal, the instruction of the ignorant, the dissemination of sound religion, the vindicating the rights of the oppressed, or the gradual advancement of the labouring and mechanic orders of the population.—COLERIDGE.

The few years which have elapsed since the above sentences were penned by the learned annotator have given birth to more and greater changes in the English law than are comprised in any entire century of its previous existence. At the head of those statutes which have produced important alterations in the CONSTITUTION is the act emancipating his majesty's Roman Catholic subjects from the disabilities under which they formerly laboured. Next in order are the statutes for amending the representation of the people in parliament, which, by withdrawing the elective franchise from some classes, extending it to many others, altering the method of election, and prescribing means for ascertaining the qualification of electors, has wrought a great and organic change in the legislative system of this realm.

Among the enactments peculiarly affecting our COLONIAL interests must be distinguished the act which prohibits slavery throughout the British empire, providing at the same time compensation for those whose property is injured by the consequences of that measure; the statute which provides a judicature for our West India colonies, and that which regulates the future government of British India, the care of which is still intrusted to the company,—stripped, however, of its commercial privileges; while the nations of that vast peninsula are allowed much more extensive capacities than they have heretofore

enjoyed under our empire, and the trade with China is thrown open to the competition of all his majesty's subjects.

Among the important changes in our DOMESTIC POLITY must be pointed out the act of municipal reform, which has popularized and remodelled the various municipal corporations throughout the kingdom, with the exception only of the metropolis; the act for the amendment of the poor-laws, which, by confiding the administration of those laws to a central board, and accompanying the relief afforded to the indigent by circumstances which render it far less desirable than formerly, has tended—whether wisely or unwisely—to deter the applicant unless impelled by actual and pressing need, and to diminish the burden upon those classes who contribute to the fund destined for the relief of their indigent fellow-subjects; the abolition of the palatine peculiarities of the county of Durham; the tithe commutation act, which has enabled persons anxious to exempt their lands from the payment of that species of ecclesiastical contributions to do so upon equitable and advantageous terms of compromise; the alteration in the law of marriages, effected to relieve the scruples of the dissenting classes of our population, and which points out a mode in which the matrimonial contract may be solemnized without the intervention of the Church of England; the erection of a general registry for births, deaths, and marriages, by which it is hoped that the memory of such events will be preserved more faithfully than heretofore; and the general highway act, providing a new system for the management of our great national thoroughfares.

Among the acts designed to benefit the COMMERCIAL INTERESTS of the nation may be reckoned that which renews the charter and defines the privileges of the Bank of England; that which erects a new tribunal denominated the Court of Bankruptcy, for the administration of that important branch of commercial law; the improvements effected in our maritime code by the alteration in our navigation and ship-registry acts, the consolidation of the custom-laws, and the act passed for the regulation of our merchant-seamen; the partial abolition of the usury-laws, whereby bills and notes having no more than three months to run may be negotiated at any rate of interest; the improvement of our law of patents, which encourages the enterprise of inventors by affording additional protection to their ingenuity; that which settles the general standard of weights and measures; that which defines the liability of common carriers, and that which enables his majesty to bestow on trading-companies several important privileges which heretofore could only have been conferred by the transcendent authority of parliament.

Among changes respecting the GENERAL ADMINISTRATION OF THE LAWS may be enumerated the alteration of the amount for which a debtor may be legally arrested from the sum of ten to that of twenty pounds; the act which sweeps away the old, intricate system of process, and substitutes an easy and intelligible method of commencing actions in the courts of common law; the law amendment act, which destroys several antiquated forms, expedites and cheapens the trial of causes of slight importance, enables the judges to amend and obviate technical errors, arms them with a power (which they have not been slow to exercise) of introducing regulations calculated to render our system of pleading more effectually subservient to the ends of justice, and renders more efficient the tribunal of the arbitrator; the consolidation of the Welsh and English judicatures; the appointment of an additional judge to each of the superior courts; the act dispensing with a number of useless oaths, the multitude of which tended to induce disregard of those most solemn invocations of the Deity, by rendering their use too frequent in matters of trivial importance; the destruction of the numerous and antiquated tribe of real actions, and the remodelling of the Court of Privy Council for judicial purposes.

Among enactments concerning THE REGULATION OF PRIVATE PROPERTY may be enumerated the act which renders a man's real property liable after his death to the claims of all his creditors; the acts which ascertain the period at which rights and titles shall be rendered secure by lapse of time and uninterrupted continuance of possession; which define the right of the wife to dower out of her husband's, and that of the husband to curtesy, as it is called, out of the wife's, real property; which alters the law of descents, by allowing the parent to inherit to the child, and letting in the half-blood, who were formerly excluded by an arbitrary rule of feudal policy; and that which substitutes easy and simple forms for the complicated and abstruse ones of fine and recovery.

Lastly: our CRIMINAL LAW has been improved by the abolition of the disabilities under which Quakers and Moravians formerly laboured of giving evidence for or against the prisoner. The statutes which composed its bulk have been consolidated, the punishment of death abolished in numerous instances, and the accused has at length obtained the right, heretofore denied him in prosecutions for felony, of making his full defence by counsel and inspecting the depositions of those who charged him with the crime for which he stands indicted.

These are the most prominent of the alterations which have within the last ten years (1836) been effected in the English law and constitution. Experience will probably show that, like other human institutions, they contain good mixed with evil. But the very experience which detects the latter will help to point out the true method of cor-

recting it; while the continuance of the former may, and, let us trust, will, be insured, by that willing obedience to existing laws, that steady attachment to the constitution, that charity to fellow-subjects and loyalty to the crown, which have ever remarkably distinguished the English people.—JOHN WILLIAM SMITH.

This admirable sketch of our legal history having only extended to about the year 1780, I shall endeavour, however imperfectly, to bring it down to the present time, as it will not be disputed that the alterations which have been made in the law since Blackstone completed his Commentaries have been fully as important as those which he commemorates. It will be convenient for this purpose to consider the other changes which were made in the reign of George the Third and in the succeeding reigns.

During the greater portion of the reign of George the Third the energies of the country were devoted to the carrying on foreign wars of great magnitude, in the last of which her very existence as a nation was perilled. From these contests she eventually arose victorious; but the effects of the struggle were long felt, and are to be traced in the statute-book. The criminal code of the country, already sufficiently penal, became more and more bloody; the liberty of the subject was very considerably curtailed, and the close of the war, however glorious to our arms, cast adrift a multitude of unemployed and restless spirits; commerce, long diverted from her regular channels, returned with difficulty to them; and the light of political science was wellnigh extinguished in the general confusion. The reader who has perused the Commentaries will perceive that scarcely any of the blemishes in our laws pointed out by Blackstone—by no means a severe censor—were remedied in this reign. Some measures of great national importance, however, were carried through, and some improvements in the law were effected. The legislative union between Great Britain and Ireland was completed; and, although the burdens on the people were greatly increased, the mode of collecting the revenue was improved; the national funds were consolidated; the privilege of copyright in books and works of art was extended; the granting of annuities was placed under proper guards and restrictions; the Roman Catholics were relieved from some of their most severe restrictions; charities were investigated, and traders prevented from disposing of their real estates after their death to the prejudice of their simple-contract creditors; the punishment of pillory (except in cases of perjury) and the trial by *battel* and appeals in treason, murder, and felony were abolished, and certain minor improvements were made in the practice of the courts of equity, of which the appointment of one vice-chancellor may be considered the chief; the barbarous parts of the punishment of treason and corruption of blood in treason and murder were also taken away; some judicious improvements were made as to gaols and houses of correction; and copyhold estates were allowed to be devised without a surrender to the use of the will.

In the reign of George the Fourth, which was undisturbed by foreign wars, the alterations, especially in its later years, although few, were of greater importance than any in the preceding reign. Thus, the laws relating to trial by jury and to bankrupts were simplified, consolidated, and greatly improved; the criminal law was much ameliorated, the number of capital punishments diminished, the nature of crimes more accurately defined, and their punishment more distinctly ascertained and more certainly executed: benefit of clergy was also entirely abolished. The Insolvent Debtors' Court was established, with a regular system for the relief of insolvent debtors. I may also mention the consolidation of the law relating to the customs and excise; the establishment of a new body of police in the metropolis, which has since been taken as a model in most of the great towns in the empire; the repeal of the navigation act, and the new regulation of the merchant-service; the alterations in the law of marriage by the new marriage act; the repeal of the test and corporation acts, and subsequently the entire removal of the disabilities of the Roman Catholics. Two important commissions were also appointed in this reign for the express purpose of considering the necessary reforms in the law, and many most important acts have since been passed, founded on their recommendations.

But the reign of William the Fourth was still more remarkable for the progress of reform; and here I can only notice the principal changes. The mode of administering justice on circuit in Wales was entirely altered, being assimilated to that adopted in England. The number of judges was increased from twelve to fifteen, and the practice of all the superior courts was rendered uniform; the law relating to trustees was amended and simplified; the laws affecting the property of persons under disability and for facilitating the payment of debts were consolidated and improved, and the law as to contempts in chancery placed on a footing which protected the liberty of the subject. The number of capital offences was still further diminished, and the exemption from death, except in certain rare cases, was extended to the crime of forgery; and this great step towards a mitigation of the criminal code has been followed during subsequent years by many other acts, all having the same ameliorating tendency; the improvements relating to the terms and returns of writs, to judgment and execution, and the examination of witnesses,—all these belong to the first year of this reign. The second was still more memorable for the reform act; for the establishment of the Bankruptcy Court; the game

act, which abolished the necessity of qualification and improved the law on this subject; the uniformity of process act, and the act which established a limitation of claims for tithes. The third year of his late majesty's reign is distinguished by the act which established a limitation to all claims to incorporeal hereditaments; by the anatomy act, which has effectually put a stop to the practice of selling dead bodies and the horrible crimes to which it gave rise. The fourth year was, so far as the law was concerned, the most important of all. In this, some of the fruits of the law commissions which were appointed in the preceding reign were reaped. A new statute of limitation of actions relating to real property was passed; the court of Chancery was regulated; fines and recoveries were abolished; the law of inheritance and dower improved; real estate was made subject to every species of debts; the alienation of property was facilitated, and the just rights of creditors extended. I should also mention that in this year were passed the important act by which slavery was abolished and apprenticeship substituted for a limited period, the act which opened the East India trade, and the Bank of England act, which made a material alteration in the usury-laws. In the next year the new poor-law was carried,—a measure sufficiently well known,—and the Central Criminal Court was established, which has greatly tended to the improvement of the administration of criminal justice. The other important alterations of this reign were the municipal corporation act, the tithe-commutation act, which has already nearly superseded the intricate and confused law of tithes, the act for the registration of births, deaths, and marriages, and the act for allowing counsel to prisoners. Many smaller amendments were also passed, which have been already noticed in their proper places: and altogether the reign of William the Fourth is as memorable for the important alterations which took place within its limits as that of any other monarch who ever sat on the English throne.

The reign of her present majesty has already been distinguished by some important juridical reforms. The law relating to wills and testaments has been simplified and rendered uniform; imprisonment for debt on mesne process has been entirely abolished, and the power of creditors over the property of their debtors has been greatly extended; the number of capital punishments has been still further diminished, every species of the *crimen falsi* being relieved from it, thus establishing on a firm footing the important principle that no crime unattended with actual violence to the person shall be punished with death; and still more recently, by what may turn out to be a more questionable alteration, the crime of rape has ceased to be a capital offence; the law requiring the qualifications of members of parliament to proceed exclusively from real estates has been abolished; the mode of trial of election-petitions has been much improved; the power of the crown to grant pensions has been considerably curtailed and placed within limits; and the rates of postage for letters have been so materially reduced as to place the power of communication by this means within the reach of all classes of her majesty's subjects. The privilege of parliament to publish whatever it may please has been fully recognised; the revenues of the Church of England have been more equally distributed, the blessings of that admirable establishment more widely diffused; some blemishes which had crept in the course of time have been wiped off, and a more wholesome zeal and energy have thus been awakened among the whole body of the clergy; the administration of justice in equity, bankruptcy, and lunacy has been improved, and already the more crying grievances of the court of Chancery have been remedied; considerable facilities have been given to the enfranchisement of copyholds; the term of copyright in books has been extended to designs in articles of manufacture; the law as to the registration of voters has been amended and placed on a better footing; the law of libel has been greatly improved, and the old rules excluding evidence on the ground of the interest or crime of the witnesses, and thus frequently preventing the truth from being elicited, have been almost entirely repealed; and, lastly, slavery, in reality as well as in name, has ceased to exist in every part of the British dominions.

But, much as has already been done for the reform of the law, still more remains to do; and there is every reason to believe that in the long reign to which, according to all human foresight, her majesty and her subjects may reasonably look forward, the cause of temperate and judicious reform in the law will be greatly advanced. In a speech which her majesty made on meeting her first parliament, she declared that "the better and more effectual administration of justice was amongst the first duties of a sovereign;" and this sentiment has been cordially responded to by the other branches of the legislature. The amendment of the law is no longer the rallying-cry of a faction: the desire to promote it is shared by the most eminent men of all parties in the state; and, under such auspices, I may be permitted to hope that the present reign, already so distinguished in arms, will be at least as memorable for improvements in the juridical institutions of the country.

This hope, expressed nearly nine years ago, has now (1854) been abundantly realized, —the legislature having proved fully sensible of the wants and desires of the country in this respect: so that it will be admitted that the present age will be distinguished, not

only by its attempts, but its success, in amending the law, the best evidence of which is to be found in the course of this work. Justice is now cheaply, and in many respects efficiently, administered in local tribunals, and is thus brought to every man's door, while the whole procedure of the superior courts has been greatly simplified and improved; useless forms and technicalities are now discountenanced as well by the practitioners of the law as the judges of the courts; and a sincere desire is manifested by all classes to promote in this way the benefit of the nation and the social welfare of the community.

Some improvement has also been made in facilitating the transfer of land. Commons have been enclosed, tithes commuted, and copyholds may now, under certain circumstances, be enfranchised compulsorily either by lord or tenant. Indeed, a strong wish has been shown that, while the present moderate law of entail should be preserved, land should be more easily and cheaply dealt with, and that the law relating to it should be more suited to the wants of a great commercial country.—STEWART.

Nearly a century has elapsed since the Commentaries of Sir William Blackstone were first published. Much as the learned and enthusiastic commentator had cause for exultation in the improvements which had been introduced in his own times and those immediately preceding, he would have found matter for still warmer panegyric had he lived in our days. The events of the last hundred years have changed the face of Europe; and although our own country has not sustained those disastrous shocks which have been felt from time to time by most of the continental nations, it has not remained a stranger to the general progressive tendency which has been discernible more or less over the whole civilized world. On the contrary, the state of continuous healthy progress, which seems to be almost peculiar to our own institutions, has perhaps carried us further in the direction of political and social freedom than any other nation in the world.

Among the first and most important constitutional changes to be mentioned was the union of the British and Irish legislatures,—an event which may be regarded as the foundation of that genuine union of interest and feeling between two nations intimately allied by geographical position, common language, and similar institutions, which, if not yet completely attained, seems now at least in a fair way of becoming permanently established. The statute amending the representation of the people in the Commons House of Parliament, popularly known as the Reform Act, introduced no new principle into the constitution, but simply restored to the great body of the people that ancient right of self-government which they had derived from their Saxon ancestors. Another statute of almost equal importance, of which the professed object was the restoration of an ancient institution, was that which remodelled the municipal corporations and removed the many abuses which had gradually crept into these bodies. Several statutes have also been passed for preventing corrupt practices in the election of members to serve in parliament, and for disfranchising the boroughs where such practices were found to prevail.

Our civil liberties have been further secured by that amendment of the law of libel which has vested in the jury the right in such cases of deciding as well upon the law as upon the fact, and by the statutory recognition of the privilege of parliament to publish whatever it pleases. The boundaries of religious liberty have been extended by the repeal of the test and corporation acts,—a measure which has enabled that numerous and influential portion of our fellow-citizens who object to the discipline or dissent from the doctrines of the Established Church to participate in those political rights from which they had been before excluded; whilst the Catholic Emancipation Act has relieved those who adhere to the Church of Rome from the civil disabilities and penalties to which they were previously subject. The national church has probably taken strength from the commutation of tithes, and still more from those statutes which have been passed for the abolition of pluralities and for compelling the residence of the beneficed clergy. Large and comprehensive measures have also been adopted for the better management and application of the cathedral-revenues, and for the subdivision of large and populous parishes, the formation of new parochial districts, and the extension of the church and its institutions. A committee of the privy council has been formed for the distribution of the large sums which have for many years been annually voted by parliament for promoting education among the poorer classes of the people.

The statutes amending the law of marriage, while requiring this important ceremony to be accompanied by certain circumstances of publicity and notoriety, have, at the same time, enabled every individual to enter into this solemn contract in the mode which he considers necessary or proper, and have thus removed an unreasonable restriction under which a large portion of the community previously laboured.

The abolition of colonial slavery, accomplished at a very great pecuniary sacrifice, is an event in our history never to be forgotten. The spirit of philanthropy which dictated this measure is a very prominent feature of our age, and has displayed itself in a variety of other enactments, particularly those modifying the severity of the laws relating to unfortunate traders and debtors, securing the proper care and treatment of lunatics,

amending the discipline of prisons, and providing reformatory institutions for all criminals who seek an opportunity of regaining their lost position. The laws for the relief of the poor have been remodelled; the numerous charities which are to be found in every part of the kingdom have been placed under the regulation and control of a body of commissioners, whose sole duty it is to see that the funds of these institutions are properly applied; the laws relating to *game*—always a fertile source of crime—have been so far modified that we may anticipate an early repeal of all penal enactments on the subject; and several statutes have been passed having for their object the improvement of the sanatory condition of populous places and the preservation of the public health.

The interests of trade, commerce, and manufactures have been unceasingly studied and promoted since the restoration of peace in 1815. This is not the place, however, in which to attempt any enumeration of the various statutes which have been from time to time passed for regulating these matters, the legislation relating to which has been often affected and controlled by financial necessities or by the conflicting views of political economists. It may be enough to allude to the statutes throwing open the trade to the East Indies, to the consolidation of the laws relating to the mercantile marine, and the repeal of the navigation acts; all tending towards establishing a system of commerce, free from all restraints other than those which the collection of the public revenue and the machinery required for that purpose render indispensable. The laws with regard to bankrupts have been consolidated and amended and courts established for the relief of all insolvent debtors whatever; real property has been subjected to the payment of debts; the rights of authors and inventors have been extended and secured; and the formation of joint-stock companies has been simplified and cheapened, the most ample regulations being made at the same time for the guidance of these bodies. The operations of the mercantile classes have been facilitated by several statutes having reference exclusively to commercial affairs, and protected to some extent by other enactments, which have made breaches of trust committed by bankers, factors, agents, and servants generally severely punishable.

In regard to landed property and its transmission the most important improvements have taken place. The alteration of the law of descent, the limitation of the time within which actions for the recovery of real estate may be brought, the shortening of the time of prescription of legal memory, the abolition of those complex modes of assurance, fines, and recoveries, the modification of the wife's claim of dower, the annihilation of satisfied terms,—these, among other things, have tended greatly to facilitate the transfer of property, have got rid of endless doubts and difficulties which perpetually arose upon titles, and have materially shortened conveyances. A great improvement has also been introduced into the law of wills; and there is less danger now than formerly of the wishes of a testator being frustrated. An attempt has been made to get rid of copyhold tenures, and repeated efforts—hitherto without effect, however—to introduce a system of registration of the titles to real estates.

The administration of private justice has been greatly simplified by the numerous alterations which have been made in the procedure of the superior courts of law and equity. The abolition of real actions and of the many fictions which formerly encumbered suits at law was an important and beneficial change, but not so advantageous to the suitor as more recent improvements in the practice of the courts at Westminster. Even these alterations have been less beneficial to the great mass of the community, however, than the establishment of the new county courts,—a measure warmly recommended by Sir William Blackstone, and to some extent a return to the ancient Saxon system, restored, if not established, by king Alfred, for securing the administration of justice at every man's door. The old rules of law, excluding the evidence of the parties to the suit, and prohibiting persons who are considered disqualified either by reason of interest or by crime from being witnesses, have been repealed, and all practical difficulties in eliciting the truth removed.

The proceedings in the court of Chancery have been simplified and shortened; the increase in the number of judges has prevented the possibility of delay in the hearing of causes in that court; and there seems to be no reason why in ordinary cases the obtaining of justice in a court of equity should not be a speedy and not ruinously-expensive process.

The criminal law has been, as to many of its branches, amended and consolidated, and the severity of punishments at the same time much softened and adapted more carefully than formerly to the nature and magnitude of the offence. The barbarous sufferings prescribed for those attainted of treason no longer stain the statute-book; and the punishment of innocent parties for ancestral guilt, which often resulted from the doctrine of corruption of blood, can no longer happen; while the offences involving capital punishment, which the convict only escaped by claiming the benefit of clergy, have been gradually reduced in number, until the extreme penalty of the law has become in practice confined to the frightful crime of murder. The trial by battel and the mode of proceeding by appeal have been formally abolished; the law relating to principal and

accessory been divested of its niceties, and the forms of the proceedings in the criminal courts so far simplified and improved that offenders who have now the advantage of being defended by counsel rarely escape punishment on purely technical objections.—KERR.

It were to be wished that the changes in our laws effected during the last twenty years, and throwing into the shade those of several centuries recorded in our annals, could have been reviewed by an eye so discriminating and delineated by a pen so masterly as those of Sir William Blackstone. There is a special reason for exhibiting a faithful picture of legislation during this interval:—that it follows and is largely due to the energy and activity infused into the legislature by the acts passed in the year 1832 for amending the representation of the people. As in all great changes, the one in question was inaugurated with sanguine predictions of good and confident forebodings of evil. It is for the impartial chronicler of our laws and institutions to afford an opportunity for judging how far events have justified the hopes and fears of those respectively favouring and deprecating so great and sudden a strengthening of the democratic element in our constitution. The change in question has already gone far towards verifying the prediction of one of its responsible promoters (Hansard, vol. ii. col. 1318, 1319, (3d ser.,) Viscount Palmerston) that it must "influence the character of the government and the legislature in all future times, and impress its influence on the whole frame of society." A consideration of what has been done and attempted since the year 1832 suffices to remind us that activity and energy in the legislature must be associated with prudence, moderation, and forethought in order to secure the enduring results of bold and beneficial legislation.

Glancing for a moment abroad, we behold acts continually passed by our legislature for the purpose of carrying into effect conventions with FOREIGN STATES for suppressing the slave-trade, and with France and the United States of America, for apprehending, in any of the three countries respectively, persons charged with murder, attempts to murder, robbery, piracy, forgery, or fraudulent bankruptcy. Other acts are for consecrating British subjects or foreigners to be bishops in foreign countries, securing to some extent the benefit of international copyright, facilitating the marriage of British subjects in foreign countries, and the naturalization of foreigners here. Her majesty has also been empowered to establish and maintain diplomatic relation and to hold diplomatic intercourse with the Pope, but not through the intervention of a person in holy orders in the Church of Rome, or a Jesuit or member of any Romish order or society bound by monastic or religious vows; and it is also expressly provided that nothing in that act is in any way to repeal, weaken, or affect the royal supremacy, civil and ecclesiastical. Our commercial relations with foreign countries have undergone a total change by the great relaxation of our system of prohibitory and protective duties, especially in respect of the importation of animal and vegetable produce from foreign countries: the abandonment of our navigation-laws, so long deemed the bulwark of our national greatness, and the admission of foreign shipping to the privileges of our own, even to the coasting-trade; while an attempt has been made to secure corresponding advantages from foreign states, by arming her majesty with retaliatory powers, to be exercised when it may be deemed expedient.

Our COLONIAL relations are the subject of constant solicitude to the mother-country, with a view of conferring on our colonies the rights and privileges of self-government, the representative system, and free institutions, under such conditions as may be thought likely to preserve and perpetuate, on terms consistent with the dignity and advantage of both, the connection between the two. For this purpose the imperial legislature is often occupied in framing and remodelling the constitution of her colonies in accordance with novel exigencies, as in Australia. Yielding to the urgent and reasonable objections of some of the more distant to being continued penal settlements, we have greatly diminished the number of offenders liable to transportation, substituting principally, in such cases, penal servitude at home or elsewhere. Importing counterfeit coin into the colonies has been made heavily punishable. Persons charged with treason or felony, in either the mother-country or the colonies, and escaping from one to the other, may now be apprehended in either, and secured for transmission to the scene of the offence, there to be dealt with according to law. Unsworn evidence has been made admissible in divers colonial courts from necessity, in the case of neighbouring barbarous and uncivilized people, ignorant of the existence of God or a future state. A great multitude of acts have been passed for regulating the commercial intercourse between ourselves and our colonies: local courts of appeal have been established in some of the West India colonies, and facilities afforded for sale, in others of them, of encumbered estates. But, above all, the legislature has evinced a benign anxiety to extend the blessings of the United Church of England and Ireland to our colonies whenever an opportunity is afforded. There are now established twenty-nine bishopries in our colonies: and provision is made for strengthening and consolidating ecclesiastical arrangements throughout our wide-spread dominions. The government of our stupendous Indian possessions

has lately been placed upon a new footing, and the legislature is continually striving to promote education, secular and religious, and reform the laws and improve the administration of justice there.

Returning to the United Kingdom, we shall find changes of great importance effected in every department of our DOMESTIC ECONOMY. The links which bind the three kingdoms together are constantly strengthened and multiplied by acts having for their object to assimilate as far as practicable the laws in force in each. The great measure for facilitating the sale of encumbered estates in Ireland is one of the boldest legislative interferences with rights of private property ever attempted in this country, by which the land of Ireland has been rendered again freely alienable and a great portion of it has changed owners.

Foremost among acts of high interest and importance are those, at the commencement of the present reign, for the support of her majesty's household and of the honour and dignity of her crown, by which, following the example of her immediate predecessors, she caused her hereditary revenues to be unreservedly carried to and made part of the consolidated fund. And in the fifth year of her reign her majesty graciously signified to parliament her wish to submit her royal income to the burden of the income-tax imposed on her subjects. Other acts effected the naturalization of, and made provision for, her royal consort, and for his filling the office of regent should the necessity arise. It also became necessary to provide for the further security and protection of her majesty's person, in consequence of some outrages perpetrated by half-crazed candidates for notoriety; and for the better security of the crown and government of the United Kingdom, because of certain public disturbances of a malignant character, to be nevertheless punishable, not as treason, but felonies, with transportation or imprisonment.

Great improvements have been made in the laws relating to the CONSTITUTION OF PARLIAMENT, the time and mode of assembling it. A third principal and a third under-secretary of state are now empowered to sit and vote in the house of commons, but not more than three of the former and three of the latter at the same time. Stat. 18 & 19 Vict. c. 10, March 16, 1855. An entirely new code of laws has been enacted for conducting elections and putting down bribery, corruption, and undue influence. Other acts allow members to qualify in respect of either real or personal property, or both; repeal certain severe penalties and disabilities; appoint the court of common pleas,—the tribunal for finally determining questions of disputed election-law; greatly improve the constitution of election-committees; and reduce restrictions on the exercise of the franchise. Acts of parliament have been simplified and shorn of much verbiage; parliamentary proceedings are diffused widely throughout the empire at a very small cost; and certain immunities granted to parliament, by way of privilege, in respect of such as may happen to involve matters challengeable in respect of its libellous character.

Our NAVAL AND MILITARY laws have been improved in various ways,—particularly by limiting the period of enlistment and service, and making liberal and salutary provisions in respect of bounty and extra pay, in order to increase the inducements for entering the public service. The militia-laws have been revised, consolidated, and placed, in some respects, on a new footing.

The interests of RELIGION AND RELIGIOUS LIBERTY have received a large share of the anxious solicitude of the legislature. It has made powerful and unwearied efforts to diffuse religious knowledge; to develop the vast capabilities of the United Church of England and Ireland; building churches and chapels in spiritually-destitute districts; altering ecclesiastical districts; remodelling dioceses; uniting and severing benefices; redistributing revenues, episcopal and capitular; establishing stipendiary curacies; abolishing commendams; vesting the patronage of deaneries in the crown; creating a new tribunal for enforcing church-discipline among the clergy; prohibiting the desecration of churches by holding in them vestry-meetings or for any other than religious purposes, and the reading of public secular proclamations or notices during divine service; for which are substituted printed or written copies attached to the outer door. The sanctity of the Sabbath has been promoted by prohibiting the opening of houses and places of public resort and public houses on Sunday, except within certain hours, throughout England and Wales, and in Scotland during the whole of Sunday, except for the accommodation of lodgers and travellers. In consequence of the Pope's affecting, in the year 1850, to parcel out this kingdom into provinces and dioceses and appoint archbishops and bishops, which occasioned an extraordinary ferment, the assumption, unauthorized by law, of the name of archbishop, bishop, or dean, of any place in the United Kingdom, is prohibited; briefs, rescripts, and letters-apostolical, from the See of Rome, are declared void; and those publishing and assuming to act under them for the purpose of constituting such offices, provinces, sees, or dioceses, are liable to penalties. A great number of statutes inflicting disabilities, penalties, and forfeitures on Roman Catholics, Jews, and Dissenters, but which had long ceased to be enforced, have been repealed, and many enactments passed facilitating the exercise of their religious rights and stringently guarding against any invasion of them. Dissenters, and, indeed, all persons professing

to entertain conscientious objections, of a religious nature, to taking oaths, may now, in lieu of them, make solemn affirmations or declarations in courts of justice and elsewhere.

Indefatigable efforts have been made by the legislature to promote the cause of EDUCATION, especially among the humbler classes of society, by establishing and affording support to parish and other schools, partly charitable and partly self-supporting. Large annual grants are made by parliament, to be applied at the discretion of her majesty in council, for the purpose of education, without preference to any particular religious denomination. The subject of popular education under state auspices, however, is one so difficult, with reference to its secular, religious, and compulsory character, as thus far to have baffled the praiseworthy efforts of all parties in the legislature to solve that difficulty. New colleges have been established in Ireland; and the Universities of Oxford and Cambridge have been subjected to great changes of their constitution and power, with a view to promotion of good government, extension, abrogation of oaths, and maintaining and improving discipline and studies. Other colleges—some of them formed into an university—have been established in the metropolis and elsewhere, the members of which are entitled to the substantial rights and privileges, especially with reference to entering the learned professions, of legitimate academical education. A permanent board, whose powers are now being increased by parliament, has been established for the better administration of CHARITABLE TRUSTS and the better application of charitable funds in England; than which few measures in recent years are likely to be attended with such great and permanent advantages in averting the evil consequences of supineness, negligence, and malversation.

In order to promote the RATIONAL ENTERTAINMENT AND INSTRUCTION OF THE PEOPLE, town-councils have been empowered to establish public libraries and museums; and an act has been passed to afford greater facilities for establishing institutions to promote literature, science, and the fine arts, or the diffusion of useful knowledge, and making effectual provision for improving the legal condition of such institutions. To encourage habits of PRUDENCE, FORETHOUGHT, and ECONOMY, various acts perfect and promote loan, benefit, building, friendly, industrial, and provident societies, but with precautions against abuse. While thus caring, however, for the religious, moral, and intellectual welfare and advancement of the people, the legislature has been equally anxious concerning their material interests, by promoting the HEALTH, CLEANLINESS, and COMFORT of all, but especially the humbler classes; and in doing this they may be thought to have pressed the maxim, *sic utere tuo ut alienum non lædas*, to an extent which might have surprised our ancestors. Measures of extreme stringency have been taken, and are now in full force, for suppressing nuisances in respect of sewers, drains, privies, slaughter-houses, offensive trades, callings, and manufactures, stench and smoke; for preventing the spread of contagious or infectious diseases, either existing in this country or likely to be imported from abroad; for compelling vaccination as a protection against small-pox; for preventing the spread of contagious or infectious diseases among sheep, cattle, and other animals. A central and local boards of health are now established, and in vigorous action, for the purpose of improving the sanitary condition of the country. Burials in churches and chapels, or in burial-grounds in populous places, are prohibited.

Various acts encourage the establishment of public baths, wash-houses, and open bathing-places; of well-ordered lodging-houses, for the labouring classes, as desirable for the health, comfort and welfare of the inhabitants of towns and populous districts; for the well-ordering of common lodging-houses as tending greatly to the health, comfort, and welfare of many of her majesty's poorer subjects,—requiring such lodging-houses to be registered, inspected, and cleansed, and notice given to the authorities of any person in them ill of fever or any contagious or infectious disease.

Our POOR-LAWS have been remodelled, and their administration, in a humane and just spirit, placed on a very satisfactory footing, under the constant superintendence of a high and responsible central authority; prison-discipline has been similarly dealt with, and subjected to systematic and vigilant inspection, with a view to securing its efficiency not only as a punishment, but, as far as may be, a preventive, of crime; and also protecting prisoners from oppression, neglect, or improper treatment of any kind; while, infinitely beyond and above all, the legislature has bestirred itself to lay the axe at the root of the upas-tree of CRIME; endeavouring to secure the reformation of offenders, especially of the young, and destroying ignorance and intemperance, the twin roots of that accursed tree.

It has been sought with sedulous anxiety to devise means for PROTECTING women from fraudulent practices against their chastity, wickedly practised by infamous persons; WOMEN AND CHILDREN both from injuries and ill treatment, to which they are peculiarly exposed; from aggravated assaults; from neglect and cruelty on the part of their employers; from exposure to serious or fatal injury in dangerous employments; from being employed at all in mines or collieries; from being set to work at too tender an age or kept at work too long in mills, factories, and print-works; for sending children employed

in the latter to school; for preventing frauds on work-people in respect of the payment of their hard-earned wages; and for subjecting such scenes of employment to periodical and searching inspection.

And as relates to the unfortunate class of persons denominated IDIOTS, LUNATICS, or INSANE, many considerate and salutary enactments have been made for the care and custody and protection of their persons and property; for the care of pauper lunatics, the maintenance and custody of insane criminals, the conveyance to a lunatic-asylum of lunatics meditating crime, the removal from India to the United Kingdom of insane persons of European birth charged with offences but acquitted on the ground of insanity; and for the periodical visitation, by the commissioners in lunacy, of county lunatic-asylums, and gaols and workhouses where any lunatics may be confined.

But, while thus humanely providing for the safety and welfare of our own species, the legislature has not been unmindful of THE ANIMAL CREATION. Cruelty to them has been visited with new and severe punishment, likely, it is hoped, to check brutal natures insensible to other influences; barbarous sports, such as bull, bear, and badger baiting, dog-fighting, and cock-fighting, have been prohibited; a sufficient quantity of fit and wholesome food and water must be supplied to cattle impounded; and the use of dogs for purposes of draught is forbidden.

Our RAILROADS, the gigantic growth of the last quarter of a century, and fast monopolizing the means of national transit, with the benefits attached to it, have been placed to a certain extent under proper control, for the protection of the public and the due discharge of the public service; and a comprehensive enactment has been passed, defining their duties and constituting the court of Common Pleas a final tribunal for enforcing the law thus newly defined.

The interests of AGRICULTURE have not been lost sight of; and foremost in changes vitally affecting it must be regarded the repeal of the corn-laws and allowing the importation of foreign cattle,—in bold reliance on the skill and energy of our own farmers, and on our means of acquiring from abroad, at all times and under all circumstances, an adequate amount of food, should the domestic supply prove deficient. This is one of those changes which signalize the age in which they are effected, and produce results of incalculable extent and importance. Excellent measures have been passed for the benefit of agriculture; for facilitating the improvement of land, by drainage, on equitable terms, by those enjoying only limited interests or under disabilities, such persons first obtaining permission of the court of chancery and the consent of the occupier, when the expense of so permanent a benefit to the estate may be charged on the inheritance. Other measures of great importance relate to the enclosure and improvement of waste lands; the enfranchisement, voluntary or compulsory, subject to certain limitations, of copyholds, and completing the working of the acts for the commutation of tithes; allowing hares, so injurious to lands, to be killed by the occupier of enclosed lands, or the owner having the right to do so, or any one authorized by him, and without paying game-duties or taking out a certificate. The law of landlord and tenant has been improved, by allowing tenants holding under uncertain interests, on the determination of their holding, instead of the ancient claim to emblements, to continue on the land till the close of the current year of the tenancy; authorizing the removal of buildings and fixtures set up for agricultural purposes; empowering a landlord to pay the tithe-rent charge left in arrear by his tenant and recover against him as for a simple contract-debt; and to distrain, for rent, growing crops still on the land, though *in custodia legis*, as already seized and sold under an execution against the tenant. The transfer of land has been in some degree simplified, real property subjected fully to the debts of the owner, the transfer of land vested in trustees and mortgagees facilitated, and the laws of real property amended in important particulars.

The laws relating to our COMMERCIAL interests have undergone recent and fundamental changes, with the view of removing impediments to the free exercise of mercantile discretion and enterprise. A multitude of acts in restraint of trade, and conferring local and exclusive privileges, and all those relating to the offences, long exclaimed against by political economists, of forestalling, engrossing, and regrating, have been abolished. The usury-laws, after steps taken in that direction for several years, have at length been totally abrogated; and annuities are no longer subject to enrolment. The navigation-laws, as we have seen, are also entirely repealed, and British shipping has now to compete, even in our own coasting-trade, with the shipping of all the world; with some provisions for endeavouring to coerce into following our example foreign countries indisposed to reciprocate our bold and liberal concessions. All acts regulating our MERCANTILE MARINE, from the eighth year of queen Elizabeth to the eighteenth of queen Victoria, have been repealed by a single statute in the latter year, and in their stead is enacted a new and comprehensive code, incorporating many improvements and vesting in the board of trade the general superintendence of the mercantile marine. Corporations and other public bodies, moreover, are empowered to grant sites for SAILORS' HOMES, calculated,

while providing for their comfort, to elevate their character; and a complete system is established for watching over the welfare of SEA-PASSENGERS and EMIGRANTS.

Improvements have been effected in the WAREHOUSING system, by which the importer of merchandise is relieved from paying duty till he has sold them to a home or foreign purchaser: the rights, powers, and liabilities, civil and criminal, of FACTORS have been defined, and those of indorsees of bills of lading extended; while summary remedies have been afforded in the case of bills of exchange and promissory-notes. The complex and critical relations between DEBTOR and CREDITOR have been several times adjusted and readjusted, by revising and remodelling the administration of BANKRUPTCY and INSOLVENCY law; and provisions are made against secret bills of sale. While the arrest of a debtor on mesne process has been abolished, except under special circumstances and under the authority of a judge, new remedies are given against absconding debtors; and debts due to a defendant can now be attached or taken in execution by a successful plaintiff.

Our BANKING system, including the Bank of England and all public and private banks, has been placed on a new footing, with a view to securing the circulation and preventing fluctuations ruinous to the country. JOINT-STOCK COMPANIES have formed subjects of incessant legislation, affecting equally their formation, practical working, compulsory dissolution, and winding up, and the rights and liabilities of shareholders among themselves and between themselves and the public. The CUSTOMS laws have been consolidated and remodelled, in conformity with fundamental changes in our commercial policy. In short, a revolution has been effected in the FISCAL system of the country, with a view to insure simplicity, certainty, and safety, and the unfettered freedom of self-reliant enterprise. Taxes have been imposed on INCOME and PROPERTY, as the basis of the great changes referred to, but have ever since been continued, and were heavily but temporarily augmented on account of the late war; while a tax has also been imposed on the SUCCESSION TO PROPERTY. The STAMP duties have been revised and placed upon a new footing, and those on newspapers entirely repealed. Our POSTAL system has been remodelled, and postage, both domestic, colonial, and foreign, reduced to low and uniform rates. The law of PATENTS and COPYRIGHTS has been improved and extended, and valuable rights and privileges conferred in respect of literature, engravings, designs for ornamenting manufactures, machines, and useful inventions, and certain colonial and international rights established in respect of books, translations of them, prints, articles of sculpture, and other works of art.

Acts have been passed for the important object of obtaining a complete GEOLOGICAL SURVEY of the United Kingdom, under the direction of government; an admirable system of REGISTRATION of BIRTHS, DEATHS, and MARRIAGES has been established, under the control of a registrar-general, whose periodical reports afford information to the country of an authentic, important, and most interesting statistical character; and a census of the population was recently taken, on a far more extensive and systematic plan than had ever before been attempted in this country.

Some of the more important alterations in the SUBSTANCE of the law are to be found in the act for enabling the personal representatives of one whose life has been sacrificed by the wrongful act, neglect, or default of another, though under circumstances amounting in law to felony, to recover damages for the benefit of his family. Another is, that effected in the law of libel, especially in newspapers and periodicals, by lord Campbell's act, having for its object the better protection of private character, for the more effectually securing the liberty of the press, and better preventing abuses in exercising it. These objects are attained by means of this valuable act, which is calculated to restrain censorious and malignant pens from publishing libellous matter, which, though true, it may not be held to have been for the public benefit to publish, but lacerating private feeling and blighting character only for the gratification of spite and malignity. Full effect is given to a prompt and proper apology, or even offer of one, in the case of haste, passion, or inadvertence: and a sum of money may be paid into court in compensation for any injury acknowledged to have been committed. A third alteration is also of importance, as abrogating a great rule of law, that freight is the mother of wages. The right to his wages of a seaman who does his duty is now properly placed on the same footing as that in respect of other service, and must be paid though the ship have earned no freight, unless it can be proved against him that, in case of wreck or loss of the ship, he did not exert himself to the utmost to save the ship, cargo, and stores.

DEODANDS, again, have been abolished, as unreasonable and inconvenient; contracts by way of WAGERING or gaming are declared null and void, and irrecoverable in courts of either law or equity; and very stringent enactments are made against gaming and betting houses.

Though the contemplation of so vast a series of legislative changes within so short a period may almost overwhelm the student, he has yet to be introduced to others of possibly greater moment than any that have gone before: the noble and inestimable improvements effected in the ADMINISTRATION OF JUSTICE. Some improvements have

been effected in our ECCLESIASTICAL COURTS, which, moreover, it has long been sought, but hitherto in vain, to place altogether on a satisfactory footing. The difficulties of doing so have hitherto proved almost insuperable; but the legislature is at this moment engaged upon the arduous undertaking. The court of ADMIRALTY has been reconstructed, invested with new powers, and now exercises with satisfaction to the country an important jurisdiction; and improvements have been made in the JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. It is, however, in the administration of CIVIL and CRIMINAL JUSTICE, alike in superior and inferior courts,—in those of law and equity, —that the *amending hand* has left the deepest traces of its giant grasp. To recapitulate with only reasonable fulness the improvements here effected would be to travel over a large space of the foregoing work: nothing more, therefore, will be attempted than a sketch of some of their leading features. The grand attained object has been, by stripping a question of needless technicalities and fictions, to leave exposed to the judicial eye the SUBSTANTIAL MERITS, and that at as early a period in litigation as is consistent with deliberately ascertaining the nature of the question; to diminish the expense of administering justice, facilitate the review of questioned decisions, and obtain the substantial results of adjudicature promptly and effectively.

First, as to the SUPERIOR COURTS OF COMMON LAW. The three great engines by which they conduct their operations—pleading, practice, and evidence—have been, so to speak, taken to pieces, thoroughly repaired, and set together again, with new capabilities and modes of action. PLEADINGS are shrunk into a span; verbiage has, in its turn, given way to the simplicity and terseness which it had originally supplanted; the record speaks the language of plain good sense; a slip and stumble of either party is quickly recovered; amendments may be made when and at every stage they appear necessary, on just and reasonable terms; facts and law are quickly referred to their proper categories; and the appropriate tribunals invested with new powers to dispose of them. The PRACTICE of the courts is now at all times under the command of the judges, who have laid down an entirely new code of rules, and have power from time to time to vary them as occasion may require. The law of EVIDENCE has been entirely reconstructed; lips are opened which ought never to have been closed, and which can at once place judges and juries in possession of facts not otherwise accessible; new and great facilities are afforded for testing the credibility of witnesses and facilitating and simplifying documentary proof, and, at the same time, for visiting with prompt and condign punishment those defiling a court of justice by perjured evidence. Oaths are dispensed with whenever a witness will solemnly pledge his word that he entertains conscientious objections, on religious grounds, to taking them; and powers are given for enforcing the attendance of witnesses out of the jurisdiction of a particular court, if they be within the United Kingdom.

A question of fact may be referred to the decision of either judge or jury, as shall appear most expedient; and those of fact or law are now easily and economically reviewable by successive courts of appellate jurisdiction. Several pages, however, would be required to indicate the substantial improvements effected in the administration of the common law in the superior courts, even by two statutes, entitled the common-law procedure acts of 1852 and 1854, by which, among other great changes, equitable matter is rendered available by either party in a common-law court, which is also armed with powers hitherto wielded by courts of equity only, by way of compelling specific performance,—by injunction, discovery, and interrogatory. Inferior civil courts of record, existing by ancient charter or act of parliament, and often possessing extensive jurisdiction, have had their procedure improved and regulated by that of the superior courts, as far as applicable, by either express enactments, or the incorporation, by an order of privy council, of the two common-law procedure acts of 1852 and 1854, or by powers conferred by act of parliament on the recorder or judge to regulate practice and pleading, subject to the approval of three judges of the superior courts.

LOCAL COURTS have been established throughout England and Wales, absorbing a large portion of the jurisdiction heretofore exercised by the superior courts only, who have been, however, compensated, so to speak, by being allowed to encroach, as we have seen, on the courts of equity.

Into COURTS OF EQUITY have been introduced also changes of number and magnitude corresponding with those effected in the common-law courts, and having the same object,—namely, to dispense with superfluous technicality, to shorten prolix pleadings, and simplify procedure in every way, so as to arrive as quickly and inexpensively as possible at the true merits of a question and have it as promptly adjudicated upon. Two new courts of primary and one of appellate jurisdiction have been erected; the judges are armed with powers, like those of their brethren in the common-law courts, for regulating practice; despatching business at chambers as well as in court, in lieu of the masters in chancery, who have been abolished; taking evidence *viva voce;* deciding legal questions, rendered necessary for the determination of equitable rights, without invoking the assistance of a court of law; and being deprived of the power any longer of sending

cases for the opinion of the latter. This, however, is only a faint outline of the great ameliorations which have recently been effected in our courts of equity, of which they have so long stood in need, and which have given great satisfaction to the public.

In the administration of our CRIMINAL LAW may be seen the same bold hand of reform; and salutary changes have been effected, in a spirit at once cautious, humane, and enlightened, before which technical jargon and senseless prolixity have melted away, leaving the indictment to speak language so plain as to be intelligible at once to the prisoner and the public, instead of misleading, harassing, and confusing all parties, and tempting chicanery, with facilities for defeating justice. Simple and brief as criminal pleadings are now become, a judge is armed with every requisite power of amendment, on rational principles, and consistently with full justice to the prisoner. Both judge and jury are enabled, better than ever heretofore, to do substantial justice without discarding proper and necessary forms. While the latter can, without prejudice to the prisoner, adapt their verdict to the true merits of the case, which the evidence has shown referable to a different class of offence from that charged in the indictment, so the former is enabled to carry that specially-adapted verdict into complete effect, and, without unduly enlarging his discretion, apportion punishments, within certain limits, to the quality of the crime and the character and previous conduct of the prisoner. A new court of appeal has been erected, exactly qualified to answer every object in the administration of criminal justice, by keeping it consistent with the letter and spirit of the law, and affording prompt redress in cases of miscarriage.

Magistrates have been recently invested with greatly-increased powers of SUMMARY JURISDICTION, over adult as well as juvenile criminals, to an extent not perhaps likely to have been approved of by Blackstone, judging from his recorded sentiments, though accompanied by provisions aimed at guarding from abuse so great a departure from the precious institution of trial by jury.

PUNISHMENTS have been often and anxiously considered by the legislature, with a view to mitigating their severity without at the same time affording impunity to crime. This has been done by men inspired by enlightened philanthropy, aiming patiently at the true medium between justice and mercy, and actuated by the spirit breathing in the grand and solemn language of one of our ancient statutes:—"The state of every king, ruler, and governor of any realm, dominion, or commonalty standeth and consisteth more assured by the love and favour of the subject toward their sovereign ruler and governor than in the dread and fear of laws, made with rigorous pains and extreme punishment for not obeying of their sovereign ruler and governor: and laws also made for the preservation of the common weal, without extreme punishment or great penalty, are more often for the most part obeyed and kept than laws and statutes made with great and extreme punishments, and, in special, such laws and statutes so made, whereby not only the ignorant and rude unlearned people, but also learned and expert people, minding honestly, are often and many times trapped and snared—yea, many times—for words only, without either fact or deed done or perpetrated." 1 Mary, stat. 1, c. 1.

Capital punishments have accordingly been expressly abolished in a great number of heinous cases, such as forgery, rape, and certain crimes, foul and revolting, but retained in others deemed of a more dangerous public tendency, and principally of a murderous character and with such intent committed, as in cases of stabbing, cutting, wounding, poisoning, doing violent injury dangerous to life. Even in these cases, however, the sentence of death is not always carried into effect; while offences of kindred enormity, as by the use of explosive substances, corrosive fluids, chloroform, laudanum, or other stupefying materials, for felonious purposes, and attempting to shoot, drown, or suffocate, are punishable by transportation for life or for a long series of years, or period of imprisonment.

As already indicated, however, one of the noblest characteristics of the age is its endeavouring to prevent the commission of crime,—to reform and restore an offender rather than harden and destroy him. And let us close this surprising summary of the legislation of the last twenty years by saying that the feature of it last brought under the reader's eye would have lit up with delight that of a Blackstone and a Coke; the latter of whom, after writing on this subject in moving terms, thus solemnly closes his Institute of Criminal Law:—"The consideration of this PREVENTING justice were worthy of the wisdom of a parliament, and, in the mean time, expert and wise men to make preparation for the same, as the text saith, *ut benedicat eis Dominus*. Blessed shall he be that layeth the first stone of this building: more blessed that proceeds in it: most of all that finisheth it, to the glory of God and the honour of our king and nation." The anxieties of the late war did not prevent the nation from addressing itself to this holy enterprise; and the return of peace beholds it more intent upon that enterprise than ever.—WARREN.

IN proposing to add an American note on the subject of the progress of the law since the publication of the Commentaries of Sir William Blackstone, it ought to be premised that it cannot, of course, enter into the details of the legislation of thirty-two different

States. The most which can be done is to notice briefly some few leading instances of important alteration or amendment which occur in the jurisprudence of the United States. In all these States, except Louisiana, the common law is the foundation; and though the superstructure has been various, yet there are points of general agreement which may be safely assumed as indicative of the character and extent of American progress.

The first, and by far the most important in its bearing upon security of person and property, and that steady social and political progress which is the never-failing accompaniment of such security, is the introduction of written constitutions of government not only describing the organization of the various departments and defining their several limits, but declaring in the most authoritative manner those individual rights which are not delegated to the government in any of its departments, but reserved as inviolate forever. Essentially connected with the principle of constitutional law,—as *lex legum*,—without which indeed it would be an empty name, is the recognised power of the judiciary department not only to construe the constitution, but to pronounce an act of the legislature, contrary to their construction, to be absolutely null and void, and to refuse to carry it into effect. Under this principle especially has an efficient sanction been added to those important restrictions upon legislative power, that no law shall be passed in violation of private contracts, that private property shall not be taken for public use without compensation, and that no man shall be deprived of life, liberty, or property without due process of law. Nor should we forget, while touching upon this subject, to notice that all our constitutions contain provisions for their own amendment. Thus peaceably, without those convulsions and revolutions which mark the history of other countries, the most important changes may be made in the very framework of society. Most of the old constitutions originally established at or soon after the Revolution have undergone revision in conventions of the people called by lawful authority, whose work has been submitted to the decision of the people at the polls. How sublime a spectacle is it to behold a great nation—and each of our States may be well so termed in its extent of territories and its prospective if not present population—engaged peaceably and calmly in considering, and determining by the light of reason and experience, those deeply-interesting and exciting questions which in other countries and in ages not far remote were settled on the battle-field, or in the more terrific scenes of domestic revolution! Let it be observed, also, that as often as these revisions have taken place they have resulted in changes tending to limit still more the power of government, and of course to guard still more individual rights. While suffrage has been everywhere more and more extended,—the will of the majority brought more and more nearly to act upon the representatives to whom its expression in law is delegated,—yet this extension has been accompanied with wise restrictions upon legislative power in the creation of public debt, the erection of corporations, and the investment of peculiar privileges in favoured classes. Orders of nobility never, in fact, existed in the American colonies. These favours were not extended to the colonists: the demand at home was equal to the supply. It was for this reason, fortunate for the colonists, that they were not represented in parliament. They would not then have been spared that infliction. Had an order of American nobility, however, existed at the Revolution in any of the States, who can doubt that it would have soon yielded up all its claims to honour, pre-eminence, or privilege? It would be curious to trace the history of freehold qualification for office and the elective franchise. Gradually, indeed, yet surely, one trace after another has disappeared of the idea that a man must have an interest in the soil to give him such an interest in good government as to render him a safe depositary of any share of its power. Provision by law for the education of the children of all classes, alike rich and poor, who choose to avail themselves of it, is another feature of the progress which has been made in this country. The fact simply is recorded, without pausing to examine its bearing upon the great questions of morals and economy with which it is connected. Church establishments, which in the beginning seemed disposed to show themselves, have now no place in our system. One of the cardinal maxims of American fundamental law is that religion, to be pleasing to the Being whose will is its supreme law, must be perfectly voluntary,—uninfluenced by any mere worldly consideration: all men have an inherent and indefeasible right to unlimited freedom of conscience and religious worship. The wisdom of free systems is nowhere more strikingly illustrated than by the results in this case. It is found that the great bulk of the clergy are better paid, more respected and more worthy of respect, enjoying more the confidence of their flocks and better entitled to it; and, what is more remarkable, the amount of effort and contribution for religious objects is greatly increased where they are the free-will offerings of cheerful givers. When we pass from what may be termed *public* to the domain of *private* law, that which meets us at the first glance is the early and universal abolition of primogenitures, and the equal division of lands as well as personal estate among all the children, or, in default of children, of the next of kin. Though one of the foremost, it is doubtless one of the most important, steps in the progress of society. In Pennsylvania

and some other of the States, the eldest son had at first a double share. But perfect equality was soon everywhere the rule. While the right of discrimination may be safely left to the justice and affection of the parent, the policy of equal distribution established by law in cases of intestacy breaks the influence of family pride and arrays the moral force of the whole community in favour of natural justice. It is the only just and safe agrarian law. It gives an impetus to public as well as private enterprise and prosperity, by the constantly-recurring division of property. It operates gradually and quietly by the prevention of overgrown estates withdrawn from productive uses, which the course of a few generations, under the operation of the rule of partible descents, never fails to reduce to a common level. Now and then some proprietor, anxious to perpetuate his property and name after his decease, may tie up his estate by a strict settlement; but, by the wise rule of law against perpetuities, the second generation will have power to loose its bands and set it free again. Indeed, in many of the States, entails have been abolished, and everywhere the legislatures are easily moved to unfetter estates which have been placed in trust, whenever they can constitutionally exercise that power. The interest of the many is in the unrestrained commerce of landed as well as movable property,—in the subjection of both alike to the just demands of creditors. In the earliest period of our colonial jurisprudence, lands were made chattels for the payment of debts. Instead of recognising fancied distinctions between different classes of debts, the estate of a decedent found to be insolvent is generally distributed among all his creditors *pro rata*, with the exception of a reasonable and humane preference given to funeral-expenses, medical attendance, and servants' wages. With this class of legal reforms is connected the universal establishment of public registries for deeds, mortgages, judgments, &c.; and thus the purchaser or mortgagee is liable to no risk of having his title defeated by some secret conveyance or encumbrance. In many of the States provisions have been made in favour of certain classes founded upon the notion that they have some superior claims upon the protection of the law. The priority given to funeral-expenses, medical attendance, and servants' wages was evidently meant not for the benefit of the undertaker, physician, and domestic, but that in that last great trial of our nature the dying man might easily find the credit to procure him necessary comfort and attention. But in the class of cases to which allusion is now made, no ulterior policy of this character is to be discerned. Yet such is their general adoption by different legislatures that some foundation of policy or justice must exist in their behalf. Such are laws giving mechanics liens upon buildings erected by them prior to all other liens originating subsequently to the commencement of the erection. Such are laws exempting a certain amount in value, or certain kinds of property, as household goods, from seizure in execution or distress for rent. Such are the laws everywhere abolishing imprisonment for small debts, and in many States advancing a step further, to the entire abolition of such imprisonment in all cases, except where upon examination and hearing the debtor is found to have fraudulently contracted the debt, or to have fraudulently concealed or removed his property.

There is another subject upon which the hand of innovation has been laid of late years; whether it should be styled reform may well be doubted. Laws have been passed in many States having in view the protection of the property of married women, and constituting them in some respects, at least as far as such property is concerned, independent of the power and control of their husbands. Instances of great hardship were often found to arise where an unwise or profligate husband has squandered the estate belonging to the wife; but whether such occasional inconveniences ought not rather to be borne, than an alteration attempted affecting so fundamentally the most intimate relation of society, has been questioned by some of our wisest and best men. Time will decide, as the tendency of our legislation is at present all in that direction. In most of the States, the causes which in England only constitute grounds of divorce *a mensa et thoro*, and some not even amounting to that, have been constituted legal reasons for a total separation of the parties *a vinculo matrimonii*, of course carrying with it the power in either party to contract a new marriage. Still greater evils have been found to result from the facility with which legislative divorces are granted, sometimes for no cause at all but the dissatisfaction of one or both the parties. It has even been attempted in some constitutions to restrict the power of the legislature on this subject; but from past experience we may conclude that nothing but absolute prohibition will ever be found effectual.

In general, special pleading has not found favour with the profession in the United States. The education of lawyers has not in general been such as to qualify them for it. Nowhere has it been found profitable to institute a separate branch of the profession devoting themselves, as in England, to this subject. Our bills of costs in general are light, and would not compensate for the labour and time which would be required. Cases are mostly tried on the general issue; and where any special defence to a sealed instrument is intended to be set up, or any defalcation relied upon, a notice of the matter before trial is in general required. In many of the States the process and prac-

tice in the courts have been much simplified, with a view to a speedy judgment in causes really without defence, and to a speedy trial in other cases. As far as evidence is concerned, we may be considered as behind our mother-country. In all but two or three States the old rules excluding the parties and interested or infamous persons from being heard as witnesses still exist in all their vigour. In general, chancery powers are conferred on the common-law courts proceeding by bill and answer on an equity side, instead of a separate court of equity. In two or three States from an early period the courts exercised the powers and applied the principles of equity only through the medium of common-law forms, considering that as done which a chancellor would decree to be done, and enforcing the specific execution of contracts through conditional verdicts of juries.

When we turn to the consideration of crimes and their punishment, then it must be acknowledged that we have always been far in advance of English jurisprudence. Our ancestors, in the earliest periods of colonization, adopted the wise and humane principle of Montesquieu, that certainty was to be preferred to severity. The death-penalty was abolished generally in all cases except murder,—and in that, in some States, confined only to what is termed *murder in the first degree*, or, in other words, where the intent was itself murderous. Great attention has been paid to penitentiaries and prison-discipline. In some places the plan has been adopted of solitary confinement at hard labour, and in others that of associated labour during the day and separate confinement at night.

Thus in this necessarily brief sketch it will be seen that in the United States there has been a constant effort to improve the framework and details of our laws. The history of the course of legislation is the best eulogy which could be composed upon republican institutions. Liberal principles in government and legislation do not tend to subvert the edifice of public and private security, but to strengthen its foundations and bind its parts more firmly together by removing gradually and successively every useless and injurious appendage. There is no danger, but the highest safety, that men should understand their right to be well and cheaply governed. The more general intelligence is diffused among a community, the more will they prize the blessing of living in a country of just and equal laws impartially administered.—Sharswood.

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THE END OF THE FOURTH BOOK.

APPENDIX.

Sect. 1. Record of an Indictment and Conviction of Murder, at the Assizes.

Warwickshire, to wit. } Be it remembered, that at the general session of the lord the king of *oyer* and *terminer* holden at Warwick in and for the said county of Warwick, on Friday, the twelfth day of March, in the second year of the reign of the lord George the Third, now king of Great Britain, before Sir Michael Foster, knight, one of the justices of the said lord the king assigned to hold pleas before the king himself, Sir Edward Clive, knight, one of the justices of the said lord the king, of his court of Common Bench, and others their fellows, justices of the said lord the king, assigned by letters-patent of the said lord the king, under his great seal of Great Britain, made to them the aforesaid justices and others, and any two or more of them, (whereof one of them the said Sir Michael Foster and Sir Edward Clive, the said lord the king would have to be one,) to inquire (by the oath of good and lawful men of the county aforesaid, by whom the truth of the matter might be the better known, and by other ways, methods, and means, whereby they could or might the better know, as well within liberties as without) more fully the truth of all treasons, misprisions of treasons, insurrections, rebellions, counterfeitings, clippings, washings, false coinings, and other falsities of the moneys of Great Britain, and of other kingdoms or dominions whatsoever; and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, unlawful assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champerties, deceits, and all other misdeeds, offences, and injuries whatsoever, and also the accessories of the same, within the county aforesaid, as well within liberties as without, by whomsoever and howsoever done, had, perpetrated, and committed, and by whom, to whom, when, how, and in what manner; and of all other articles and circumstances in the said letters-patent of the said lord the king specified; the premises and every or any of them howsoever concerning; and for this time to hear and determine the said treasons and other the premises, according to the law and custom of the realm of England; and also keepers of the peace and justices of the said lord the king, assigned to hear and determine divers felonies, trespasses, and other misdemeanours committed within the county aforesaid, by the oath of Sir James Thomson, baronet, Charles Roper, Henry Dawes, Peter Wilson, Samuel Rogers, John Dawson, James Phillips, John Mayo, Richard Savage, William Bell, James Morris, Laurence Hall, and Charles Carter, esquires, good and lawful men of the county aforesaid, then and there impanelled, sworn, and charged to inquire for the said lord the king and for the body of the said county, it is presented: That Peter Hunt, late of the parish of Lighthorne, in the said county, gentleman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the fifth day of March in the said second year of the reign of the said lord the king, at the parish of Lighthorne aforesaid, with force and arms, in and upon one Samuel Collins, in the peace of God and of the said lord the king then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Peter Hunt, with a certain drawn sword, made of iron and steel, of the value of five shillings, which he the said Peter Hunt in his right hand then and there had and held, him the said Samuel Collins, in and upon the left side of the belly of him the said Samuel Collins then and there feloniously, wilfully, and of his malice aforethought, did strike, thrust, stab, and penetrate; giving unto the said Samuel

Session of *oyer* and *terminer*.

Commission of

oyer and *terminer*,

and of the peace.

Grand jury.

Indictment

Collins, then and there, with the sword drawn as aforesaid, in and upon the left side of the belly of him the said Samuel Collins, one mortal wound, of the breadth of one inch and the depth of nine inches; of which said mortal wound he the said Samuel Collins, at the parish of Lighthorne aforesaid, in the said county of Warwick, from the said fifth day of March in the year aforesaid, until the seventh day of the same month in the same year, did languish, and languishing did live; on which said seventh day of March in the year aforesaid, the said Samuel Collins, at the parish of Lighthorne aforesaid, in the county aforesaid, of the said mortal wound did die: and so the jurors aforesaid, upon their oath aforesaid, do say that the said Peter Hunt him the said Samuel Collins, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace of the said lord the now king, his crown, and dignity.

Capias. WHEREUPON the sheriff of the county aforesaid is commanded that he omit not for any liberty in his bailiwick, but that he take the said Peter Hunt, if he may be found in his bailiwick, and him safely keep, to answer to the felony and murder whereof he stands indicted. WHICH said indictment the said justices of the lord the king above named, afterwards, to wit, at the delivery of the gaol of the said lord the king, holden at Warwick in and for the county aforesaid, on Friday, the sixth day of August, in the said second year of the reign of the said lord the king, before the right honourable William lord Mansfield, chief justice of the said lord the king, assigned to hold pleas before the king himself, Sir Sidney Stafford Smythe, knight, one of the barons of the exchequer of the said lord the king, and others their fellows, justices of the said lord the king, assigned to deliver his said gaol of the county aforesaid of the prisoners therein being, by their proper hands do deliver here in court of record in form of the law to be determined.

Session of gaol-delivery.

Arraignment. AND AFTERWARDS, to wit, at the same delivery of the gaol of the said lord the king of his county aforesaid, on the said Friday, the sixth day of August, in the said second year of the reign of the said lord the king, before the said justices of the lord the king last above named and others their fellows aforesaid, here cometh the said Peter Hunt, under the custody of William Browne, esquire, sheriff of the county aforesaid, (in whose custody in the gaol of the county aforesaid, for the cause aforesaid, he had been before committed,) being brought to the bar here in his proper person by the said sheriff, to whom he is here also committed. AND forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, he saith that he is not guilty thereof; and thereof for good and evil he puts himself upon the country.

Plea: not guilty. Issue.

AND John Blencowe, esquire, clerk of the assizes for the county aforesaid, who prosecutes for the said lord the king in this behalf, doth the like.

Venire. THEREFORE let a jury thereupon here immediately come before the said justices of the lord the king last above mentioned, and others their fellows aforesaid, of free and lawful men of the neighbourhood of the said parish of Lighthorne, in the county of Warwick aforesaid, by whom the truth of the matter may be the better known, and who are not of kin to the said Peter Hunt, to recognise upon their oath whether the said Peter Hunt be guilty of the felony and murder in the indictment aforesaid above specified, or not guilty: because as well the said John Blencowe, who prosecutes for the said lord the king in this behalf, as the said Peter Hunt, have put themselves upon the said jury. And the jurors of the said jury by the said sheriff for this purpose impanelled and returned, to wit, David Williams, John Smith, Thomas Horne, Charles Nokes, Richard May, Walter Duke, Matthew Lion, James White, William Bates, Oliver Green, Bartholomew Nash, and Henry Long, being called, come; who, being elected, tried, and sworn to speak the truth of and concerning the premises, upon their oath say, THAT the said Peter Hunt is guilty of the felony and murder aforesaid, on him above charged in the form aforesaid, as by the indictment aforesaid is above supposed against him; and that the said Peter Hunt at the time of committing the said felony and murder, or at any time since to this time, had not nor hath any goods or chattels, lands or tenements, in the said county of Warwick, or elsewhere, to the knowledge of the said jurors.[1] And upon this it is forthwith demanded of the said Peter Hunt, if he hath or knoweth any thing to say wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him: who nothing further saith, unless as he before had said.

Verdict: guilty of *murder.*

[1] This averment is now rendered unnecessary. See 7 & 8 Geo. IV. c. 28, § 5.

WHEREUPON, all and singular the premises being seen, and by the said justices here fully understood, IT IS CONSIDERED by the court here, that the said Peter Hunt be taken to the gaol of the said lord the king of the said county of Warwick from whence he came, and from thence to the place of execution on Monday now next ensuing, being the ninth day of this instant August, and there be hanged by the neck until he be dead; and that afterwards his body be dissected and anatomized.

Judgment of death, and dissection.

SECT. 2. CONVICTION OF MANSLAUGHTER.

upon their oath say, that the said Peter Hunt is not guilty of the murder aforesaid, above charged upon him: but that the said Peter Hunt is guilty of the felonious slaying of the aforesaid Samuel Collins; and that he had not nor hath any goods or chattels, lands or tenements, at the time of the felony and manslaughter aforesaid, or ever afterwards to this time, to the knowledge of the said jurors.[2] And immediately it is demanded of the said Peter Hunt if he hath or knoweth any thing to say wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him: WHO saith that he is a clerk, and prayeth the benefit of clergy to be allowed him in this behalf. WHEREUPON, all and singular the premises being seen, and by the said justices here fully understood, IT IS CONSIDERED by the court here that the said Peter Hunt be burned in his left hand and delivered. And immediately he is burned in his left hand, and is delivered, according to the form of the statute.[3]

Verdict: not guilty of *murder;* guilty of *manslaughter.*

Clergy prayed.

Judgment to be burned in the hand, and delivered.

SECT. 3. ENTRY OF A TRIAL INSTANTER IN THE COURT OF KING'S BENCH, UPON A COLLATERAL ISSUE; AND RULE OF COURT FOR EXECUTION THEREON.

Michaelmas Term, in the Sixth Year of the Reign of King George the Third.

Kent; The King against Thomas Rogers. } THE PRISONER at the bar being brought into this court in custody of the sheriff of the county of Sussex, by virtue of his majesty's writ of *habeas corpus,* IT IS ORDERED that the said writ and the return thereto be filed. AND it appearing by a certain record of attainder, which hath been removed into this court by his majesty's writ of *certiorari,* that the prisoner at the bar stands attainted, by the name of Thomas Rogers, of felony for a robbery on the highway, and the said prisoner at the bar having heard the record of the said attainder now read to him, is now asked by the court here what he hath to say for himself why the court here should not proceed to award execution against him upon the said attainder. HE for plea saith that he is not the same Thomas Rogers in the said record of attainder named, and against whom judgment was pronounced; and this he is ready to verify and prove, &c. To which said plea the honourable Charles Yorke, esquire, attorney-general of our present sovereign lord the king, who for our said lord the king in this behalf prosecuteth, being now present here in court, and having heard what the said prisoner at the bar hath now alleged, for our said lord the king by way of reply saith, that the said prisoner now here at the bar is the same Thomas Rogers in the said record of attainder named, and against whom judgment was pronounced as aforesaid; and this he prayeth may be inquired into by the country; and the said prisoner at the bar doth the like: THEREFORE let a jury in this behalf immediately come here into court, by whom the truth of the matter will be the better known, and who have no affinity to the said prisoner, to try upon their oath whether the said prisoner at the bar be the same Thomas Rogers in the said record of attainder named, and against whom judgment was so pronounced as aforesaid, or not: because as well the said Charles Yorke, esquire, attorney-general of our said lord the king, who for our said lord the king in this behalf prosecutes, as the said prisoner at the bar, have put themselves in this behalf upon the said jury. AND immediately thereupon the said jury come here into court; and, being elected, tried, and sworn to speak the truth touching and concerning the premises aforesaid, and having heard the said record read to them, do say upon their oath that the said prisoner at the bar is the same Thomas Rogers in the said record of attainder named, and against whom judgment was so pronounced as aforesaid, in manner and form as the said attorney-general

Habeas corpus.

Record of attainder read, for felony and robbery.

Prisoner asked what he can say in bar of execution.

Plea: not the same person.

Replication, averring that he is.

Issue joined.

Venire awarded *instanter.*

Jury sworn.

Verdict: that he is the same.

[2] See preceding note.

[3] Benefit of clergy and burning in the hand being now abolished, (see 6 Geo. IV. c. 25. 7 & 8 Geo. IV. c. 28,) this form will require alteration accordingly.

hath by his said replication to the said plea of the said prisoner now here at the bar alleged. And hereupon the said attorney-general on behalf of our said lord the king now prayeth, that the court here would proceed to award execution against him the said Thomas Rogers upon the said attainder. Whereupon, all and singular the premises being now seen and fully understood by the court here, it is ordered by the court here that execution be done upon the said prisoner at the bar for the said felony in pursuance of the said judgment, according to due form of law: And it is lastly ordered that he the said Thomas Rogers, the prisoner at the bar, be now committed to the custody of the sheriff of the county of Kent (now also present here in court) for the purpose aforesaid; and that the said sheriff of Kent do execution upon the said defendant the prisoner at the bar for the said felony, in pursuance of the said judgment, according to due form of law. On the motion of Mr. Attorney-General.

Award of execution.

By the Court.

Sect. 4. Warrant of Execution on Judgment of Death, at the General Gaol-Delivery in London and Middlesex.

London and Middlesex. } To the sheriffs of the city of London; and to the sheriff of the county of Middlesex; and to the keeper of his majesty's gaol of Newgate.

Whereas at the session of gaol-delivery of Newgate, for the city of London and county of Middlesex, holden at Justice Hall in the Old Bailey, on the nineteenth day of October last, Patrick Mahony, Roger Jones, Charles King, and Mary Smith, received sentence of death for the respective offences in their several indictments mentioned: Now it is hereby ordered that execution of the said sentence be made and done upon them the said Patrick Mahony and Roger Jones, on Wednesday the ninth day of this instant month of November, at the usual place of execution. And it is his majesty's command that execution of the said sentence upon them the said Charles King and Mary Smith be respited, until his majesty's pleasure touching them be further known.

Given under my hand and seal this fourth day of November, one thousand seven hundred and sixty-eight.

James Eyre, Recorder, (L.S.)

Sect. 5. Writ of Execution upon a Judgment of Murder, before the King in Parliament.

George the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, to the sheriffs of London and sheriff of Middlesex, greeting. Whereas Lawrence earl Ferrers, viscount Tamworth, hath been indicted of felony and murder by him done and committed, which said indictment hath been certified before us in our present parliament; and the said Lawrence earl Ferrers, viscount Tamworth, hath been thereupon arraigned, and upon such arraignment hath pleaded not guilty; and the said Lawrence earl Ferrers, viscount Tamworth, hath before us in our said parliament been tried, and in due form of law convicted thereof; and whereas judgment hath been given in our said parliament that the said Lawrence earl Ferrers, viscount Tamworth, shall be hanged by the neck till he is dead, and that his body be dissected and anatomized, the execution of which judgment yet remaineth to be done: We require, and by these presents strictly command you, that upon Monday, the fifth day of May instant, between the hours of nine in the morning and one in the afternoon of the same day, him the said Lawrence earl Ferrers, viscount Tamworth, without the gate of our tower of London (to you then and there to be delivered, as by another writ to the lieutenant of our tower of London or to his deputy directed we have commanded) into your custody you then and there receive; and him, in your custody so being, you forthwith convey to the accustomed place of execution at Tyburn; and that you do cause execution to be done upon the said Lawrence earl Ferrers, viscount Tamworth, in your custody so being, in all things according to the said judgment. And this you are by no means to omit, at your peril. Witness ourself at Westminster, the second day of May, in the thirty-third year of our reign.

Yorke and Yorke.

AN ANALYSIS

OF

BLACKSTONE'S COMMENTARIES

ON

The Laws of England.

BY BARRON FIELD, ESQ.

The figures at the end of each Question refer to the pages of Blackstone (and those of all the editions are alike) where its Answer may be found.

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14. What does a person gain by *serving seven years* as *apprentice* to a trade? 427.

15. Are *apprenticeships* requisite for every trade and for trading everywhere? 428.

16. Is an actual *apprenticeship* to a trade for *seven years* necessary to entitle a person to exercise that trade? 428.

17. May a *master*, or *master's wife*, correct his *apprentice* or his *servant?* 428.

18. What if a *servant* assault his *master* or his *master's wife?* 428.

19. What may a *master* do towards others on behalf of his *servant?* 429.

20. What does the law call *maintenance?* 429.

21. What may a *servant* do towards others on behalf of his *master?* 429, 430.

22. In what case is the *master* answerable for the act of the *servant?* 429, 430.

CHAP. XV.—*Of Husband and Wife.*

1. What is the second *private economical relation of persons?* 433.

2. In what light does the *law* consider *marriage?* 433.

3. When does the *law* allow the *marriage contract* to be good and valid? 433.

4. Of what two sorts are the disabilities to contract *marriage?* 434.

5. How do *canonical impediments* affect a *marriage?* 434.

6. What are the disabilities of this nature? 434.

7. What does the statute 32 Hen. VII. c. 38 declare as to *marriages?* 435.

8. How do *civil disabilities* affect a *marriage?* 435.

9. What is the first of these *legal disabilities?* 436.

10. What is the second? 436.

11. What is the third? 437.

12. To what penalty is that *clergyman* liable who marries a couple either without publication of *banns* or without a *license?* 437.

13. To what penalty is he liable, by statute 4 & 5 Ph. and M. c. 8, who marries a female under the age of sixteen years without consent of her *parents* or *guardians?* 437.

14. What *marriages* without consent are void by statute 26 Geo. II. c. 33? 437, 438.

15. What is the fourth legal incapacity to contract *marriage;* and what has the statute 15 Geo. II. c. 30 provided as to this incapacity? 438, 439.

16. How must a *marriage* be celebrated to make it valid? 439, 440.

17. In what two ways may *marriages* be dissolved? 440.

18. What are the two kinds of *divorce?* 440.

19. For what cause must the first kind of *divorce* be? 440.

20. For what cause must the second kind of *divorce* be? 440, 441.

21. In case of *divorce a mensa et thoro*, what does the law allow to the *wife?* 441.

22. What is the writ *de estoveriis habendis?* 441.

23. But in what case does the law allow no *alimony?* 442.

24. What are the legal consequences of *marriage?* 442.

25. For what *debts* of the *wife* is the *husband* liable? 442, 443.

26. Is there not one case where the *wife* shall sue and be sued as a *feme sole?* 443.

27. Is there not one case where a *wife*, by statute 3 Hen. VII. c. 2, can be evidence against her *husband?* 443.

28. What is the only *deed* a wife can execute? 444.

29. What restraint may a *husband* lay upon his *wife* in case of gross misbehaviour? 444, 445.

CHAP. XVI.—*Of Parent and Child.*

1. What is the third and most universal *private economical relation of persons?* 446.

2. Of what two sorts are *children?* 446.

3. Who is a *legitimate child?* 446.

4. What are the three legal duties of *parents* to *legitimate children?* 446.

5. In what case may the *churchwardens* and *overseers* of the parish seize the *parent's* rents, goods, and chattels and dispose of them towards the *child's maintenance?* 448.

6. In what case shall a second *husband* be charged to maintain his *wife's child* by her first *husband?* 448.

7. But in what case is a *parent* not bound to provide a *maintenance* for his *issue?* 449.

8. What is the penalty on a *parent's* refusing to provide a *maintenance* for such of his *children* as the law puts upon him to maintain? 449.

9. What is enacted if a *Popish* or *Jewish parent* shall refuse to allow his *Protestant child* a fitting *maintenance?* 449.

10. What is the law as to disinheriting *children* by *will?* 449, 450.

11. What may a *parent* do for a *child*, as its *protector*, towards others? 450.

12. In what one case does the law interfere between a *parent* and his *child* in regard to *education?* 451.

13. From what is the *power* of *parents* over their *children* derived? 452.

14. What power do our *laws* give a *parent* over his *child?* 452, 453.

15. When does that power cease? 453.

16. Whence do the *duties* of *children* to their *parents* arise? 453.

17. What are those duties? 453, 454.

18. Do these duties cease upon any misbehaviour of the *parent?* 454.

19. Who is a *bastard?* 454.

20. Why is our law on this head superior to the Roman? 455.

21. What is a *writ de ventre inspiciendo;* and by whom and when may it be sued out? 456.

22. If a *man* dies, and his *widow* marries again so soon that, by the course of nature, the *child* of which she shall be delivered might have been begotten by either *husband*, which shall be the *child's father?* 457.

23. In what cases may *children* born during *wedlock* be *bastards?* 457.

24. What is the duty of *parents* to their *bastard children?* 458.

25. What is the method in which the English law provides *maintenance* for *bastards?* 458.

26. What are the rights of a *bastard?* 459.

27. What is the principal incapacity of a *bastard?* 459.

28. How may a *bastard* be made *legitimate?* 459.

CHAP. XVII.—*Of Guardian and Ward.*

1. What is the fourth *private economical relation of persons?* 460.

2. What is the first species of *guardian;* and who is that *guardian?* 461.

3. If the *father* assign no *guardian* to his *daughter* under the age of sixteen years, who shall be her *guardian?* 461.

4. What and who is the second species of *guardian?* 461.

5. What is the third species of *guardian;* when does it take place; upon whom does that *guardianship* devolve till the *minor* is presumed to have sufficient discretion to choose his own guardian; and at what age does that presumption take place? 461, 462.

6. What is the fourth species of *guardian;* how may it be appointed; and who may accept the appointment? 462.

7. What are the power and reciprocal duty of a *guardian* and *ward?* 462.

8. What is the *guardian* bound to do when the *ward* comes of age? 463.

9. Under whose control are *guardians?* 463.

10. What are the different ages at which *male* and *female* are competent to different purposes? 463.

11. On what day is the full *age* of *male* and *female* completed? 463.

12. How can an *infant* be sued? 464.

13. How can he sue? 464.

14. At what age may an *infant* be *capitally punished?* 464.

15. What if an *infant* neglect to demand his right? 465.

16. What estates may an *infant* aliene? 465.

17. What legal act may an *infant* do? 465.

18. How may an *infant* purchase lands? 466.

19. What *deed* can an *infant* make which is not afterwards voidable? 466.

20. How may an *infant* bind himself by *contract?* 466.

CHAP. XVIII.—*Of Corporations.*

1. What are *bodies politic, bodies corporate,* or *corporations;* and for what purpose are they constituted? 467.

2. What is the first division of *corporations?* 469.

3. How are these *incorporations* again divided? 470.

4. Of what two sorts are *lay corporations?* 470.

5. What is absolutely necessary to the erection of a *corporation?* 472.

6. In what sort of *corporations* is the *king's implied* consent to be found? 472.

7. What are the two methods by which the *king's consent* is given? 473.

8. What is necessary to the very being of a *corporation?* 475.

9. What are the five powers incident to all *corporations?* 475, 476.

10. What are those privileges and disabilities that attend *aggregate corporations* and are not applicable to such as are *sole?* 476, 477.

11. May either kind of *corporation* take goods and chattels for the benefit of themselves and their successors? 477.

12. Who have the right to give *laws* to *ecclesiastical* and *eleemosynary foundations?* 477.

13. What acts can *aggregate corporations,* that have by their constitution a *head,* do during the vacancy of the *headship?* 478.

14. In *aggregate corporations* what determines the act of the whole *body;* and what is enacted by statute 33 Hen. VIII. c. 27 as to any private statutes made by *founders* of *corporations* in derogation of the *common law* in this particular? 478.

15. How do the statutes of *mortmain* effect *corporations?* 479.

16. What is the general duty of *corporations?* 480.

17. How is this duty enforced? 480.

18. Who is the visitor of *ecclesiastical corporations?* 480.

19. Who is the visitor of *lay corporations?* 480.

20. What does the law mean by the distinction of *fundatio incipiens* and *fundatio perficiens;* and why is the king the visitor of all *lay civil corporations,* and the *endower* the visitor of all *lay eleemosynary* ones? 481.

21. Where shall the *king* exercise this his jurisdiction? 481.

22. May there not be another visitor of *lay eleemosynary corporations* than the *founder?* 482.

23. What has been long held as to the *visitation* of *hospitals, spiritual* and *lay;* what does the statute 14 Eliz. c. 5 direct on the subject; and by whom are all the *hospitals* founded by the statute 39 Eliz. c. 5 to be visited? 482.

24. Are *colleges lay* or *ecclesiastical corporations?* 483.

25. To whom do the lands and tenements of a *corporation* revert upon its dissolution? 484.

26. What becomes of the *corporation's* debts upon its dissolution? 484.

27. By what four methods may a *corporation* be dissolved? 485.

28. What is an *information in nature of a writ of quo warranto;* and when may it be brought? 485.

29. What is enacted as to the *franchises* of the *city of London?* 485.

30. What is provided against the dissolution of *corporations?* 485.

BOOK II.—OF THE RIGHTS OF THINGS.

CHAP. I.—*Of Property in General.*

1. What do the writers on natural law style those rights which a man may acquire in and to such external things as are unconnected with his person? 1.

2. In what has all dominion over external things its original? 2.

3. In those times when all things were in common among men, what first gave to one man a transient property in the *use* of a thing? 3.

4. What circumstances must soon have pointed out the necessity of appropriating to individuals not the immediate *use* only, but the *substance,* of the thing to be used; and how must that property have been originally acquired? 4–9.

5. What was the origin of *conveyances, wills, heirships,* and *escheats?* 9–13.

6. But are there not some few things which are capable only of a transient usufructory property, and which must therefore still remain in common? 14.

7. And are there not other things in which a permanent property *may* subsist, and which yet would be frequently found without a proprietor had not the law provided a remedy for this inconvenience? 14, 15.

CHAP. II.—*Of Real Property; and, first, of Corporeal Hereditaments.*

1. What are the *objects* of dominion or property, as contradistinguished from what? 16.

2. Into what two kinds are *things,* by the *law of England,* distributed? 16.

3. What is the commentator's definition of the first kind of *things?* 16.

4. What of the second? 16.
5. Of what three sorts or kinds are *things real* usually said to consist? 16.
6. What is a *tenement* in law? 17.
7. How does Sir Edward Coke define a *hereditament?* 17.
8. Does either of these kinds of *things real* include the other? 17.
9. Of what two kinds are *hereditaments;* and of what do each of those kinds consist? 17.
10. Under what general denomination may all *corporeal hereditaments* be comprehended? 17.
11. If I convey the *land*, doth the *structure* upon it pass with it? 18.
12. How is *water* considered in law; and by what description must an *action* be brought to recover it? 18.
13. What extent hath *land*, in its legal signification, upwards and downwards? 18.
14. What passes in law by a grant of *water*? 19.

CHAP. III.—*Of Incorporeal Hereditaments.*

1. What is an *incorporeal hereditament?* 20.
2. Of what ten sorts do *incorporeal hereditaments* principally consist? 21.
3. What is an *advowson?* 21.
4. What is the difference between an *advowson appendant* and an *advowson in gross?* 22.
5. What is an advowson *presentative?* 22.
6. What is an advowson *collative?* 22.
7. What is an advowson *donative?* 23.
8. What are *tithes*, whether *predial*, *mixed*, or *personal?* 24.
9. To whom are they due? 28.
10. By what two means may lands be discharged from the payment of *tithes?* 28.
11. What is a *real composition;* and by what means has it grown into desuetude? 28, 29.
12. What is a *modus decimandi*, or *modus* only, as it is called? 29.
13. What six rules must be observed to make the *modus* good and sufficient? 30.
14. What is a *rank modus?* 30.
15. What is a prescription *de non decimendo?* 31.
16. Who are personally entitled to the privilege of being discharged from the payment of *tithes?* 31.
17. From what original have sprung all the lands which, being in *lay* hands, do at present claim to be *tithe-free?* 32.
18. What is right of *common?* 32.
19. Of what four sorts does *common* chiefly consist? 32.
20. What is *common of pasture;* and of what four species does it consist? 32.
21. What is common *appendant?* 33.
22. What is common *appurtenant?* 33.
23. What is common *because of vicinage?* 33.
24. What is common *in gross?* 34.
25. What is called a lord of a manor's *approving?* 34.
26. What is common of *piscary?* 34.
27. What is common of *turbary?* 34.
28. What is common of *estovers* or *botes?* 35.
29. What is *right of way;* and on what three reasons may it be grounded? 35, 36.
30. Upon what principle of law, when a man grants me a piece of ground in the middle of his field, does he at the same time tacitly and impliedly give me a *way* to come at it? 36.
31. What are *offices?* 36.
32. What are *dignities?* 37.
33. What are *franchises* or *liberties?* 37.
34. Wherein do a *forest*, *a chace*, and a *park* differ? 38.
35. What is a *free warren?* 38, 39.
36. How comes it to pass that a man and his heirs have sometimes *free warren* over another's ground? 39.
37. What is a *free fishery;* and by what was the making *grants* of such a franchise prohibited? 39.
38. Wherein does a *free fishery* differ from a *several* one and a *common of piscary?* 39, 40.
39. What are *corodies?* 40.
40. What is an *annuity;* and wherein does it differ from a *rent charge?* 40.
41. What are *rents?* 41.
42. What are the four requisites to a *rent?* 41.
43. What are the three manner of *rents* at common law? 41.
44. What is *rent-service?* 42.
45. What is *rent-charge?* 42.
46. What is *rent-seck?* 42.
47. What are *rents of assize?* 42.
48. What are *chief-rents?* 42.
49. What are *quit-rents?* 42.
50. What were anciently called *white-rents* or *blanch farms*, *reditus albi*, in contradistinction to *reditus nigri* or *black-mail?* 42.
51. What is *rack-rent?* 43.
52. What is a *fee-farm rent?* 43.
53. Where and when is *rent* regularly due and payable? 43.

CHAP. IV.—*Of the Feodal System.*

1. Whence is the origin of the constitution of *feuds?* 45.
2. What were *feuds?* 45.
3. Upon what condition were they held; and what was the nature of the *feodal* constitution? 46.
4. At about what time was the *feodal* polity received in England? 48.
5. Into what historical mistake have many writers been led by not understanding the *feodal* acceptation of the word *conquest?* 48.
6. Upon the introduction of the *feodal* system into England, what became the fundamental maxim and necessary principle of our English tenures? 51.
7. How was the *feodal* system affected by king Henry I.'s charter? 52.
8. How by that of king John, confirmed by his son Hen. III.? 52.
9. What were the grantor and grantee of a *feud* respectively called? 53.
10. What was the ceremony of granting a *feud?* 53.
11. What were the oaths of *fealty* and *homage?* 53, 54.
12. What was the twofold nature of the feudatory's *service* or *suit?* 54.
13. Why were the feudatories distinguished by the appellation of *pares curtis* or *curiæ?* 54.
14. How were *feuds* hereditary? 55, 56.
15. Why could neither the *lord* nor the *vassal*

alienate their estates without the consent of each other? 57.

16. Whence came *feodal* tenures to be divided into *feodal propria et impropria;* and what was the difference between such *feuds?* 57, 58.

CHAP. V. *Of the Ancient English Tenures.*

1. Why are the words *tenement, tenant,* and *tenure* so universally applied in speaking of all the real property of the kingdom? 59.

2. Who is the lord *paramount* of England? 59.

3. Who were called *tenants paravail?* 60.

4. Who were called *tenants in capite?* 60.

5. Of what two kinds, in respect of their quality, were the *services* that were due on account of the four principal species of *lay tenure,* to which all other *tenures* that subsisted among our ancestors may be reduced? 60.

6. Of what two kinds were they in respect of their quantity and the time of exacting them? 60.

7. What were *free* services? 60.

8. What were *base* services? 61.

9. What were the *certain* services? 61.

10. What were the *uncertain* services? 61.

11. What, according to Bracton, were these four principal species of *lay-tenure,* to which all other *tenures* that subsisted among our ancestors may be reduced? 61, 62.

12. What constituted a *tenure* by *knight-service,* and what was the *service?* 62.

13. What was this tenant's *reditus,* his *rent* or *service,* for the land he claimed to hold? 62.

14. What were the seven fruits and consequences inseparably incident to this *tenure?* 63.

15. What were the three principal *aids* which were taken by the *lord* of this *tenant?* 63.

16. What did king John's *magna carta* ordain as to *aids?* 64.

17. What did the statute called *confirmatio chartarum* ordain as to *aids?* 64.

18. What did the *statute of Westminster* fix as to *aids?* 65.

19. What was *relief,* and how was it compounded for? 65, 66.

20. What was *primer seisin?* 66.

21. What was *wardship?* 67.

22. What was *livery* or *ousterlemain?* 68.

23. What was an *inquisitio post mortem?* 68.

24. Who was compelled to receive the *order* of *knighthood* or to pay a *fine* to the *king?* 69.

25. What was the right of *marriage* (*maritagium,* as contradistinguished from *matrimonium*)? 70.

26. What were *fines upon alienation?* 71.

27. What was an *attornment?* 72.

28. What was *escheat?* 72.

29. What was the *tenure* by *grand serjeanty, per magnum servitium?* 73.

30. What was *tenure* by *cornage?* 74.

31. What was *tenure* by *scutage,* or *escuage, servitium scuti?* 74.

32. What did *magna carta* declare as to *scutage?* 74.

33. By what means were all the advantages of the feodal constitution destroyed? 75.

34. To whom do we owe the plan for the abolition of the feodal system? 76, 77.

35. What actually gave it its death-blow? 77.

CHAP. VI.—*Of the Modern English Tenures.*

1. What, in its most general and extensive signification, is *socage,* to which all *tenures,* except *frankalmoign, grand serjeanty,* and *copyhold,* were reduced upon the abolition of the feodal system? 78, 79.

2. Of what two sorts is *socage?* 79.

3. What is the etymology of the word? 80, 81.

4. Does *free* and *common socage tenure* remain in any part of England to this day; and what people's liberty does that remnant prove *socage* to have been? 81.

5. Since the certainty of its *services* is the grand criterion of *socage,* what will this species of *tenure* include? 81.

6. What is *petit-serjeanty?* 82.

7. What is *tenure* in *burgage?* 82.

8. What is the custom of *borough-English?* 83.

9. What are the four distinguishing properties of *tenure* in *gavelkind?* 84.

10. In what points does *tenure* in *free socage* partake of the feodal nature? 85–89.

11. But wherein did the *socage* and the *feodal tenures* widely differ as to *service, relief, wardship,* and *marriage?* 86–89.

12. When was the *feodal tenure* abolished and sunk into the *socage?* 89.

13. What species of our modern *tenures* has arisen from *pure villenage?* 90.

14. What is a *manor?* 90.

15. What was the difference between *book-land* and *folk-land?* 90.

16. What is a *court-baron;* and what happens if the number of suitors should not be sufficient to make a *jury of two?* 90, 91.

17. What is an *honour?* 91.

18. What did the 32d chapter of *magna carta,* 9 Hen. III., and the *statute of Westminster,* declare as to all sales or feoffments of land; and what is now therefore essential to a *manor?* 91, 92.

19. What were *pure villeins;* and of what two classes? 92–94.

20. What was a *neife?* 94.

21. In case of a marriage between a *freeman* and a *neife,* or a *villein* and a *freewoman,* were the issue *free* or *villein?* 94.

22. Why could not a bastard be born a *villein?* 94.

23. In what cases had the *villein* remedy at law against the *lord?* 94.

24. How might a *villein* be enfranchised? 94.

25. What was *implied manumission?* 94, 95.

26. How came *villeins* to be called *tenants by copy of court-roll?* 95.

27. How did *villenage* decline and fall? 95, 96.

28. From what has been premised, what two indispensable principles of copyhold tenure may we collect? 97.

29. In what degree have the customs of *manors* superseded the will of the *lord?* 97.

30. What four fruits and appendages has a *copyhold tenure,* whether of inheritance or for life, in common with *free tenures?* 97.

31. What three besides has a *copyhold?* 97.

32. What is a *heriot?* 97.

33. What is *wardship* in *copyhold estates?* 98.

34. What are *fines;* and what has the law de-

clared to be the *ultimatum* of their amount? 98.

35. What was *privileged villenage* or *villein socage?* 99.

36. What species of our modern *tenures* has arisen from this ancient one? 99.

37. Of what does *ancient demesne* consist? 99.

38. What immunities have *tenures* of *ancient demesne?* and in what do lands holden by this *tenure* differ from common *copyholds?* 99–101.

39. To what two species are all *lay tenures* now in effect reduced? 101.

40. What is that *tenure* of a *spiritual* nature which was reserved by the statute of Charles II.? 101.

41. To what *services* only are the holders of lands under this *tenure* liable? 101, 102.

42. Wherein did this *tenure* materially differ from what was called *tenure by divine service?* 102.

43. Can lands be given to be held by this *tenure* now? 102.

CHAP. VII.—*Of Freehold Estates of Inheritance.*

1. What does an *estate* in lands, tenements, and hereditaments signify? 103.

2. To ascertain this signification with proper accuracy, in what threefold view may *estates* be considered? 103.

3. What is the primary division of *estates* with regard to their quantity of interest? 104.

4. How does the commentator define an *estate* of *freehold?* 104.

5. What is the twofold nature of *estates* of *freehold* (thus understood)? 104.

6. Into what two species are *estates* of *freehold* of the former nature again divided? 104.

7. Who is *tenant* in *fee simple* or *tenant* in *fee?* 104.

8. What, and in contradistinction to what, is the true meaning of the word *fee?* 104, 105.

9. By what words do we, in the most solemn acts of law, express the highest *estate* that any subject can have? 105.

10. In contradistinction to what has the word *fee* the adjunct of *simple* annexed to it? 106.

11. Of what species of hereditaments can a man not be said to be seised IN HIS DEMESNE *as of fee?* 106, 107.

12. What word is necessary, in the *grant* or *donation*, in order to make a *fee* or *inheritance?* 107, 108.

13. But by what five exceptions is this rule now softened? 108, 109.

14. Into what two sorts may we divide limited *fees?* 109.

15. What is a *base* or *qualified fee?* 109.

16. What was a *conditional fee* at the common law? 110.

17. What did our ancestors hold with regard to the *condition* annexed to such a *fee?* 110, 111.

18. But what if the *tenant* did not in fact aliene the land, and if then both the *tenant* and the *issue* died? 111.

19. What did the *statute of Westminster the second* (commonly called the statute *de donis conditionalibus*) enact as to *conditional fees?* 112.

20. Whence is the origin of *fee-tail* and *reversion?* 112.

21. What things may, and what may not, be *entailed* under the statute *de donis?* 113.

22. What is the first division of the several species of *estates tail?* 113.

23. What is *tail general?* 113.

24. What is *tail special?* 113, 114.

25. By what distinction are *estates* in *general* and *special tail* further diversified? 114.

26. What word is necessary to make a *fee-tail?* 114, 115.

27. Is there not another species of *entailed estates*, now grown out of use, but still capable of subsisting in law? 115.

28. What is this defined to be? 115.

29. What are the four *incidents* to a *tenancy in tail* under the *statute of Westminster the second?* 115, 116.

30. What and when was declared the first sufficient *bar* of an *estate tail?* 116, 117.

31. Can an *estate tail* be forfeited to the king upon any conviction of high treason? 117, 118.

32. Do *leases* made by *tenants* in *tail* bind the *issue* in *tail?* 118.

33. What construction was put upon the statute of *fines* by the statute 32 Hen. VIII. c. 36? 118.

34. What exceptions were made by this statute as to *fines*, and by the statute 34 & 35 Hen. VIII. c. 20 as to *common recoveries?* 118, 119.

35. Of what debts are *estates tail* liable to the payment? 119.

36. What appointment of lands *entailed* by tenant in *tail* is good without *fine* or *recovery?* 119.

37. What difference is there, then, between the present *estates tail* and the old *conditional fees* after the *condition* was performed? 119.

CHAP. VIII.—*Of Freeholds not of Inheritance.*

1. Of what two species are such *estates* of *freehold* as are not of *inheritance*, but *for life* only? 120.

2. In what two ways may an *estate* of the first species be created? 120, 121.

3. What is a tenant *pur auter vie?* 120.

4. Against whom (with what exception) does the law say that all grants are to be taken most strongly? 121.

5. Are there not some *estates* for *life* which may determine before the *life* expires? 121.

6. Why, in *conveyances*, is the grant usually made "for the term of a man's *natural* life"? 121.

7. What are the two principal *incidents* to all *estates for life?* 122.

8. What are *emblements?* 122.

9. Who is a *cestuy que vie?* 123.

10. When is a *tenant for life* not entitled to *emblements?* 123.

11. Are the advantages of *emblements* extended to the parochial clergy? 123.

12. What *incidents* have *under-tenants* or *lessees* of *estates for life* above their *lessors?* 123, 124.

13. What is the *estate for life* (of the second species of such estates) of a *tenant in tail after possibility of issue extinct?* 124.

14. By what only is a possibility of issue extinct in law? 125.

15. Wherein does this *estate* partake both of an *estate-tail* and an *estate for life?* 125, 126.

16. What is a *tenancy by the curtesy of England?* 126.

17. What four requisites are necessary to make a *tenancy by the curtesy?* 127.

18. What does the *husband* become by the birth of the *child;* and what is he not till the death of the *wife?* 127, 128.

19. What is a *tenancy in dower?* 129.

20. Who may and may not be *endowed?* 130.

21. What crimes of the *husband bar* the *wife's dower?* 130, 131.

22. Of what may and may not a *wife* be *endowed?* 131.

23. Upon what principle are all *endowments* made? 131.

24. How long must the *husband* be seised of land in order to entitle the *widow* to *dower?* 132.

25. What is usually called the *widow's freebench?* 132.

26. What are the four species of *dower* now subsisting? 132, 133.

27. Of what part of his lands might a *husband endow* his *wife ad ostium ecclesiæ?* 133–135.

28. What is now the only usual species of *endowment?* 135.

29. What is called the *widow's quarantine?* 135.

30. What is a *writ of admeasurement of dower?* 136.

31. How may *dower* be *barred* or prevented? 136, 137.

32. How is a *jointure* defined by Sir Edward Coke? 137.

33. What did the statute of *uses* provide as to *barring* a *wife* of *dower?* 137, 138.

34. What four requisites must be punctually observed to make a *jointure* good? 138.

35. What if the *jointure* be made to the *wife after* marriage? 138.

36. What if the *jointress* be evicted of her *jointure* on account of its being made on a bad title? 138.

37. What are the comparative advantages of situation between *tenant in dower* and *jointresses?* 138, 139.

CHAP. IX.—*Of Estates less than Freehold.*

1. What are the three sorts of *estates less than freehold?* 140.

2. What is an *estate for years?* 140.

3. What is a *month* in law? 141.

4. What is a lease for a *twelvemonth?* 141.

5. How many hours does the law reckon in the space of a day? 141.

6. How might a *lessee estate* be defeated by the ancient law? 142.

7. What is an indispensable requisite to an *estate for years?* 143.

8. Why cannot a *lease for life* commence *in futuro*, though a *lease for years* may? 143, 144.

9. What right has a *tenant for years* in the *tenement?* 144.

10. Of what is he possessed when he has entered the *tenement?* 144.

11. What is the legal difference between the *term* and the *time* of a *lease for years?* 144.

12. What are the *incidents* to an *estate for years?* 144, 145.

13. What is the difference of situation between a *tenant for life* and a *tenant for years* with regard to *emblements?* 145.

14. What is an *estate at will?* 145.

15. In what case is a *tenant at will* entitled to *emblements?* 146.

16. What act amounts to a determination of the *will* on either side? 146.

17. How have courts of law leaned in constructing demises where no certain *term* is mentioned? 147.

18. What *notice* is requisite to determine a *tenancy from year to year?* 147.

19. In what one species of *estate at will* is the *will* qualified by what? 147, 148.

20. What seems to have been the reason why the *absolute freehold* was never granted by *lords* to their *villeins?* 148, 149.

21. What kind of *freehold* have *customary freeholders?* 149.

22. What are the comparative advantages of interest between a *copyholder of inheritance with a fine certain* and an *absolute freeholder?* 150.

23. What is an *estate at sufferance?* 150.

24. Against whom can no man be *tenant at sufferance?* 150.

25. How must an owner of lands vary his proceeding in an *action of trespass* against a *tenant by sufferance* from the same *action* against a stranger? 150.

26. What have the statutes 4 & 11 Geo. II. c. 23 and 19 enacted in the cases of a *tenant's holding over his term* or his own *notice to quit?* 151.

CHAP. X.—*Of Estates upon Condition.*

1. What are *estates upon condition?* 152.

2. Of what two sorts are *estates upon condition?* 152.

3. What three other *conditional estates* are included under this last sort? 152.

4. What are *estates upon condition implied* in law? 152.

5. By what two breaches of an *implied condition* may an *office* be *forfeited?* 153.

6. How do a *public* and a *private office* differ in respect of *forfeit?* 153.

7. Upon what principle proceed all the *forfeitures* which are given by law of *life estates* and others? 153.

8. What is an *estate on condition expressed?* 154.

9. Of what two sorts are *condition expressed?* 154.

10. What is an *estate* "to a man and his heirs, *tenants of the manor of Dale*"? 154.

11. What is the distinction between a *condition in deed* and a *limitation* or *condition in law?* 155.

12. In all instances of *limitations* or *conditions subsequent*, where the *condition* is *contingent* and *uncertain*, what *estate* has the *grantee* so long as the *condition* remains unbroken? 156.

13. When are *conditions* void? 156

14. When are estates, upon *void conditions*, *absolute* in the *tenant*, and when in the *feoffor?* 157.

15. Of what two kinds are *estates* held *in vadio*, *in gage*, or *pledge?* 157.

16. What is *vivum vadium*, or *living pledge?* 157.

17. What is *mortuum vadium*, *dead pledge* or *mortgage?* 157, 158.

18. Who was *tenant in mortgage?* 158.

19. Whence is the origin of granting a long *term of years* by way of *mortgage?* 158.

20. What is *equity of redemption?* 159.
21. What is a *foreclosure?* 159.
22. What are *estates* held by *statute merchant* and *statute staple?* 160.
23. What is an *estate by elegit?* 161.
24. Why are estates by *statute merchant, statute staple,* and *elegit, chattel interests,* and not *freehold?* 161, 162.

CHAP. XI.—*Of Estates in Possession, Remainder, and Reversion.*

1. Of what two natures are *estates* with regard to the *time of their enjoyment?* 163.
2. What two sorts of *expectancy* are there; and by what acts are they severally created? 163.
3. What is the difference between *estates executed* and *estates executory?* 163.
4. What may an *estate in remainder* be defined to be? 164.
5. When lands are granted to A. for twenty years, with *remainder* to B. and his heirs forever, are not these two *estates?* 164.
6. What are the three rules laid down by law to be observed in the creation of *remainders?* 165, 167, 168.
7. What is called the *particular estate?* 165.
8. Why cannot an *estate* of *freehold* be created to commence *in futuro?* 166.
9. Is a *remainder* an *estate* commencing *in præsenti* or *in futuro?* 165, 166.
10. What *particular estate* will, and when will a *particular estate* not, *support* a *remainder over?* 166, 167.
11. Can a *remainder* be granted of a *chattel interest?* 167.
12. In what case is it necessary that a *lessee for years* should have *livery of seisin?* 167.
13. Need the *precedent particular estate* and the *remainder* be *in esse* at one and the same time *during the continuance of the first estate;* or what latitude is allowed? 168.
14. Of what two sorts are *remainders?* 168.
15. What are *vested* or *executed remainders?* 168, 169.
16. On account of what two sorts of uncertainty may *remainders* be *contingent* or *executory?* 169.
17. What is enacted by statute 10 & 11 W. III. c. 16 as to *posthumous children taking remainders?* 169.
18. What are *potentia propinqua* and *potentia remotissima?* 170.
19. Why cannot a *contingent remainder* of *freehold* be limited on any *particular estate* less than a *freehold?* 171.
20. How may *contingent remainders* be *defeated?* 171.
21. Is there no way of preventing this *defeat?* 171.
22. What is an *executory devise?* 172.
23. In what three points does it differ from a *remainder?* 172, 173.
24. Why may a *devise of freehold* commence *in futuro?* 173.
25. Within what time does the law's *abhorrence of a perpetuity* declare that the *contingencies* of an *executory devise* ought to be such as may happen? 173, 174.
26. Why does the law *abhor a perpetuity?* 174.
27. What has been settled in order to prevent the danger of *perpetuities* as to the persons to whom *remainders* may, by an *executory devise,* be limited over after a *term* of years has been given to one man for his life; and what has been also settled as to the *contingencies* upon which such *remainders* may be limited to take effect? 174, 175.
28. What is an *estate in reversion?* 175.
29. What are the two usual *incidents* to *reversions?* 176.
30. What is enacted by the statute 6 Anne, c. 18 in order to assist such persons as have any *estate* in *remainder, reversion,* or *expectancy,* after the death of others, against fraudulent concealments of their deaths? 177.
31. What happens whenever a greater *estate* and a less coincide in the same person in the same right without any intermediate *estate?* 177.
32. What one exception is there to this rule; and what is the reason of this exception? 177, 178.

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1. In what four different ways may *estates* be held with respect to the number and connections of their owners? 179.
2. Who is *tenant in severalty?* 179.
3. What is an *estate in joint-tenancy?* 179.
4. How may this estate be created? 180.
5. From what are the *properties* of a *joint-estate* derived? 180.
6. Of what four kinds is the *unity* of a *joint-estate?* 180–182.
7. If an estate in fee be given to a man and his wife, how are they *seised?* 182.
8. Upon the decease of one *joint-tenant,* what share of the *estate* remains to the *survivor;* and why? 183, 184.
9. Why cannot the *king,* or any *corporation,* be *joint-tenant* with a private person? 184.
10. How may an estate in *joint-tenancy* be severed and destroyed? 185.
11. But why is a devise of one *joint-tenant's* share by will no *severance* of the *jointure?* 186.
12. In what case is it disadvantageous for *joint-tenants* to dissolve the *jointure?* 186.
13. What is an *estate* held in *coparcenary?* 187.
14. Who are *parceners* by common law? 187
15. Who are *parceners* by particular custom? 187.
16. What are the properties of *parceners?* 188.
17. Which of the four *unities* of a *joint-estate* have *parceners?* 188.
18. In what five points do *parceners* differ from *joint-tenants?* 188.
19. What are the five methods in which *parceners* may make *partition?* 189.
20. What is the law of *hotchpot,* which is incident to this estate? 190, 191.
21. In what three ways may an *estate in coparcenary* be dissolved? 191.
22. Who are *tenants in common?* 191–193.
23. Which of the four *unities* of a *joint-estate* have *tenants in common?* 191.
24. By what two means may *tenancy in common* be created? 192, 193.
25. Does the law, in its construction of a

deed, favour *joint-tenancy* or *tenancy in common?* 193.

26. What are the *incidents* attending a *tenancy in common?* 194.

27. In what two ways only can *estates in common* be dissolved? 194.

CHAP. XIII.—*Of the Title to Things Real in General.*

1. WHAT is the *title* to *things real?* 195.

2. What are the four several stages or degrees requisite to form a complete *title* to lands and tenements? 195–197, 199.

3. What is the mere *naked possession;* how may it happen; and in what degree is it a legal *title?* 195, 196.

4. What are the two sorts of *right of possession;* and by what means may the first grow into the second? 196, 197.

5. What is the mere *right of property;* and how can it recover the *right of possession?* 197, 198.

CHAP. XIV.—*Of Title by Descent.*

1. By what two methods may the *title* to *things real* be reciprocally acquired on the one hand and lost on the other? 201.

2. What is the *title* by *descent?* 201.

3. What is *consanguinity;* and of what two kinds? 202.

4. Wherein do these two kinds of *consanguinity* differ? 203, 204.

5. In what does the very being of *collateral consanguinity* consist? 205.

6. What is the method of computing the *degrees* of *collateral consanguinity?* 206, 207.

7. What is the first *rule* or *canon* of *inheritance* according to which *estates* are transmitted from the ancestor to the heir? 208, 210.

8. What is the difference between an *heir apparent* and an *heir presumptive?* 208.

9. Who cannot be accounted such an ancestor as that an *inheritance* of lands or tenements can be derived from him? 209.

10. What is the second *rule* or *canon* of *inheritance?* 212, 213.

11. What is the third *rule* or *canon* of *inheritance?* 214, 216.

12. What are exceptions to this rule? 216.

13. In what one *inheritance* does *succession* by *primogeniture* take place among females? 216.

14. In what one *inheritance* does *sole succession* take place among females? 216.

15. What is the fourth *rule* or *canon* of *inheritance?* 217.

16. When is an *inheritance* divided *per stirpes*, and when *per capita?* 217, 218.

17. What is the fifth *rule* or *canon* of *inheritance?* 220, 222.

18. What is the great and general principle upon which the law of *collateral inheritances* depends? 223.

19. What is the sixth *rule* or *canon* of *inheritance*, being, like the seventh and last, only a *rule of evidence* who the *purchasing* ancestor was? 224.

20. Who is a *kinsman of the whole blood?* 227.

21. Why is the exclusion of a *kinsman of the half-blood* not unreasonable? 228–232.

22. What one *inheritance* may descend to the *half-blood* of the person last seised, so that it be the *blood* of the first *purchasor;* and why? 233.

23. For this reason, in what kind of *estate* is *half-blood* no impediment to the descent? 233.

24. What is the seventh and last *rule* or *canon* of *inheritance?* 234.

25. What is the most probable original of this *rule?* 235.

26. When is this *rule* totally reversed? 236.

CHAP. XV.—*Of Title by Purchase; and, first, by Escheat.*

1. WHAT is *purchase*, taken in its largest and most extensive sense? 241.

2. If an *estate* be made to A. for life, *remainder* to his right heirs in *fee*, by what shall the heirs take? 242.

3. What was meant by calling William the Norman *Conqueror?* 243.

4. In what two points does the difference in effect between the acquisition of an *estate* by *descent* and by *purchase* principally consist? 243, 244.

5. What five methods of acquiring a *title* to *estates* does *purchase* include? 244.

6. What is *escheat?* 244, 245.

7. Upon what principle is the law of *escheats* founded? 245.

8. What are the first three cases wherein *inheritable blood* is wanting? 246.

9. What is the fourth case wherein *inheritable blood* is wanting? 246, 247.

10. What is the fifth case? 247, 248.

11. Who are *bastard eignè* and *mulier puisnè;* and in what case may the former *bar* the latter of his *inheritance;* and this for what three reasons? 248.

12. What legal *heirs* can a *bastard* have? 249.

13. What is the sixth case wherein *inheritable blood* is wanting? 249.

14. What is the difference of *inheritable* operation on the *blood* of *alien* in the acts of *denization* and of *naturalization?* 249, 250.

15. If an *alien* come into England and there have issue two sons, who are thereby *natural-born subjects*, and one of them purchase land and die, who cannot be his *heir*, and why? 250.

16. What is enacted by the statute 11 & 12 W. III. c. 6 as to the *inheritance* of *natural-born subjects* deriving their pedigrees through *aliens;* and how is this statute qualified by that of 25 Geo. II. c. 39? 251.

17. What is the seventh case wherein *inheritable blood* is wanting? 251.

18. What is the difference between *forfeitures* of *lands* to the *king* and *escheat* to the *lord?* 251–254.

19. By what means only can the *corruption of blood* be absolutely removed? 254.

20. If a man *attainted* be pardoned by the king, can his son inherit? 254.

21. If a man have issue a son and be *attainted*, and afterwards pardoned, and then have issue a second son and die, who cannot be his *heir*, and why? 255.

22. If the ancestor be *attainted*, may his sons be *heirs* to each other? 255.

23. What is declared in most of the new *felonies* created by act of parliament since the reign of Hen. VIII.; and wherefore is it so? 256.

24. In what singular instance are lands held in *fee-simple* not liable to *escheat* to the *lord*, even when their owner is no more, and hath left no *heirs* to inherit them? 256, 257.

25. What is the eighth and last case wherein *inheritable blood* is wanting; and how does this case differ from all the rest? 257.

CHAP. XVI.—*Of Title by Occupancy.*

1. What is *occupancy?* 258.

2. To what single instance, so far as it concerns *real property*, have the laws of England confined this *right?* 258.

3. Why was no *right* of *occupancy* allowed where the king had the *reversion* of the lands? 259.

4. What if the estate *pur auter vie* had been granted to a man *and his heirs?* 259.

5. But what do the statutes of 29 Car. II. c. 3 and of 14 Geo. II. c. 20 enact as to this *estate?* 259, 260.

6. What is the commentator's opinion as to the operation of these statutes? 260.

7. What is the law of *alluvion* and *dereliction?* 261, 262.

CHAP. XVII.—*Of Title by Prescription.*

1. What is title by *prescription;* and how is it distinguished from *custom?* 263.

2. What is called *prescribing in a que estate?* 264.

3. What has the *statute of limitations*, 32 Hen. VIII. c. 2, enacted as to *prescriptions?* 264.

4. What sort of *hereditaments* may be claimed by *prescription?* 264.

5. Why cannot a *prescription* give a *title* to lands? 264.

6. In whom must a *prescription* be laid? 265.

7. If the thing prescribed has what incapacity, why cannot the *prescription* be made? 265.

8. Why cannot *deodands, felons' goods*, and the like be prescribed for, while *treasure-trove, waifs, estrays*, and the like can? 265.

9. For what more may a man prescribe *in himself and his ancestors* than he may *in a que estate;* and why may he do so? 266.

10. Is there not a difference in the *inheritance* of a thing prescribed *in one's self and one's ancestors*, and one prescribed *in a que estate?* 266.

CHAP. XVIII.—*Of Title by Forfeiture.*

1. What is *forfeiture?* 267.

2. By what eight means may lands, tenements, and hereditaments be *forfeited?* 267.

3. What are the six offences which induce a *forfeiture* of lands and tenements to the crown? 267, 268.

4. Of what three kinds is the *alienation* contrary to law which induces a *forfeiture?* 268.

5. What is *alienation* in *mortmain, in mortua manu?* 268.

6. How were *common recoveries* invented? 271.

7. How were *uses* and *trusts* invented? 272.

8. What is *license of mortmain;* and how has it been dispensed with? 272, 273.

9. What is enacted by the statute 9 Geo. II. c. 36 as to lands and tenements, or money to be laid out thereon, given for or charged with *charitable uses?* 273, 274

10. Who are excepted out of this act; and with what proviso is the exception made? 274.

11. Why is *alienation* to an *alien* a cause of forfeiture? 274.

12. When are *alienations* by *particular tenants forfeitures;* and to whom, and for what two reasons? 274, 275.

13. What is it if *tenant in tail* alienes in *fee;* and why? 275.

14. In case of *forfeiture* by *particular tenants*, what becomes of all legal *estates* by them before created? 275.

15. What is *disclaimer*, in its nature and consequences? 275, 276.

16. What is *forfeiture* by *lapse?* 276.

17. In what two cases can no right of *lapse* accrue? 276.

18. What is the *term* in which the *title* to present by *lapse* accrues? 276, 277.

19. What if the *bishop* be both *patron* and *ordinary?* 277.

20. What if the *bishop* or *metropolitan* do not *present* immediately upon *lapse?* 277.

21. What if the *king* do not? 277.

22. In what cases only is the *bishop* required to give notice of a vacancy to the *patron*, in order to entitle him, the *metropolitan*, and the *king* to the advantage of a *lapse?* 278.

23. When does the law style the *bishop* a *disturber;* and of what does it consequently deprive him? 278.

24. What if the right of *presentation* be contested? 278.

25. What is *forfeiture* by *simony?* 278, 279.

26. Is it *simony* to purchase a *presentation*, the *living* being actually vacant? 279.

27. Is it *simony* for a *clerk* to purchase the next presentation and be thereupon presented? 279, 280.

28. Is it *simony* for a *father* to purchase such a presentation for his *son?* 280.

29. What if a *simoniacal* contract be made with the *patron*, the *clerk* not being privy thereto? 280.

30. Are bonds given to pay money to charitable uses on receiving a presentation to a *living simoniacal?* 280.

31. What *bonds of resignation* are not *simoniacal?* 280.

32. Are general *bonds of resignation* legal? 280.

33. What are the only causes for which the law will justify the patron's making use of such a general *bond of resignation?* 280.

34. Of what two kinds are the *conditions* the *breach* or *non-performance* of which induces a *forfeiture?* 281.

35. What is *waste*, and of what two kinds? 281.

36. What are the general heads of *waste* in *houses*, in *timber*, and in *land?* 281, 282.

37. Who are liable to be punished for *waste*, and who not? 282, 283.

38. What is the punishment for committing *waste?* 283, 284.

39. By what may *copyhold estates* be *forfeited?* 284.

40. Who is a *bankrupt?* 285.

41. What becomes of a *bankrupt's* lands and tenements? 285, 286.

42. With only what exception has the statute 21 Jac. I. c. 19 authorized the disposal of a *bankrupt's estate-tail* in *possession*, *remainder*, or *reversion?* 286.

CHAP. XIX.—*Of Title by Alienation.*

1. WHAT is *alienation*, *conveyance*, or *purchase*, in its limited sense? 287.
2. Who are capable of *conveying* and *purchasing?* 290.
3. How alone may *contingencies* and mere *possibilities* be assigned to a stranger? 290.
4. What seven descriptions of persons are incapable of *conveying?* 290–293.
5. Are the *conveyances* and *purchases* of *idiots* and *persons of non-sane memory*, *infants*, and *persons under duress*, void? 291.
6. May a *non compos* plead his own disability in order to avoid his acts? 291, 292.
7. May his next heir, or other person interested, plead it? 292.
8. How may the *purchase* of a *feme-covert* be *avoided?* 293.
9. What of the *conveyance* or other contract of a *feme-covert?* 293.
10. What only can an *alien* hold? 293.
11. What are the legal evidences of *alienations* called? 294.
12. What of what four kinds are these *common assurances?* 294.

CHAP. XX.—*Of Alienation by Deed.*

1. WHAT is a *deed* in its general nature? 295.
2. What is an *indenture*? 295.
3. What is a *chirograph?* 296.
4. Which is the *original*, and which the *counterpart*, of a deed? 296.
5. What is a *deed-poll?* 296.
6. What are the eight requisites of a *deed*? 296–298, 304–308.
7. What are the eight usual, formal, and orderly parts of a *deed?* 298–301, 304.
8. What are the *premises* of a deed? 298.
9. What are the *habendum* and *tenendum?* 298, 299.
10. What is the *reddendum?* 299.
11. What is a *condition?* 299, 300
12. What is the clause of *warranty*? 300.
13. What was the origin of *express warranties?* 301.
14. What was the difference between *lineal* and *collateral warranty?* 301, 302.
15. What was a *warranty commencing by disseisin?* 302.
16. In case the *warrantee* was evicted, what was the obligation of the *heir?* 302.
17. What *warranties* against the *heir* are now good? 302, 303.
18. What are *covenants?* 304.
19. What is the difference of effect between *covenanting* for *heirs* and *covenanting* for *executors and administrators?* 304.
20. For what reasons has the *covenant*, in modern practice, totally superseded the *warranty?* 304.
21. Of what does the *conclusion* of a deed consist? 304.
22. Is a *deed* good with no, or a false *date?* 304.
23. When is it necessary to the validity of a *deed* to read it to the *parties?* 304.
24. What if a *deed* be read falsely? 304.
25. Is it necessary to *sign* as well as *seal a deed?* 305, 306.
26. What is the *delivery* of a *deed;* and what is its efficacy? 307.
27. What is the difference between a *deed* and an *escrow?* 307.
28. Of what use is the *attestation* of a *deed?* 307.
29. Must the *witnesses* sign the *deed?* 307, 308.
30. By what five means may a *deed* be avoided? 308, 309.
31. What are those *deeds* called which are generally used in the alienation of *real estates?* 309.
32. Of what two natures are *conveyances* as to the manner in which they receive their force and efficacy? 309.
33. Of what two kinds are *conveyances by the common law?* 309.
34. What are the six species of *original conveyances;* and what the five of *derivative?* 310.
35. What is a *feoffment?* 310.
36. What is necessary to the perfection of a *feoffment?* 311.
37. What if an *heir* dies before *entry* made upon his *estate?* 312.
38. By what *delivery* is a *conveyance* of a *copyhold estate* made to this day? 313.
39. What is necessary, by the common law, to be made upon every *grant* of an *estate* of *freehold* in *hereditaments corporeal?* 314.
40. What is necessary in *leases for years?* 314.
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42. If a *freehold remainder* be created after, and expectant on, a *lease for years* now in being, to whom must the *livery* be made? 314, 315.
43. Of what two kinds is *livery of seisin?* 315.
44. How is *livery* in *deed* performed? 315, 316.
45. What is *livery* in *law?* 316.
46. What is the *conveyance* by *gift donatio?* 316, 317.
47. What are *grants concessiones?* 317.
48. What is a *lease?* 317, 318.
49. What was the old meaning of the word *farm*, in which sense it is used in the *operative words* of a lease, "to *farm* let"? 318.
50. To what one species of *leases* is *livery of seisin* necessary? 318.
51. What three manner of persons does the *enabling* statute, 32 Hen. VIII. c. 28, empower to make *leases* for *three lives* or *one and-twenty years?* 319.
52. But what are the nine requisites that the statute specifies which must be observed in order to render the *leases* binding? 319, 320.
53. Unless under what six regulations do the *disabling* or *restraining* statutes of Elizabeth restrain all *ecclesiastical* or *eleemosynary corporations*, and all *parsons* and *vicars*, from making any *leases* of their lands? 320, 321.
54. Is there not another restriction with regard to *college-leases* by the statute 18 Eliz. c. 6? 322.
55. What restraint upon the *leases* of *beneficed clergymen* does *non-residence* place? 322.

56. What is an *exchange?* 323.
57. Is either *livery of seisin* or *entry* necessary in order to perfect an *exchange?* 323.
58. What is a *partition?* 324.
59. Can a *partition* be made by *parol* only, in any case? 324.
60. What is a *release?* 324.
61. For what five purposes may *releases* enure? 324, 325.
62. What is a *confirmation*? 325, 326.
63. Why is not a *livery of seisin* necessary to a *release* or *confirmation* of lands? 325, 326.
64. What is a *surrender?* 326.
65. Why is not a *livery of seisin* necessary to a *surrender?* 326.
66. What is an *assignment;* and wherein does it differ from a *lease?* 326, 327.
67. What is a *defeazance;* and may it be made *after* the original conveyance? 327.
68. What are *uses* and *trusts* in our law? 328.
69. Who were the *terre-tenant*, and who the *cestuy que use*, or the *cestuy que trust?* 328.
70. What was done by the *statute of uses*, 27 Hen. VIII. c. 10? 332, 333.
71. In what do the *contingent* or *springing uses* of *a conveyance* differ from an *executory devise?* 334.
72. Why, in both cases, may a *fee* be limited to take effect after a *fee?* 334.
73. What is a *secondary* or *shifting use?* 335.
74. What is a *resulting use?* 335.
75. May *uses* originally declared be revoked at any time and new ones declared? 335.
76. What is the origin of *trusts?* 335, 336.
77. How do the courts now consider a *trust-estate?* 337.
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80. What was enacted by the 27 Hen. VIII. c. 16 as to *bargains* and *sales?* 338.
81. What gave rise to the *fourteenth* species of *conveyance;* and what is its nature? 338, 339.
82. What may be added as a *fifteenth* and a *sixteenth* species of *conveyance?* 339.
83. What are the three species of *deeds* used not to *convey* but to *charge* or *discharge* lands? 340.
84. What is an *obligation* or bond, whether *single* (*simplex obligatio*) or *conditional;* and how is it a *charge* upon lands? 340.
85. When is the *condition* of a *bond* void; and when the *bond* itself? 340, 341.
86. On the *forfeiture* of a *bond*, what sum is recoverable? 341.
87. What is a *recognizance;* and wherein does it differ from a *bond*? 341.
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89. What general *registers* for *deeds*, *wills*, and other acts affecting *real property* are there in England and Scotland? 343.

CHAP. XXI.—*Of Alienation by Matter of Record.*

1. What are *assurances by matter of record?* 344.
2. Of what four kinds are they? 344.
3. What are the intentions of *private acts of parliament?* 344.
4. With what cautions and preliminaries are *private acts of parliament* made? 345.
5. In what are the *king's grants* contained? 346.
6. What is the difference between the *king's letters-patent*, *literæ patentes*, and his *writs close*, *literæ clausæ?* 346.
7. In what three points does the *construction* of the *king's grants* differ from those of a *subject?* 347, 348.
8. What is a *fine* of lands and tenements? 348.
9. What is the origin of *fines?* 349.
10. Why is a *fine* so called? 349.
11. What is the *action of covenant* upon which the *fine* is founded? 350.
12. What is the *primer fine?* 350.
13. What is the *licentia concordani?* 350.
14. What is the *king's silver*, or *post fine?* 350.
15. What is the *concord;* and who is the *cognizor*, and who the *cognizee?* 350, 351.
16. How must the *acknowledgment* be made; and how far does this *acknowledgment* complete the *fine?* 351.
17. What is the *note* of the *fine?* 351.
18. What is the *foot* of the *fine?* 351.
19. What *proclamations* of a *fine* hath the statute added to prevent the *levying* of one by fraud or *covin?* 352.
20. Of what four kinds are *fines* thus *levied?* 352, 353.
21. What is a *fine sur cognizance de droit, come ceo que il ad de son done;* and of what efficacy is it? 352.
22. What is a *fine sur cognizance de droit tantum;* and for what is it commonly used? 353.
23. What is a *fine sur concessit?* 353.
24. What is a *fine sur done, grant, et rendet*, and wherein does it differ from the *fine sur cognizance de droit, come ceo, &c.?* 353.
25. What are the force and effect of *fines?* 354, 355.
26. What are the three classes of persons bound by a fine? 355.
27. Who are the *parties* to a *fine*, and how are they bound? 355.
28. Who are *privies*, and how are they bound? 355.
29. Who are *strangers*, and in what cases are they bound? 356.
30. But what is necessary in order to make a *fine* of any avail at all? 356, 357.
31. Upon what neglect of the *remainderman* or *reversioner* does a *tenant's for life levying a fine* fail to forfeit the *estate* from the latter to the former and *bar* it forever? 356.
32. What is the nature of a *common recovery*, and how far is it like a *fine?* 357.
33. What is the *writ of præcipe quod reddat;* and what does it allege? 358.
34. Who is the *demandant*, and who the *defendant?* 358.
35. What is the *voucher*, *vocatio*, or *calling to warranty;* and who is the *vouchee?* 358.
36. Who is the *recoverer*, and who the *recoveree?* 358.
37. What is called the *recompense* or *recovery in value?* 359.

38. Of what nature is this *recompense;* and who is usually the *common vouchee?* 359.

39. What is a *recovery* with *double voucher;* and why is it now usually employed? 359.

40. What is the reason why the *issue in tail* is held to be *barred* by a *common recovery?* 360.

41. In what light have our modern *courts of justice* considered *common recoveries?* 360.

42. How does the commentator recommend the shortening of the process of this *conveyance?* 361.

43. What are the force and effect of a *common recovery?* 361.

44. By statute, when will not a *recovery bar* an *estate tail,* and who shall not suffer a *recovery?* 362.

45. What, in all *recoveries,* is necessary on the part of the *recoveree* or *tenant to the præcipe?* 362.

46. But what are the *provisions* of the statute 14 Geo. II. c. 20 in order to make good a *recovery?* 362.

47. By what two sorts of *deed* may the *uses* of a *fine* or *recovery* be directed? 363, 364.

48. When are these *deeds* called *deeds* to *lead* the *uses* of a *fine* or *recovery,* and when *deeds* to *declare them;* for what purpose are they made; and what effect have they on the *fine* or *recovery?* 363, 364.

CHAP. XXII.—*Of Alienation by Special Custom.*

1. To what are *assurances by special custom* confined? 365.

2. How are *copyhold lands* generally transferred? 365.

3. What is *surrender sursam redditio;* and what is the manner of transferring *copyhold estates?* 365, 366.

4. What operation upon a *copyhold estate* has any *feoffment* or *grant?* 367.

5. If I would exchange a *copyhold estate* with another, or devise one, what must be done? 367, 368.

6. What effect will a *fine* or *recovery* had of *copyhold lands* in the *king's courts* have; and how may such *fine* or *recovery* be reversed by the *lord?* 368.

7. What are the three several parts of the *assurance* by *surrender?* 368.

8. What part of it does the *surrender* itself constitute? 368.

9. What if the *lord* refuse to *admit* the *surrenderee?* 368.

10. Can the *surrenderor* retract his *surrender?* 369.

11. What is the *presentment* of the *surrender;* and when and by whom must it be presented? 369.

12. What if those into whose hands the *surrender* was made refuse to *present* and the *lord* refuse to compel them to do so? 369.

13. Of what three sorts is *admittance?* 370.

14. What is the *lord* bound to do in *admittances upon a voluntary grant?* 370.

15. How is the *lord* regarded in *admittances upon surrender of a former tenant,* or *upon descent from the ancestor?* 370, 371.

16. In what, however, do *admittances upon surrender* differ from *admittances upon descent?* 371.

17. Are *heirs* of *copyhold* compellable to be *admitted?* 372.

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1. What is *devise?* 373.

2. Upon what did the restraint of *devising lands* take place? 373.

3. What *estate* only could then be *devised,* with what exceptions? 374.

4. In what shape did the popish clergy, who then generally sat in the *court of chancery,* allow of the *devise* of *lands?* 375.

5. Upon what did lands in this shape become no longer *devisable?* 375.

6. What did the *statute of wills,* 32 Hen. VIII. c. 1, enact? 375.

7. How is a *devise* to a *corporation* for a charitable use now held by the statute 48 Eliz. c. 4 to be valid? 376.

8. What does the *statute of frauds and perjuries,* 29 Car. II. c. 3, direct as to *devises* of *lands?* 376.

9. Are *copyholds* and *terms* for *years* within the statute? 376.

10. How may a *will* be *revoked?* 376.

11. What did the statute 25 Geo. II. c. 6 declare as to the *witnesses* to a *will?* 377.

12. What hath the statute 3 & 4 W. and M. c. 14 provided for the benefit of a testator's creditors? 378.

13. How is a *will* of *lands* considered by the *courts of law?* 378.

14. What distinction between *devises* of *lands* and *testaments* of *personal chattels* is founded upon this notion? 378, 379.

15. What seven general rules and maxims have been laid down by *courts of justice* for the construction and exposition of all the species of *common assurances?* 379–382.

CHAP. XXIV.—*Of Things Personal.*

1. What are included under the name of *things personal?* 384.

2. Do not things *personal* consist of *things movable* only, as *things real* do of *things immovable?* 385.

3. Under what general name, then, is the whole comprehended? 385.

4. Into what two kinds, therefore, are *chattels* distributed by the law? 386.

5. What are *chattels real?* 386.

6. Which quality of *real estates* have they which denominates them *real;* and which do they want the want of which constitutes them *chattels?* 386.

7. What are *chattels personal?* 387, 388.

CHAP. XXV.—*Of Property in Things Personal.*

1. Of what two natures is *property in chattels personal?* 389.

2. Into what two sorts is *property in chattels personal* of the former nature divided? 389.

3. What is *property in chattels personal in possession absolute?* 389.

4. Into what two classes does the law distinguish *animals?* 390.

5. What property can a man have in such animals as are *domitiæ,* and what in such as are *feræ naturæ?* 390.

6. Why, of all tame and domestic animals, does the *brood* belong to the *mother* (with what exception)? 390.

. What is *property in chattels personal, in possession qualified, limited*, or *special?* 391.

8. On what three accounts may a *qualified property* subsist in *animals feræ naturæ?* 391.

9. What are those animals *feræ naturæ* in which a *qualified property* may be acquired *per industriam hominis*, by a man's *reclaiming* and making them tame by art, industry, and education? 392.

10. How long are these *animals* the *property* of a man? 392.

11. What *animals* is it *felony* to *steal?* 393.

12. What *crime* is it to *steal* such *animals* the stealing of which does not amount to *felony?* 394.

13. When, and how long, may a *qualified property* also subsist with relation to *animals feræ naturæ, ratione impotentiæ*, on account of their own inability? 394.

14. What is that *qualified property* which a man may have in *animals feræ naturæ, propter privilegium?* 394, 395.

15. What other things besides *animals feræ naturæ* may be the objects of *qualified property;* and how long does that *property last?* 395.

16. These kinds of *qualification* in *property* arise from the *subject's incapacity of absolute ownership;* but in what cases may *property* be of a *qualified* or *special* nature, on account of *the peculiar circumstances of the owner*, when the thing itself is very capable of absolute ownership? 396.

17. Hath a *servant* who hath the care of his *master's goods* or *chattels* any *property* in them? 396.

18. What is called a *thing*, or *chose in action?* 396, 397.

19. Upon what depends, and what are the only regular means of acquiring, all *property in action?* 397.

20. Upon all *contracts*, what does the law give to the *party* injured in case of *non-performance?* 397.

21. May *things personal* be limited by *deed* or *will* in *remainder* and in *estate-tail?* 398.

22. May *things personal* be vested in *joint-tenancy*, in *common*, and in *coparcenary?* 399.

23. But how is it held that *partnership stock in trade* shall always be considered? 399.

CHAP. XXVI.—*Of Title to Things Personal by Occupancy.*

1. What are the twelve principal methods by which the *title to things personal* may be acquired and lost? 400.

2. In what eight species of *goods* may a *property* be acquired by *occupancy?* 401–406.

3. But what are the restrictions as to the right to seize the *goods* and *person* of an *alien enemy?* 401, 402.

4. To what do the restrictions which are laid upon the right to the *occupancy* of *animals feræ naturæ* principally relate? 403.

5. What constitutes an *accession* to *property?* 404, 405.

6. What is *confusion* of goods; and to whom does such act of *confusion* give the entire *property?* 405.

7. What hath the statute declared as to *literary* and other *copyright?* 407.

CHAP. XXVII.—*Of Title by Prerogative and Forfeiture.*

1. What *personal chattels* may accrue to whom by *prerogative?* 408.

2. What if the *titles* of the *king* and the *subject* concur? 409.

3. In what three classes of *books* hath the *king* a kind of *prerogative copyright?* 410.

4. Is there not still another species of *prerogative property*, founded upon a very different principle from any that have been mentioned? 410, 411.

5. What four reasons have concurred for making the restrictions which the municipal laws of many nations have exerted upon the natural right of every man to pursue and take to his own use all such creatures as are *feræ naturæ?* 411, 412.

6. What, however, is the origin of the *game-laws* in *England?* 413–416.

7. What was done by the *carta de foresta?* 416.

8. Who only, by *common law*, have a right to take or kill any *beasts of chase* not also *beasts of prey?* 416.

9. What are *free-warren* and *free-fishery;* and what does *magna carta* provide as to the latter? 417.

10. Who only, by *common law*, can justify *hunting* or *sporting* upon another man's *soil*, or, in thorough strictness, *hunting* or *sporting* at all? 417.

11. But how have the exemptions from certain *penal statutes* for *preserving the game* virtually extended what are called the *qualifications* to kill it? 417, 418.

12. For what twelve *offences* are all the *goods* and *chattels* of the *offender forfeited to the crown?* 421.

13. When do these *forfeitures commence?* 421.

CHAP. XXVIII.—*Of Title by Custom.*

1. What are the three sorts of *customary interests* which obtain pretty generally throughout most parts of the nation? 422.

2. Into what two sorts are *heriots* usually divided? 422.

3. What is *heriot-service?* 422.

4. Upon what does *heriot-custom* arise; and what is it defined to be? 422.

5. To what species of *tenures* is *heriot-custom* now for the most part confined? 423.

6. Of what does the *heriot* now usually consist; and of what *estate* is it always? 424.

7. Why can no *heriot* be taken on the death of a *feme-covert?* 424.

8. Can a *heriot* be compounded for by the payment of *money?* 424.

9. What are *mortuaries;* and why are they sometimes called *corse-presents?* 425.

10. To what certainty did the statute 21 Hen. VIII. c. 6 reduce *mortuaries?* 427.

11. What are *heir-looms;* what may they be by *special custom;* and what are they by *general?* 427, 428.

12. What other *personal chattels* are there which descend to the heir in the nature of *heir-looms?* 428, 429.

13. What if *heir-looms* are *devised* away from the *heir* by *will?* 429.

CHAP. XXIX.—*Of Title by Succession, Marriage, and Judgment.*

1. To what is *succession*, in strictness of law, only applicable? 430.

2. But what *sole corporations* have in this respect the same powers as *corporations aggregate* have? 431.

3. In case a *lease for years* be made to the *Bishop of Oxford and his successors*, who shall have it; and why? 431, 432.

4. Yet what two exceptions are there to the rule that no *chattel* can go to *corporations merely sole* in right of succession? 432.

5. How are those *chattels* which formerly belonged to the *wife* vested in the *husband* by *marriage;* and how does *personal property* differ in this respect from *real estate?* 433.

6. How do a *chattel real* and a *chattel personal* or *chose in action* vest in the *husband;* and what if he die before he have recovered or reduced them into possession? 434.

7. What shall become of the *chattel real* and *chattel personal* if the *wife* die before the husband have done so; and why? 435.

8. How do *chattels personal in possession* vest in the husband? 435.

9. What are the *wife's paraphernalia?* 435, 436.

10. Of what natures is *property in chattel interests* vested by a *judgment* in consequence of some *suit* or *action?* 436, 437.

11. What three species of *property* are of the second of these natures? 437–439.

CHAP. XXX.—*Of Title by Gift, Grant, and Contract.*

1. What is the distinction between a *gift* of *personal property* and a *grant?* 440.

2. What may be included under the head of *gifts or grants of chattels real;* and *what considerations*, in the eye of the law, convert the *gift*, if executed, into a *grant*, if not executed, into a *contract?* 440.

3. What are *grants* or *gifts* of *chattels personal;* and how may they be made? 441.

4. Why does the statute 3 Hen. VII. c. 4 declare all *deeds of gifts* of *goods* made in trust to the use of the donor void; and what does the statute 13 Eliz. c. 5 declare as to every *grant* or *gift* of *chattels*, as well as lands, with intent to defraud creditors? 441.

5. By what is a true and proper *gift or grant* always accompanied; and in what cases only may it be retracted? 441.

6. But what if the *gift* do not take effect by delivery of immediate possession? 441, 442.

7. What *interest* does a *contract* convey as distinguished from a *gift* or *grant;* and how is it defined? 442.

8. Can a *chose in action* be *assigned?* 442.

9. What are *express contracts*, and what *implied?* 443.

10. What are *executed* and what *executory contracts;* and how do they differ in the *choses* they *convey?* 443.

11. What is a *good* and what a *valuable consideration;* and how may each of these be *set aside?* 444.

12. In what four species are *valuable considerations* divided by the *civilians?* 444, 445.

13. What is a *nudum pactum;* and what degree of *reciprocity* will prevent it? 445, 446.

14. How far will *courts of justice* support a *voluntary bond* or *promissory note;* and why? 446.

15. What are the four most usual *contracts* whereby the *right of chattels personal* may be acquired in England? 446.

16. What is *sale* or *exchange;* how does the former differ from the latter; and how are both regarded by the law? 446, 447

17. Where the *vendor* hath in himself the *property* of the *goods*, when only hath he not the liberty of disposing of them? 447.

18. What constitutes a *sale?* 447, 448.

19. But in what cases may *property* be transferred by *sale* though the *vendor* have none at all in the *goods?* 449.

20. What is *market-day* and *market-overt* in the *country;* and what in *London?* 449.

21. But what has the statute 1 Jac. I. c. 21 provided as to the *sale* of goods to *pawnbrokers?* 449.

22. And in what cases are *sales* not binding even in *market-overt?* 450.

23. What directions do the statutes 2 P. and M. c. 7 and 31 Eliz. c. 12 enact concerning the *sale of horses?* 450, 451.

24. What remedy has a *purchasor* if a *vendor* sell *goods* and *chattels* as his own and the *title* prove deficient? 451.

25. When is the *vendor* bound to answer for the goodness of his wares purchased? 451.

26. What is *bailment;* and who is the *bailor*, and who the *bailee?* 451, 452.

27. What does the law call *agistment?* 452.

28. If a man deliver any thing to his friend to keep for him, when is the *bailee* answerable for any damage or loss it may sustain? 452.

29. Why, in all instances of *bailment*, may the *bailee*, as well as the *bailor*, maintain an *action* against such as injure the *chattels bailed?* 452, 453.

30. What is the difference between *hiring* and *borrowing?* 453.

31. What is *interest;* and upon what are its doctrines grounded? 454, 455.

32. To what three practices does the circumstance of the hazard of *lending money* being greater than the compensation arising from the rate of *interest* allowed by law on the *loan* give rise? 457.

33. What is *bottomry;* and in what does it differ from *respondentia?* 457, 458.

34. What is enacted by the statute 19 Geo. II. c. 37 as to all moneys lent on *bottomry* or *respondentia* on vessels bound to and from the West Indies? 458.

35. What is a *policy of insurance?* 458, 459.

36. What is enacted by the statute 14 Geo. III. c. 48 as to *insurances on lives?* 459, 460.

37. *Policies of insurance* being *contracts*, the very essence of which consists in observing the purest good faith and integrity, how is fraud or undue concealment in them provided against? 460.

38. What is enacted by the statute 19 Geo. II. c. 37 as to what are denominated *wagering policies?* 460, 461.

39. From what does the practice of purchasing *annuities for lives* at a certain price or *premium*,

instead of advancing the same sum on an ordinary *loan*, arise? 461.

40. What has the statute 37 Geo. III. c. 26 directed in order to throw some check upon improvident transactions of this kind? 461, 462.

41. What is now the extremity of *legal interest* that can be taken? 463.

42. If a *contract* which carries interest be made in a foreign country, of what *interest* will our *courts* direct the payment? 463, 464.

43. What does the statute 14 Geo. III. c. 79 enact as to the *legality* of *interest* on all *mortgages* and other *securities* upon *estates* or other *property* in *Ireland* or the *plantations?* 464.

44. What is *debt;* and in what cases may it be the counterpart of and arise from any of the other species of *contracts?* 464.

45. Into what three classes is *debt* usually divided? 465.

46. What is a *debt of record?* 465.

47. What is a *debt by specialty* or *special contract?* 465.

48. What are *debts by simple contract?* 465.

49. What is enacted by the statute 29 Car. II. c. 3 as to one person's being responsible for the *debt* of another? 466.

50. What is that species of *simple-contract debt* now introduced into all sorts of *civil* life under the name of *paper credit?* 466.

51. What is a *bill of exchange*, or *draft;* and who is the *drawer* of it, who the *drawee*, and who the *payee?* 466, 467.

52. Of what two sorts are *bills of exchange;* and what difference is there in law between them? 467.

53. What are *promissory notes*, or *notes of hand*, and for what sum at least must they be drawn? 467, 468.

54. Why is it usual in *bills of exchange* to express that the *value* thereof hath been *received* by the *drawer?* 468.

55. By what means may a *bill of exchange* or *promissory note* be assigned? 468, 469.

56. When may a *bill of exchange* be *protested* for *non-acceptance;* and when, both a *bill* and a *promissory note*, for *non-payment?* 469.

57. In case of such *protests*, what compensation is the *drawer* bound to make to the *payee* or *endorsee;* but what happens in the absence of such *protests* or their *notification* to the *drawer?* 469.

58. When a *bill* or a *note* is *refused*, how soon must it be demanded of the *drawer?* 470.

59. Upon whom may an *endorsee* call to *discharge* a *bill* or a *note?* 470.

CHAP. XXXI.—*Of Title by Bankruptcy.*

1. Who may become a *bankrupt;* and who may not? 471, 473–477.

2 What privileges do the laws of *bankruptcy* confer on the *creditors;* and what on the *debtor?* 472.

3. By what eleven acts may a man become a *bankrupt?* 478, 479.

4. What are the ten *proceedings* on a *commission* of *bankrupt?* 480–484.

5. What if the *bankrupt* make default in either surrender of himself or conformity to the directions of the statutes of *bankruptcy?* 481.

6. What powers has any *judge* or *justice of the peace* over a *bankrupt?* 481.

7. What powers have the *commissioners* of bankruptcy? 481.

8. What if the *bankrupt* conceal or embezzle any *effects* to the amount of 20*l.*, or withhold any books or writings with intent to defraud his creditors? 482.

9. What if it appear that his inability to pay his debts arose from some gross misconduct and negligence? 482.

10. After the time allowed to the *bankrupt* for such discovery is expired, to what shall any other person, voluntarily discovering any part of the *bankrupt's estate*, be entitled; and what shall any *trustee*, wilfully concealing it, forfeit? 482.

11. Of what ratable amount is the *bankrupt's allowance?* 483.

12. When shall not the *bankrupt's allowance* or *indemnity* be given him? 484.

13. What is an *act of insolvency?* 484.

14. But as to what only are persons who have been once cleared by a *bankruptcy* or by an *insolvent act* indemnified in case they become *bankrupts* again? 484, 485.

15. By virtue of the statutes of *bankruptcy*, in whom are all the *personal estate* and *effects* of the *bankrupt* considered as vested by the *act of bankruptcy?* 485.

16. What is the meaning of the saying "*Once a bankrupt and always a bankrupt*"? 485, 486.

17. Who alone is not within the statute of *bankrupts?* 486.

18. But what is provided by the statute 19 Geo. II. c. 32 as to money paid by a *bankrupt* to a *creditor*, and by statute 1 Jac. I. c. 15 as to money paid by a *debtor* to a *bankrupt?* 486.

19. What acts can and cannot the *assignees* of a *bankrupt* do without the consent of the *creditors?* 486.

20. What is the duty of the *assignees* towards the *creditors;* and within what time shall the first dividend be made? 487.

21. What *debts* of a *bankrupt* have a priority to be paid; and what shall not be postponed or set aside? 487, 488.

22. Within what time shall a second and final *dividend* be made; and if any *surplus* remain after paying every *creditor* his full *debt* to whom shall it be given? 488.

CHAP. XXXII.—*Of Title by Testament and Administration.*

1. What is a *testament*, and what an *administration?* 490.

2. What were the *reasonable parts* in a man's *chattels* of the *wife* and *children?* 492.

3. What part of his *chattels* may a man now *devise?* 492, 493.

4. When is a man said to die *intestate?* 494.

5. To whom did the *goods* of *intestates* anciently belong; and to whom were they granted? 494.

6. What is the origin of the right of the *church* to the *probate* of *wills* and to the *administration* of *intestate's property?* 494–496, 509, 510.

7. Who is the *intestate's administrator?* 496.

8. Upon what three accounts are persons prohibited, by law or custom, from making a will? 497.

9. Who are to be reckoned in the first species? 497.

10. Are *prisoners, captives,* and the like absolutely *intestable?* 497.

11. In what cases may a *feme-covert* make a *testament* of *chattels?* 498.

12. Who is an exception to the general rule that a *feme-covert* cannot make a *testament* of *chattels?* 498.

13. What if a *feme-sole* make her will and afterwards marry? 499.

14. Who are persons incapable of making *testaments* on account of their criminal conduct? 499.

15. Into what two sorts are *testaments* divided? 500.

16. What is a *codicil;* and of what two sorts? 500.

17. Under what three restrictions has the *statute of frauds,* 29 Car. II. c. 3, laid *nuncupative wills* and *codicils?* 500, 501.

18. What *witness* of their *publication* do *written testaments* of *chattels* need? 501.

19. What if there be many *testaments* of different dates; and what effect has the *republication* of a former *will* upon one of a later date? 502.

20. In what three ways may *testaments* be avoided? 502.

21. What if a man who hath made a *will* marry and have a child? 502.

22. Is it necessary to leave the *heir* a *shilling;* or, if the *heir* or *next of kin* be totally omitted in the *will,* does the law admit a *querela inofficiosi* to set it aside? 503.

23. What is an *executor,* and who may be one? 503.

24. What must be done if the *executor* be not seventeen years of age, or be out of the realm when a *suit* is commenced in the *ecclesiastical court* touching the *validity* of the *will?* 503.

25. What if the testator name no, or incapable, *executors,* or if the *executors* named refuse to act? 503, 504.

26. What if the deceased die wholly *intestate* without making either *will* or *executors?* 504.

27. In granting *letters of administration* pursuant to the statutes 31 Edw. III. c. 11 and 21 Hen. VIII. c. 5, by what seven rules is the *ordinary* bound? 504, 505.

28. Who may *administer* to a *bastard?* 505, 506.

29. If the *executor* of A. die, who is A.'s *executor?* 506.

30. Is it the same with regard to A.'s *administrator?* 506.

31. What is an *administrator de bonis non?* 506

32. What is the difference between the offices and duties of *executors* and those of *administrators?* 507.

33. Who is an *executor de son tort;* and how shall he be treated? 507.

34. What are the seven powers and duties of a rightful *executor* or *administrator?* 508, 510–512, 514, 515.

35. In what two ways is a *will proved;* and what is styled the *probate?* 508.

36. When must the will be *proved* before the *ordinary* of the *jurisdiction,* and when before the *metropolitan* of the *province* by way of *special prerogative?* 508, 509.

37. If there be two or more *executors* or *administrators,* is a *sale* or *release* by one of them good against the rest? 510.

38. What are called *assets?* 510.

39. In what order of priority must the deceased's *debts* be paid? 511.

40. What if a *creditor* constitute his *debtor* his *executor?* 512.

41. May an *executor* or *administrator* give himself the preference in the payment of the deceased's *debts* and *legacies?* 511, 512.

42. What is a *legacy,* and what is necessary to its perfection? 512.

43. In case of a deficiency of assets, what *legacies* must *abate,* and how? 512, 513.

44. What is a *lapsed legacy;* and to whom does it *lapse?* 513.

45. What is a *contingent* and what a *vested legacy?* 513.

46. But what if such *legacies* be charged upon *real estate?* 513.

47. When do *legacies* carry *interest?* 513, 514.

48. What is a *donation causa mortis?* 514.

49. When shall the *residuum* go to the *executor,* and when to the *next of kin?* 514, 515.

50. How do the statutes 22 & 23 Car. II. c. 10, explained by 29 Car. II. c. 30 and 1 Jac. II. c. 17, distribute the surplusage of *intestate's estates?* 515, 516.

51. But what are the *customs* of the *city* of *London* and the *province* of *York* as to the distribution of *intestate's effects* which are expressly reserved by the *statute of distributions?* 518, 519.

52. What is the *widow's chamber* by these *customs?* 518.

53. What was the *dead man's part?* 518.

54. In what two principal points do the *customs* of *London* and *York* considerably differ? 519.

BOOK III.—OF PRIVATE WRONGS.

CHAP. I.—*Of the Redress of Private Wrongs by the mere Act of the Parties.*

1. WHAT are *private wrongs* as distinguished from *public wrongs;* and why are the former frequently termed *civil injuries,* and the latter *crimes* and *misdemeanours?* 2.

2. How is the redress of *private wrongs* principally to be sought? 2, 3.

3. Into what three species may the redress of *private wrongs* be distributed? 3.

4. Of what two sorts is that redress of *private wrongs* which is obtained by the mere *act* of the *parties?* 3.

5. Of what six species is that redress of *private wrongs* which arises from the *sole act* of the *injured party?* 3–6, 15.

6. What is a *distress, districtio;* and for what four *injuries* may a *distress* be taken? 6, 7.

7. What are *cattle damage-feasant?* 7.

8. What six species of *things* cannot be *distrained?* 7–10.

9. What are cattle *levant* and *couchant elevantes et cubantes?* 9.

10. When, where, and how must all *distresses* be made; with what exceptions as to the time? 11.

11. In what cases may a second *distress* for the same *duty* be made? 11, 12.

12. What does the *statute of Marlberge*, 52 Hen. III. c. 4, enact as to *unreasonable distress?* 12.

13. How must a *distress* be disposed of; and when may it be *rescued* by its owner? 12.

14. What is a *pound* (*parcus*); and of what four kinds? 12.

15. What is the difference in the effect between *impounding* a *live distress* in a *common pound-overt* and in a *special pound-overt?* 13.

16. What if the *beasts* are put in a *pound-covert;* or if a *distress* of *dead chattels* be not put in one? 13.

17. How long must *beasts* taken *damage-feasant* and *distresses* for *suit* or *services* remain *impounded?* 13.

18. What is to *replevy* (*replegiare*)? 13.

19. When is the *distress* salable for a *debt* due to the *crown* for an *amercement* to the *lord*, and for *statute distresses;* and when in all cases of *distress* for *rent?* 14.

20. What has the statute 11 Geo. II. c. 19 provided in case of any unlawful act done in taking a *distress?* 15.

21. Are those who are entitled to that redress of *private wrongs* which arises from the *sole act* of the *injured party* debarred of their redress by *suit* or *action?* 15.

22. Of what two species is that redress of *private wrongs* which arises from the *joint act* of *all the parties* together? 15.

23. What is *accord;* and what is its effect? 15, 16.

24. In what cases is *tender* of sufficient amends to the *party injured* a *bar* of all *actions?* 16.

25. What is *arbitration;* who is an *umpire* (*imperator* or *impar*); and what is an *award?* 16.

26. How may the right of *real property* pass by an *award?* 16.

27. In what case does the statute 9 & 10 W. III. c. 15 enact that all submissions of *suit* to *arbitration* or *umpirage* may be made *rules* of any of the *king's courts of record?* 17.

CHAP. II.—*Of Redress by the mere Operation of Law.*

1. Of what two species is that redress of *private wrongs* which is effected by the *mere operation of law?* 18.

2. Why, when a *creditor* is *executor* or *administrator*, is he allowed to *retain* his own *debt?* 18, 19.

3. But in prejudice to whom can he not *retain* his own *debt?* 19.

4. What is *remitter?* 19, 20.

5. But what if the subsequent *estate* or *right of possession* be gained by a man's own act and consent? 20.

6. What is the reason why this remedy of *remitter* to a *right* was *allowed?* 20.

7. But what, too, if the party have no remedy by *action?* 21.

CHAP. III.—*Of Courts in General.*

1. What is that redress of *private wrongs* wherein the *act of the parties* and the *act of law* co-operate? 22.

2. Is not the ordinary course of *justice* excluded by the extrajudicial remedy which the law allows in the several cases of redress by the *act of the parties* mentioned in a former chapter? 22, 23.

3. What in the cases of remedy by the mere *operation of law?* 23.

4. What is a general and indisputable rule where there is a legal *right?* 23.

5. What is a *court* defined to be? 23.

6. Whence are all *courts of justice* derived? 24.

7. What one distinction runs throughout all *courts of justice?* 24.

8. What constitutes a *court of record;* and by what shall its existence be tried? 24, 25.

9. What is a *court not of record;* what is the extent of its power, and by what shall its existence be tried? 25.

10. What three constituent parts must there be in every *court;* and what assistants is it usual for the *superior courts* to have? 25.

11. What is an *attorney at law?* 25.

12. Who cannot appear in *court* by *attorney?* 25.

13. What are the qualifications of *attorneys?* 26.

14. Of what two species or degrees are *advocates* or *counsel?* 26.

15. When may a *barrister* be called to the state and degree of a *serjeant;* and who are by custom always admitted into this venerable order as a qualification for their office? 27.

16. Who are *his majesty's counsel learned in the law*, and his *attorney* and *solicitor general;* and what are their restrictions? 27.

17. To what does a *patent of precedence* entitle a *barrister?* 28.

18. Who are *clients?* 28.

19. Can a counsel maintain an action for his fees? 28.

20. For what spoken by him is a *counsel* not answerable? 29.

21. How are *counsel* guilty of deceit or collusion punishable by the statute Westminster 1, 3 Edw. I. c. 28? 29.

CHAP. IV.—*Of the Public Courts of Common Law and Equity.*

1. Of what two natures are *courts of justice* with regard to their several species? 30.

2. Of what four sorts are *public courts of justice?* 30.

3. What are the ten general and *public courts of common law* and *equity* constituted for the redress of *civil* injuries, beginning with the lowest; and, of these ten, which are of a partial jurisdiction and confined to particular districts, and which are the *superior courts*, calculated for the administration of redress throughout the whole kingdom; which are *courts* of *record*, and which *not*, and which are *courts* of *equity* as well as *law?* 32–35, 37, 41, 44, 47, 48, 56, 57.

4. What is the *court of piepoudre;* who is the *judge* of it; what is its jurisdiction; and where lies an appeal from it? 32, 33.

5. What is the *court-baron;* by whom is it held as *registrar;* and of what two natures is it? 33.

6. Before whom, as *judges*, is the *court-baron*

of the second or *common-law* nature held; what *pleas* may it hold; whither may its *proceedings* be removed; and where lies an appeal from it? 34.

7. What is a *hundred court;* who are its *judges* and *registrar;* whither may its *proceedings* be removed; and where lies an appeal from it? 34, 35.

8. What is the *county court;* what *pleas* may it hold; who are its real *judges*, and who its *ministerial officer;* whither may its *proceedings* be removed; and where lies an appeal from it? 36, 37.

9. What is the origin of the *court of common pleas* or *common bench;* and by what was the *court* rendered fixed and stationary where? 38, 39.

10. What benefit did the *common law* itself derive from this establishment of its principal *court?* 39.

11. Into what two sorts are *pleas* or *suits* regularly divided; and of what *court's* jurisdiction were each of these the proper objects? 40.

12. What are the *judges* of the *court of common pleas;* and when do they sit? 41.

13. Where lies an appeal from this *court?* 41.

14. What is the *court of king's bench;* why is it so called, and what are its *judges?* 41.

15. For what reason is all *process* issuing out of this *court* in the *king's* name returnable "*ubicunque fuerimus in Anglia*"? 41, 42.

16. What is the jurisdiction of this *court;* and by what fiction can it hold *plea* of all personal actions whatever? 42–44.

17. Where lies an appeal from this *court*? 44.

18. What is the court of *exchequer* (*scacchario*); why is it so called; and what is its rank? 44.

19. Of what two divisions does it consist; and what are the two subdivisions of the second division? 44.

20. Where and before whom is the *exchequer court of equity* held; and what is the primary and original business of this *court?* 45.

21. But by what fiction, with the help of the *common-law* part of this *court's* jurisdiction, may all kinds of *personal suits* be prosecuted in it? 45, 46.

22. Where lies an appeal from the *equity* side of this court; and where from the *common law?* 46.

23. What is the *court of chancery* (*cancellaria*); why is it so called; and how is the office of *chancellor* or *lord-keeper* created? 47.

24. What is the *chancellor virtute officii;* and what are his powers and authorities? 47, 48.

25. Of what two distinct tribunals does the *court of chancery* consist? 48.

26. What is the jurisdiction of the ordinary *legal court* in *chancery;* what if any *fact* be disputed between the *parties;* and where lies an appeal from its *judgments in law?* 48, 49.

27. What *writs* issue from the *common-law court* in *chancery;* and what is the origin of the *hanaper* and *petty-bag* offices? 49.

28. What is the origin of the separate jurisdiction of the *chancery* as a *court of equity?* 51–53.

29. How was that notable dispute decided which was set on foot by Sir Edward Coke when *chief justice* of the *court of king's bench*, whether a *court of equity* could give relief after or against a *judgment* at *common law?* 54.

30. What *chancellor* first built a system of *equitable* jurisprudence and jurisdiction upon wide and rational foundations, and occasioned the power and business of the *court* of *chancery* to increase to its present amazing degree? 56.

31. Where lies an appeal from this *court of equity* in *chancery;* and what two differences are there between *appeals* from a *court of equity* and *writs of error* from a *court of law?* 56.

32. What is the nature of all the branches of the *court of exchequer chamber;* and of whom does it now consist? 56, 57.

33. Where lies an appeal from this *court?* 57.

34. What is the nature of the *house of peers* as a *court of judicature;* and where lies an appeal from it? 57.

35. What is an *eleventh* species of *courts* of general jurisdiction and use which are derived out of, and act as collateral auxiliaries to, the foregoing? 58.

36. Of what are these *courts* composed; how often in the year are they instituted, and for what purpose? 58, 59.

37. By virtue of what five several authorities do the *judges* upon their *circuits* now sit? 60.

38. What is a commission *of assize?* 60.

39. What is a commission of *nisi prius?* 60.

CHAP. V.—*Of Courts Ecclesiastical, Military, and Maritime.*

1. Who first separated the *ecclesiastical court* from the *civil?* 62.

2. What are the seven principal *courts* of *ecclesiastical* jurisdiction, or, as they are often styled, *courts Christian*, (*curiæ Christianitatis*,) beginning with the lowest? 64–67.

3. What is the jurisdiction of the *archdeacon's court;* before whom may it be held; and where lies an appeal from it? 64.

4. What is the jurisdiction of the *consistory court* of every *diocesan bishop;* where is it held; who is the *judge;* and where lies an appeal from it? 64.

5. What is the *court of arches;* why is its *judge* called *dean of the arches;* what is now the jurisdiction of the *court;* and where lies an appeal from it? 64, 65.

6. What is the *court of peculiars;* what is its jurisdiction; and where lies an appeal from it? 65.

7. What is the jurisdiction of the *prerogative court;* by whom is the judge appointed; and where lies an appeal from it? 65, 66.

8. What is the nature of the *court of delegates* (*judices delegati*); and by whom are they appointed? 66, 67.

9. What is a *commission of review?* 67.

10. What is the only *court military* known to and established by the permanent laws of the land; before whom is it held; of what has it cognizance; and where lies an appeal from it? 68.

11. What are the three *maritime courts;* and what are their power and jurisdiction? 68, 69.

12. Before whom is the *court of admiralty* held; according to the method of what law are its proceedings; and where is it held? 69.

13. Where lies an appeal from the ordinary

sentences of the *admiralty judge;* but, in cases of *prize vessels* taken in the time of war in any part of the world and condemned in any of the *courts of admiralty* or *vice-admiralty* as lawful prize, where lies an appeal? 69.

CHAP. VI.—*Of Courts of a Special Jurisdiction.*

1. WHAT are the ten *courts* whose jurisdiction is *private* and special, confined to particular spots, or instituted only to redress particular injuries? 71, 73–75, 77–80, 83.

2. What were the *forest courts?* 71–73.

3. By whom is the *court of commissioners of sewers* appointed; what are their jurisdiction and power; and under whose control are they? 73, 74.

4. What are the power and jurisdiction of the *court of policies of assurance*; by whom may it be appointed; of whom does it consist; and why has it fallen into disuse? 74, 75.

5. What is the origin of the *court* of the *marshalsea* and the *palace-court* at Westminster; how were both revived by king Charles I.; what is their present jurisdiction; how may their *proceedings* be removed; and where lies an appeal from them? 75, 76.

6. What are the *courts* of the *principality of Wales;* by whom are the *judges* of *session* appointed; what is their jurisdiction; and where lies an appeal from their *judgments?* 77.

7. What *writs* of *process* of the *king's courts at Westminster* run into the *principality of Wales;* and when may *actions* between Welsh parties be brought in the English *courts*, and where may they be tried? 77, 78.

8. What are the nature and jurisdiction of the *court* of the *duchy-chamber of Lancaster;* and before whom may it be held? 78.

9. What is the jurisdiction of the *courts* appertaining to the *counties palatine* of *Chester, Lancaster,* and *Durham,* and the *royal franchise* of *Ely;* under whose *government* are these *franchises*; and by virtue of what do the *judges* of *assize* sit therein? 78, 79.

10. What *franchises* and exclusive jurisdiction (before whom) have the *cinque ports* of *Dover, Sandwich, Romney, Hastings,* and *Hythe,* to which *Winchelsey* and *Rye* have been added; and what is the progress of an appeal from them? 79.

11. Why may all *prerogative writs* issue to these exempt jurisdictions? 79.

12. What are the *stannary courts* in Devonshire and Cornwall; and before whom are they held? 79.

13. What are the privileges of *tinners;* and what is the progress of appeal from decisions in a *stannary court?* 80.

14. What is the origin of the several *courts* within the city of London and other cities, boroughs, and corporations, held by prescription, charter, or act of parliament; under what superintendency are they; and according to what law must their proceedings be? 80, 81.

15. What are the nature and constitution of the *courts of requests* or *courts of conscience;* and wherein do their proceedings vary from the course of the *common law?* 81.

16. What does the commentator recommend in preference to *courts of requests;* and why? 82, 83.

17. In what one instance have the proceedings in the *county* and *hundred courts* been again revived by the statute 23 Geo. III. c. 33; and what does it enact? 83.

18. What are the jurisdiction and system of jurisprudence of the *chancellor's courts* in the two *universities* of England; and why, in the reign of Queen Elizabeth, was an act of *parliament* obtained confirming all the *charters* of the two *universities?* 83–85.

19. Who is the *judge* of the *chancellor's court;* and what is the progress of an appeal from its decisions? 85.

CHAP. VII.—*Of the Cognizance of Private Wrongs.*

1. OF what three classes are *wrongs* or *injuries* cognizable by the *ecclesiastical court,* not for the sake of the party *injuring,* (*pro salute animæ,*) but for the sake of the party *injured?* 87, 88.

2. From what five principal *injuries* do the *pecuniary causes* cognizable in the *ecclesiastical court* arise? 88–92.

3. When will a suit for *tithes* lie in *ecclesiastical courts?* 88, 89.

4. What, by the ancient law and by the statute 2 & 3 Edw. VI. c. 13, is the penalty in case any person shall carry off his *predial tithes* before the tenth part be duly set forth, or agreement be made with the proprietor, or shall withdraw his *tithes* of the same, or shall hinder the proprietor of the *tithes,* or his deputy, from viewing or carrying them away? 89.

5. But how may what *tithes* and *dues* be recovered by statutes 7 W. III. c. 6 and 8 W. III. c. 34? 89, 90.

6. When will a suit for *fees* lie in the *ecclesiastical courts?* 90.

7. When has a *curate* a remedy for his salary in the *ecclesiastical court?* 90.

8. What is *spoliation,* and when is it cognizable in the *spiritual court?* 90, 91.

9. When will the *temporal courts* interfere with the *spiritual* in *causes matrimonial?* 93.

10. What are the five principal *matrimonial causes* now cognizable in the *ecclesiastical courts?* 93, 94.

11. When does the *ecclesiastical law* decree a divorce *à mensâ et thoro,* and when *à vinculo matrimonii?* 94.

12. What are the three principal *testamentary causes* belonging to the *ecclesiastical* jurisdiction? 98.

13. In what cases of *testamentary causes* do the *courts of equity* exercise a concurrent jurisdiction with the *ecclesiastical courts;* and why? 98.

14. According to the practice of what laws are the proceedings in the *ecclesiastical courts* regulated? 100.

15. When will the *courts* of *common law* award a prohibition against the proceedings in the *spiritual court?* 100.

16. What is the ordinary course of proceeding in the *ecclesiastical courts?* 100, 101.

17. What *process* have the *ecclesiastical courts* to enforce their *sentences?* 101.

18. What are the two sorts of *excommunication?* 101.

19. What if the *judge* of any *spiritual court* excommunicate a man for a cause of which he hath not the legal cognizance? 101.

20. What acts is an excommunicated person disabled from doing? 102.

21. What are writs of *significavit* or *de excommunicato capiendo* and *de excommunicato deliberando;* when and whence do they issue; and what are their effects? 102.

22. What assistance is given by the statutes 27 Hen. VIII. c. 20 and 32 Hen. VIII. c. 7 in case of *subtraction of tithes?* 102, 103.

23. What is the jurisdiction of the *court military* or *courts of chivalry* declared to be by statute 13 Ric. II. c. 2; and by what fiction of *common law* has it been still more narrowly confined? 103.

24. Of what two *civil injuries* is it cognizable? 103, 104.

25. Will an *action for words* lie; and what remedy can the *court military* give as a *court of honour?* 104.

26. What were the proceedings of the *court military* as a *court of heraldry* and *precedence;* and why has it fallen into disuse? 105.

27. What *deeds* and *records* of the *heralds* are received in a *court of justice?* 105.

28. How has the *house of lords* provided for the *descent of peers?* 106.

29. Have the *courts maritime* cognizance of any thing done by water within the body of any *county*, of *wrecks*, of things *flotsum, jetsam,* and *ligan*, of seaman's wages contracted for on land, of *charter parties* or ship covenants, or of contracts made upon sea to be performed in England; and what is the general rule as to their jurisdiction? 106, 107.

30. By what fiction of *common law* has the cognizance of *suits* been drawn from the *courts* of *admiralty* to those of *Westminster hall?* 107.

31. What if a question that is proper for the cognizance of the *court* of *admiralty* should arise in a *cause* of which that *court* hath not the original jurisdiction; or if a question properly determinable by the *common law* should arise in a *cause* of which the *court* of *admiralty* hath the original jurisdiction? 108.

32. Upon what laws are the proceedings of the *courts of admiralty* founded? 108.

33. What are their *process* and power? 108, 109.

34. What *injuries* are cognizable by the *courts* of *common law?* 109.

35. What is the remedy when *justice* is either refused or delayed by an *inferior court* that has proper cognizance of the cause? 109.

36. What is a writ of *procedendo ad judicium;* and when and whence does it issue? 109, 110.

37. What is a writ of *mandamus;* and when and whence does it issue? 110, 111.

38. What is a *peremptory mandamus;* when does it issue; and what if a *false return* should be made to it? 111.

39. What is the remedy when an *inferior court* encroaches on its jurisdiction or calls one *coram non judice* to answer in a *court* that has no legal cognizance of the cause? 111.

40. What is a writ of *prohibition;* and when, whence, and whither does it issue? 112.

41. What if the *judge* or the *party* shall proceed after such *prohibition?* 113.

42. What is the usual form of proceeding upon *prohibitions?* 113.

43. When is the *party* applying for the *prohibition* directed to *declare* in *prohibition;* and what is the nature and effect of that proceeding? 113, 114.

44. When is a writ of *consultation* awarded upon that proceeding; why is it so called; and what is its effect? 114.

45. What if the *fact* upon which the *prohibition* is granted be afterwards falsified? 114.

46. In what other case is the writ of *consultation* frequently granted? 114.

CHAP. VIII.—*Of Wrongs and their Remedies respecting the Rights of Persons.*

1. What two things may be considered in treating of the cognizance of *injuries* by the *courts* of *common law?* 115.

2. What is the plain, natural remedy for every species of *wrong* between *subject and subject?* 116.

3. In what two ways may this remedy be effected? 116.

4. What are the instruments whereby this remedy is obtained? 116.

5. Into what three kinds are the *suits*, from the subject of them, distinguished? 117.

6. Of what two sorts are *personal actions;* and upon what is each said to be founded? 117.

7. What are *real actions;* and why and for what are they now pretty generally laid aside in practice? 118.

8. What are *mixed actions?* 118.

9. What distinction into two kinds runs through all *civil injuries;* the latter species why savouring of the criminal kind, and how, therefore, in strictness of law, liable to a double punishment? 118, 119.

10. May we make the same division of *injuries* that we did of *rights* in a former book? 119.

11. Into what two kinds, may we remember, were the *rights of persons* distributed; and what three were the *absolute rights* of each individual defined to be; and must the *wrongs* or *injuries* affecting them be of a correspondent nature? 119.

12. Of what five kinds are the *injuries* which affect the *personal security* of individuals? 119.

13. By what five means may the two species of *injuries* affecting the limbs or bodies of individuals be committed? 120, 121.

14. What is necessary to complete the *injury* of *threat?* 120.

15. What constitutes *assault?* 120.

16. What constitutes *battery;* and when is *battery* justifiable? 120.

17. What is the plea of *son assault demesne?* 120.

18. What is the plea of *molliter manus imposuit;* and when may it be pleaded in *justification?* 121.

19. What is *mayhem?* 121.

20. What are the *members* the loss of which constitutes *mayhem;* and what are not? 121.

21. For which of these five *injuries* may an *indictment* be brought as well as an *action;* and why? 121.

22. What are the *injuries* affecting a man's *health;* and, these being *injuries* unaccompanied by force, what is the remedy for them? 122.

23. What is the special action of *trespass* or transgression *upon the case;* and why is it so called? 122.

24. When is it a settled distinction that the remedy shall be by an action of *trespass vi et armis*, and when by an action of *trespass upon the case?* 123.

25. Of what three kinds are *injuries* affecting a man's *reputation* or good name? 123, 125, 126.

26. What *words* are *actionable* without proving any particular *damage* to have happened, but merely upon the probability that it might happen? 123, 124.

27. What is *scandalum magnatum;* how is it redressed; and, if tending to scandalize whom, are *words* reputed more highly injurious than ordinary? 123, 124.

28. What is called laying an action for *words* with a *per quod?* 124.

29. When are scandals cognizable only in the *ecclesiastical court?* 124, 125.

30. What *words* are not *actionable?* 124, 125.

31. When will no *action* for *words* lie, even though *special damage* have ensued; and is it *damnum absquæ injuriâ*? 125.

32. What are *libels;* and why are there what two remedies for *libels?* 125.

33. In the remedy by *action on the case* for *libel*, may the *defendant justify* the truth of the facts and show that the *plaintiff* has received no *injury at all?* 125, 126.

34. What is it necessary for the plaintiff to show in *actions* for *libels* by signs and pictures? 126.

35. In the case of *injuries* affecting a man's *reputation* by *malicious prosecutions*, when does the law give him the choice of what two remedies? 126.

36. By what *injury* is the *right* of *personal liberty* violated? 127.

37. What two points are requisite to constitute the *injury* of *false imprisonment?* 127, 128.

38. Of what two sorts is the remedy for *false imprisonment?* 128.

39. What are the four means of *removing* the actual *injury* of *false imprisonment?* 128.

40. What is the *writ of mainprize, manucaptio;* when is it *generally* granted, and when *specially;* and how do *mainpernors* differ from *bail?* 128.

41. What is the *writ de odio et atia;* what does *magna carta* say of it; by what was it abolished; and by what is Sir Edward Coke of opinion that it was revived? 128, 129.

42. What is the *writ de homine replegiando;* and when does a process issue called a *capias in withernam;* and what is its effect? 129.

43. But what hath almost entirely antiquated these three remedies of *false imprisonment;* and to what hath it caused a general recourse to be had in behalf of persons thus aggrieved? 129.

44. What four kinds of the *writ of habeas corpus* are made use of by the *courts* at Westminster for removing prisoners from one *court* to another in the more easy administration of justice? 129, 130.

45. What is the *habeas corpus ad respondendum?* 129.

46. What is that *ad satisfaciendum?* 129.

47. What are those *ad prosequendum, testificandum, deliberandum*, &c.? 129.

48. What is the common *writ ad faciendum et recipiendum;* and why is the *writ* frequently denominated an *habeas corpus cum causa?* 129, 130.

49. Upon what is this writ grantable, and what is its effect? 130.

50. But what is ordered by the statute 1 & 2 P. and M. c. 13 in order to prevent the surreptitious discharge of *prisoners?* 130.

51. And what is enacted by statutes 21 Jac. I. c. 23, 12 Geo. I. c. 29, and 19 Geo. III. c. 70, in order to avoid vexatious delays by removal of frivolous *causes?* 130, 131.

52. But what is the great and efficacious *writ* in all manner of illegal confinement; what does it direct; and when, whence, and whither does it issue? 131, 132.

53. How must this *writ* be obtained; and why? 132, 133.

54. When is this *writ* a *writ of right* in whom against whom? 133.

55. What is it absolutely necessary to express upon every *commitment?* 134.

56. What does the statute 16 Car. I. c. 10, § 8 enact as to the writ of *habeas corpus?* 135.

57. What does the famous *habeas corpus* act, 31 Car. II. c. 2, enact; but to what *commitments* only does it extend? 136, 137.

58. What if the writ be not immediately obeyed? 137.

59. What is the *satisfactory* remedy for the *injury* of *false imprisonment*? 138.

60. What four relations of persons do *injuries* which affect the *relative rights* of individuals particularly affect? 139.

61. What are the three principal *injuries* which may be offered to a *husband?* 139.

62. What does the law always suppose in case of *abduction;* and why? 139.

63. What two species of remedy has the husband for this *injury?* 139.

64. What satisfaction does the law give a husband for the *civil injury* of *adultery?* 139.

65. By what circumstances are the *damages* recovered for this *injury* increased or diminished? 140.

66. In what cases must *marriage* in fact be proved? 140.

67. When does the law give the *husband* a separate remedy by an action of trespass *per quod consortium amisit?* 140.

68. Of what two kinds were *injuries* that might be offered to persons considered in the *relations* of *parent* or *guardian;* and, provided either be still an *injury*, what is the remedy? 140, 141.

69. But what more speedy and summary method of redressing all complaints relative to *wards* and *guardians* hath of late obtained; and what is expressly provided by statute 12 Car. II. c. 24 as to *testamentary guardians?* 141, 142.

70. What two species of *injuries* are incident to the *relation* between *master* and *servant*, and the rights accruing therefrom? 142.

71. Who have what two remedies in case on man beat or confine another's servant? 142.

CHAP. IX.—*Of Injuries to Personal Property.*

1. Of what two natures are the *injuries* which may be offered to the *rights* of *property?* 144.

2. What are the two sorts of *injuries* which may be offered to the rights of *personal property?* 145.

3. To what two species of *injuries* are the *rights* of *personal property* in *possession* liable? 145.

4. Into what two branches is *dispossession* divisible? 145.

5. Of what two kinds is the remedy which the law has given for an unlawful *taking* of goods? 145, 146.

6. By what two species of *action* is the actual specific possession of the identical *personal chattel* restored to the proper owner? 146.

7. Why may this be done in the case of *distress* more than in any other? 146.

8. What are the two species of *rescous* and their several remedies? 146.

9. What is an action of *replevin;* and what do the *statutes of Marlberge* and of 1 P. and M. c. 12 direct the sheriff to do concerning *replevin?* 147.

10. In pursuance of the statute of Westminster 2, 13 Edw. I. c. 2, for what two things is security to be given by the party *replevying* to the *sheriff* or his deputy; and what does the statute 11 Geo. II. c. 19 require besides of the officer granting a *replevin* on a *distress* for *rent?* 147, 148.

11. But what if the *distrainor* claim any property in the goods so taken and to keep them by a kind of *personal remitter?* 148.

12. And what if the *sheriff return* that the goods or beasts are *eloigned, elongata,* carried to a distance to places to him unknown? 149.

13. When can goods taken *in withernam* be *replevied?* 149.

14. Upon *action* of *replevin* brought, when does the *distrainor* or *defendant* make *avowry,* and when *cognizance?* 150.

15. What if the *cause* be determined for the *plaintiff;* and what if for the *defendant;* and what does the statute of Westminster 3, c. 2 enact in this latter event? 150.

16. When shall the *plaintiff* have a *writ of second deliverance* and the *defendant* a *writ of return irreplevisable;* and what are they? 150.

17. What does the statute 17 Car. II. c. 7 direct if the *plaintiff* in an *action* of *replevin* be *nonsuit* before *issue* joined, or if *judgment* be given against him on *demurrer;* and what if the *nonsuit* be after *issue* joined, or if a *verdict* be against the *plaintiff?* 150, 151.

18. But what if, pending a *replevin* for a former *distress,* a man *distrain* again for the same *rent* or *service?* 151.

19. What is the remedy if one man take the goods of another out of his possession; or what other remedy may the *party* have, at his choice, if the taking be without force? 151.

20. Of what two kinds is the remedy for the unlawful *detaining* of goods lawfully taken? 151, 152.

21. By what two species of *action* may the first of these kinds of remedy be sought? 151, 152.

22. What is necessary in an *action* of *detinue;* and for what, therefore, cannot such *action* be brought? 152.

23. What four points are necessary to ground an *action* of *detinue?* 152.

24. But what disadvantage attends this *action;* and whence did it arise? 152.

25. What was the *action* of *trover* and *conversion* in its original; and why by fiction of law was its use enlarged to what extent? 153.

26. What shall be recovered by an *action* of *trover* and *conversion?* 153.

27. What are the two remedies for *damage* that may be offered to *things personal* while in the possession of the owner? 153, 154.

28. From what do all *injuries* affecting the *right* of *things personal* in *action* arise? 154.

29. What is the twofold division of *contracts?* 154.

30. What three distinct species do *express contracts* include? 154.

31. What is the legal acceptation of *debt?* 154.

32. What are the two species of remedy for *debt;* and when only will the first lie? 154, 155.

33. For what two reasons is *action of debt* seldom brought but upon *special contracts* under seal? 155.

34. Wherein does an *action on the case,* or what is called an *indebitatus assumpsit,* differ from an *action of debt?* 155, 156.

35. But what, in an *action of debt,* if the *defendant* can show that he has discharged any part of it? 156.

36. When is the form of the writ of *debt* in the *debet* as well as the *detinet;* and when in the *detinet* only? 156.

37. What is a *covenant;* and what is the remedy for a breach of one? 156, 157.

38. What is a *covenant real;* and what is the remedy for a breach of one? 157.

39. What does the statute 32 Hen. VIII. c. 34 give to the *grantee* or *assignee* of a *reversion?* 158.

40. What is a *promise;* and what is the remedy for a breach of one? 158.

41. In the case of a *simple contract debt,* what is it that gives the *creditor* his *action on the case* instead of being driven to an *action of debt?* 159.

42. In what five cases does the statute of frauds and perjuries, 29 Car. II. c. 3, enact that no verbal promise shall be sufficient to ground an action upon, but at least some note or *memorandum* of it shall be made in writing and signed by the *party* to be charged therewith? 159.

43. From what two circumstances do *implied contracts* arise? 159, 162.

44. What is every man bound and hath virtually agreed to do by the fundamental *constitution* of *government,* to which every man is a contracting party? 160.

45. If a *plaintiff* have once obtained a *judgment* against a *defendant* for a certain sum and neglect to take out *execution* thereupon, what *action* may he afterwards bring upon this *judgment,* and to what proof shall he be put? 160.

46. How does the law look upon a *forfeiture* imposed by the *by-laws* and private ordinances of a *corporation* upon any that belong to the *body,* or an *amercement* set in a *court-leet* or *court-baron* upon any of the *suitors* to the *court?* 161.

47. What forfeitures do the *statute of Winchester* and the statute 9 Geo. I. c. 22, commonly called the *black act,* impose upon the inhabitants of *hundreds?* 161.

48. What is called a *popular action,* and what a *qui tam;* and what does the statute 4 Hen. VII. c. 20 enact in order to prevent the practice of offenders procuring their own friends to begin a *qui tam action* that may forestall and prevent other actions? 161.

49. What six classes of *implied contracts,* or *assumpsits,* arise from the general implication

and intendment of the *courts of judicature*, that every man hath engaged to perform what his justice or duty requires? 162–165.

50. What is a *writ of account de computato;* and against whom is it extended by statute 4 Anne, c. 16? 164.

51. When is a *sheriff* or *gaoler* liable to an *action on the case;* and when of *debt?* 165.

52. But in what case does the law imply no *general undertaking* to perform an office with integrity, diligence, and skill? 166.

53. What is an *action of deceit,* (or *on the case* in nature of a *writ of deceit;*) and when may it be brought? *165, *166.

CHAP. X.—*Of Injuries to Real Property; and, first, of Dispossession, or Ouster of the Freehold.*

1. What are the six principal *injuries* affecting *real rights?* 167.

2. What is *ouster;* and of what two kinds may it be? 167.

3. By what five methods is *ouster* of the *freehold* effected? 167.

4. What is an *abatement?* 167, 168.

5. What is an *intrusion;* and wherein does it differ from an abatement? 169.

6. What is a *disseisin;* and wherein does it differ from the two former species of *injury?* 169.

7. How must *disseisin* of *things corporeal* be effected? 170.

8. What is *disseisin* of *things incorporeal?* 170.

9. With regard to *freehold rent* in particular, what five methods of working a *disseisin* thereof do our ancient law-books mention? 170.

10. But when only are all these *disseisins* of *hereditaments incorporeal* such? 170.

11. May not something of this kind be done, even in *corporeal hereditaments,* to entitle a man to the more easy and commodious remedy of an *assise* of *novel disseisin,* instead of being driven to the more tedious process of a *writ of entry?* 170, 171.

12. Wherein do the remaining two species of *injury* by *ouster* differ from the former three? 171.

13. What is a *discontinuance?* 171, 172.

14. What did the statute 32 Hen. VIII. c. 28 provide as to a *discontinuance* of the *wife's* estate by the *alienation* of the *husband;* and what is declared by the statutes 1 Eliz. c. 19 and 13 Eliz. c. 10 as to *discontinuance* by the *alienation* of a *sole corporation?* 172.

15. What is a *deforcement* as contradistinguished from the former four species of *injury* by *ouster?* 172–174.

16. What are the remedies for the several species of *injury* by *ouster?* 174.

17. What is the first method whereby these remedies may be obtained, or that where the *tenant* or occupier of the *land* hath gained only a mere possession and no apparent shadow of *right?* 174.

18. How must *entry* be made; and what are making *claim* and *continual claim?* 174, 175.

19. Upon what three only of the five species of *ouster* does the remedy by *entry* take place? 175.

20. What remedy has a man for *ouster* by a *tenant by sufferance?* 175, 176.

21. How may the right of *entry* be *tolled;* and why? 176, 177.

22. Yet what exceptions are there to this rule of *tolling* the right of *entry;* and how is it still further narrowed by the statute 32 Hen. VIII. c. 33? 177, 178.

23. What is enacted, on the other hand, by the statute of limitations, 21 Jac. I. c. 16, and by statute 4 & 5 Anne, c. 16? 178.

24. What is the remedy upon an *ouster* by the *discontinuance* of *tenant in tail,* or in case of *deforcement;* and why? 178, 179.

25. What if one turn or keep another out of possession forcibly; and what does the statute 8 Hen. VI. c. 9 enact in such case, or if any *alienation* be made to defraud the possessor of his right? 179.

26. What are the two remedies which are in use where the *tenant* or occupier hath in him not only a bare *possession,* but also an apparent *right* of *possession?* 179, 180.

27. If a *recovery* be had against the *dispossessor* in the *actions* by *writ* of *entry* or an *assise,* may he afterwards exert his legal claim to the *right* of ownership? 180.

28. What is a *writ of entry;* to whom is it directed; and what does it require? 180, 181.

29. Against whom must the *writ of entry* always be brought; and what are the *degrees,* called the *per,* the *per* and *cui,* and the *post,* within which *writs of entry* are brought? 182, 182.

30. To what cases of *ouster* is the remedy by *writ of entry* inapplicable? 181, 183.

31. What is the origin of a *writ of assise;* wherein does it differ from a *writ of entry;* and can recourse be had to the one action to set aside the decision of the other? 184, 185.

32. To what two species of *injury* by *ouster* is the remedy by *writ of assise* only applicable? 185.

33. What were an *assise of mort d'ancestor,* and *writs* of *ayle,* or *de avo,* of *besayle,* or *de proavo,* of *cosinage,* or *de consanguineo,* and of *nuper obiit;* beyond what degrees collateral and lineal was a man not allowed to have any of these actions; and why can they not now be brought? 185–187.

34. What is an *assise* of *novel* (or recent) *disseisin;* and wherein does it differ from an *assise* of *mort d'ancestor?* 187.

35. If the *jury* of *recognitors,* in an *assise* of *novel disseisin,* find an *actual seisin* in the *demandant,* what shall he have? 187.

36. If a person *disseised* recover *seisin* of the *land* again by *assises* of *novel disseisin* and *mort d'ancestor,* and be again *disseised* of the same *tenements* by the same *disseisor,* what is enacted by the statutes of *Merton, Marlberge,* and *Westminster* 2? 188.

37. Beyond what period does the present *statute of limitations* enact that no person shall bring any *possessory action* to recover possession of *lands,* and customary and prescriptive *rents, suits,* and *services,* merely upon the *seisin* or dispossession of his ancestors? 189.

38. Had it not been for the doctrine of *remitter,* how might the *tenant by remitter* have been turned out of possession? 190.

39. What is the great and final remedy whereby the *right of property* may be asserted against the *right of possession?* 191.

40. In what four cases is this remedy, or that by such other *writs* as are said to be of the same nature, principally applied? 191.

41. What is the remedy upon an *alienation* by *tenant in tail* whereby the estate-tail is *discontinued* and the *remainder* or *reversion* is, by failure of the *particular estate*, displaced and turned into a mere *right?* 191.

42. Into what three species is the writ of *formedon* (*secundum forman doni*) distinguished; and where does each species lie? 192.

43. What, by statute 21 Jac. I. c. 16, is the time of limitation in a *formedon?* 192, 193.

44. What is the remedy if the owners of a *particular estate* be *barred* of the *right of possession* by a *recovery* had against them through their default or non-appearance in a *possessory action?* 193.

45. What is the remedy in case the *right of possession* be *barred* by a *recovery* upon the merits, in a *possessory action*, or by the *statute of limitations?* 193.

46. Of what estate only doth a *mere writ of right* lie; and what if other actions are or have been brought to recover the same estate? 193.

47. In bar of what may a *recovery* had in this *action* be pleaded? 194.

48. But are there not some cases when *writs* in the nature of *writs of right* do not demand the *fee-simple;* and are there not others where the *mere writ of right* alone is not applicable to every case of a claim of *lands* in *fee-simple?* 194, 195.

49. Where must the general *writ of right* be brought; and whither may it be removed? 195.

50. What, by statute 32 Hen. VIII. c. 2, is the limitation of a *writ of right?* 196.

51. But by what *actions* is the *title* of *lands* now usually tried? 197.

CHAP. XI.—*Of Dispossession or Ouster of Chattels Real.*

1. Of what two kinds is *ouster* from *chattels real?* 198.

2. By what only is *ouster* of the first kind liable to happen; and what is the remedy for such *ouster?* 198.

3. By what only does *ouster* of the second kind happen; and what two remedies has the law provided for this injury? 199.

4. Where doth a writ of *ejectione firmæ*, or *action* of *trespass* in *ejectment*, lie; and what shall be recovered by it? 199.

5. What is the present method by which the remedy by *ejectment* is converted into a method of trying *titles* to the *freehold;* who is called the *casual ejector;* and what if the *tenant in possession* do not within a limited time apply to the *court* to be admitted a *defendant* in his stead? 202, 203.

6. But, if the *tenant in possession* do apply to be made a *defendant*, upon what condition is it allowed him; and what is the *lessor* of the *plaintiff* then bound to do? 203, 204.

7. Yet, to prevent fraudulent recoveries of the *possession* by collusion with the *tenant* of the *land*, what is enacted by statute 11 Geo. II. c. 19? 204.

8. But what if the new *defendants*, whether *landlord*, or *tenant*, or both, after entering into the *common rule*, fail to appear at the *trial* and to confess *lease, entry*, and *ouster?* 204, 205.

9. The *damages* recovered in these *actions* being now merely *nominal*, what *action* lies in order to complete the remedy when the possession has been long detained from him who had the *right* to it? 205.

10. Why will not a *writ of ejectment* lie of *incorporeal hereditaments;* with what exception by the express purview of statute 32 Hen. VIII. c. 7? 206.

11. What does the statute 4 Geo. II. c. 28 enact as to *landlords* whose *tenants* are in arrear? 206.

12. Where doth the *writ of quare ejecit infra terminum* lie by the ancient law; and what shall be recovered by it? 207.

13. But why is this *action* fallen into disuse? 207.

CHAP. XII.—*Of Trespass.*

1. What is *trespass* in its limited and confined sense? 209.

2. Why does the law call every *trespass* of this nature a *breach* of another's *close?* 209, 210.

3. What is necessary in order to be able to maintain an *action of trespass?* 210, 211.

4. In case of *trespass* by *cattle damage feasant*, what remedy has the party injured? 211.

5. What is the *action* that lies in either of these cases of *trespass* committed upon another's land; and when may *damages* be recovered? 211, 212.

6. What is called laying the *action* with a *continuando;* and when only can this be done? 212.

7. In what case is *trespass* justifiable; but in what shall a man be accounted a *trespasser ab initio?* 212–214.

8. What does the statute 11 Geo. II. c. 19 enact as to *trespass* by *entry* of the *landlord* to *distrain?* 213.

9. What is enacted by statutes 43 Eliz. c. 6 and 22 & 23 Car. II. c. 9, § 136, in order to prevent trifling and vexatious *actions of trespass;* but what two exceptions more have been made to this rule by statutes 8 & 9 W. III. c. 11 and 4 & 5 W. and M. c. 23? 214, 215.

CHAP. XIII.—*Of Nuisance.*

1. What is *nuisance, nocumentum;* and of what two kinds? 216.

2. Of what two kinds are *private nuisances* with regard to the species of hereditaments which they may affect? 216.

3. To what three may the *nuisances* which affect a man's *dwelling* be reduced? 217.

4. What are *nuisances* to one's *lands?* 217, 218.

5. What are *nuisances* with regard to other *corporeal hereditaments?* 218.

6. What are *nuisances* as to *incorporeal hereditaments?* 218, 219.

7. What two things are necessary in order to make out another person's setting up a *fair* or *market* so near mine that he does me a prejudice to be a *nuisance?* 218, 219.

8. When shall a private person have a private satisfaction for *damage* by a *public nuisance?* 220.

9. What are the three remedies by *suit* for a *private nuisance;* and by whom only can the last two *actions* be brought? 220–222.

10. What if, after one *verdict* against him in an *action on the case* for *damages* for a *nuisance*, the *defendant* continue it? 220.

11. What is an *assise of nuisance;* and if the *assise* be found for the *plaintiff*, of what two things shall he have *judgment?* 221.

12. Does an *assise of nuisance* lie against the wrong-doer who levied or did the *nuisance*, or against the person to whom he may have aliened the *tenement* whereon the *nuisance* is situated? 221.

13. What is a *writ quod permittat prosternere;* and for and against whom does this *writ* extend its power? 221, 222.

14. Why are these two last *actions* fallen into disuse? 222.

CHAP. XIV. —*Of Waste.*

1. What is *waste, vastum;* and of what two natures? 223.

2. What must those persons have who may be injured by *waste?* 223, 224.

3. What remedy has a person who has a *freehold right of common* of *estovers* if the owner of the *wood* demolish the whole wood; and what remedy has he if he have only a *chattel interest* in such *common?* 224.

4. But what is the most usual and important *interest* that is hurt by the commission of *waste;* and what remedy hath he who hath this *interest* in case of *waste?* 224, 225.

5. Yet why may a *parson, vicar, archdeacon, prebendary*, and the like, who are seised in right of their churches of any *remainder* or *reversion*, have an *action of waste?* 225.

6. Of what two kinds is the redress for this *injury* of *waste;* and by what process is each kind obtained? 225.

7. What is a *writ of estrepement;* when may it now be had; by virtue of it what may the *sheriff* do if the *writ* be directed to him; and what is the consequence of its being directed to the *tenant* himself? 225–227.

8. Besides this preventive redress at *common law*, what will the *courts of equity* do upon bill exhibited therein? 227.

9. What is a *writ of waste;* and by and against whom may it be brought? 227.

10. Why is this *action* also maintainable, in pursuance of the statute Westminster 2, by one *tenant in common* or *joint tenant* of the *inheritance* against another who makes *waste* in the *estate* holden in *common* or *joint tenancy*, but not by one *coparcener* against another? 227.

11. Wherein is the *action of waste* a *real action;* and what shall be recovered if the *waste* be proved? 228.

12. What if the *defendant* in the *action* make default in *appearance* to the *writ;* and what if he suffer *judgment* to go against him by default or upon a *nihil dicit?* 228.

CHAP. XV.—*Of Subtraction.*

1. What is *subtraction;* and wherein does it differ from *disseisin?* 230.

2. Of what two kinds are the *rents* or other *services* the *subtraction* of which varies the remedy in the same degree? 230.

3. What are *duties* and *services* usually issuing and arising *ratione tenuræ;* and what is the general remedy for their *subtraction?* 231.

4. What is called a *distress infinite;* and when may it be taken? 231.

5. What five other remedies for *subtraction* of *rents* or *services* are there? 231–233.

6. What is the effect of the *writ de consuetudinibus et servitiis?* 232.

7. What is the *writ of cessavit;* and when, by the statute of Glocester, does it not lie? 232, 233.

8. What is a *writ of right sur disclaimer?* 233, 234.

9. But what two *writs* has the law given the *tenant* to remedy the oppression of the *lord?* 234.

10. What is the *writ ne injuste vexes;* and where does it lie? 234.

11. What is *writ of mesne de medio;* and where does it lie? 234.

12. What are *services* due by ancient *custom* and *prescription;* and what are the remedies for their *subtraction?* 235.

CHAP. XVI.—*Of Disturbance.*

1. What is *disturbance;* and of what five sorts? 236.

2. When does *disturbance* of *franchises* happen; and what are its remedies? 236, 237.

3. What are the three species of *disturbance* of *common?* 237, 240.

4. When does the first species of *disturbance* of *common* happen; and what are its remedies? 237.

5. What is *surcharging* a *common;* and when can it happen? 237, 238.

6. What are the usual remedies for *surcharging* a *common?* 238.

7. What is a *writ of admeasurement of pasture;* where does it lie; who is entitled to it; to whom is it directed; and how must it be executed? 238, 239.

8. What if, after the *admeasurement* have ascertained the *right*, the same *defendant surcharges* the *common* again? 239.

9. What is *disturbance* of *common* by *enclosure* or *obstruction;* and what are its remedies? 240.

10. But are there not cases in which the *lord* may enclose and abridge the *common?* 240, 241.

11. When does *disturbance* of *ways* happen; how is this species of *injury* distinguished from that of *nuisance;* and what is the remedy for it? 241, 242.

12. What is *disturbance* of *tenure;* and who has what remedy for it? 242.

13. What is *disturbance* of *patronage;* and how was it distinguished at *common law* from another species of *injury*, called *usurpation?* 242, 243.

14. How is the title of *usurpation* now narrowed; and upon what foundation stands the law of it? 244.

15. What three persons may be *disturbers* of a *right of advowson;* and to whom has the law given what three remedies for the *disturbance?* 245.

16. When does an assise of *darrein presentment*, or *last presentation*, lie; but why is it fallen into disuse? 245, 246.

17. What is a *jus patronatus;* and when must it be awarded? 246, 247.

18. What is a *duplex querela;* and when may it be had? 247.

19. What is a *writ* of *quare impedit;* why, in the case of another *presentation* being set up, is it most advisable to bring it against the *bishop*, the *patron*, and the *clerk* too; and what does the *writ* command? 247, 248.

20. What is a *writ* of *ne admittas;* when may it be had; and what if the *bishop*, after the receipt of it, admit any person? 248.

21. In the proceedings upon a *quare impedit*, what must the *plaintiff* prove; and, upon failure of the *plaintiff's* proof, what must the *defendant?* 249.

22. But if the *right* be found for the *plaintiff*, what three further points are also to be inquired? 249.

23. If it be found that the *plaintiff* hath the right, and hath commenced his *action* in due time, then what *judgment* shall he have? 249, 250.

24. But what if the *church* remain still void at the end of the *suit?* 250.

25. And what if the *bishop* do not admit the *clerk* upon this? 250.

26. What is the advantage of a *writ of right of advowson* over a *writ* of *quare impedit?* 250.

27. Why is there no limitation with regard to the time within which any *actions* touching *advowsons* are to be brought? 250, 251.

28. But is there not one species of *presentation* in which, by virtue of several *acts of parliament*, a remedy, to be sued for in the *temporal courts*, is put into the hands of the *clerks* presented as well as of the owners of the *advowson;* and with what powers particularly are the *patrons* clothed by the statutes of 12 Anne, st. 2, c. 14, § 4, and 11 Geo. II. c. 17? 251, 252.

29. But when the *clerk* is in full possession of the *benefice*, what possessory remedies does the law give him; and when is he entitled to a special remedy called a *writ* of *juris utrum*, or the *parson's writ of right;* but why is this remedy now of very little use? 252, 253.

CHAP. XVII.—*Of Injuries proceeding from or affecting the Crown.*

1. Of what two natures are *injuries* to which the *crown* is a *party?* 254.

2. What are the two *common-law* methods of obtaining possession or restitution from the *crown* of either *real* or *personal property;* and when may each be resorted to? 256, 257.

3. What are the six methods of redressing such *injuries* as the *crown* may receive from the *subject?* 257, 258, 260–262, 264.

4. What *actions* cannot the *king* maintain? 257.

5. What is an *inquisition*, or *inquest of office?* 258–260.

6. What remedy may the *subject* have in order to avoid the possession of the *crown* acquired by the *finding* of such *office*, besides his *petition of right* and his *monstrans de droit?* 260.

7. By whom may a *writ* of *scire facias* to repeal the *king's patent* or *grant* be brought? 260, 261.

8. What is *an information* on behalf of the *crown* filed in the *exchequer;* and of what two sorts are the most usual *informations?* 261.

9. What is an *information in rem?* 262.

10. When does a *writ* of *quo warranto* lie in the *king;* and why has it given way to an *information* in the nature of such a *writ?* 262, 263.

11. To what is this proceeding now applied by virtue of the statute 9 Anne, c. 20? 264.

12. For what is the *writ* of *mandamus* made a most full and effectual remedy by the same statute, and by statute 11 Geo. I. c. 4; what are the proceedings on this *writ;* and what is a *writ of restitution?* 264, 265.

CHAP. XVIII.—*Of the Pursuit of Remedies by Action; and, first, of the Original Writ.*

1. What are the eight general and orderly parts of a *suit* in the *court of common pleas?* 272.

2. What is an *original*, or *original writ;* where is it sued out; and what and where is its *return?* 273.

3. What is the foundation of suits below the value of forty shillings? 273.

4. Of what two sorts are *original writs;* and where is each sort in use? 274.

5. What is the security given by the *plaintiff* for prosecuting his claim? 274, 275.

6. What and when is the *return* of each sort of writ? 275.

7. What is the origin of the *terms;* and what are they? 275–277.

8. What are *days in bank, dies in banco?* 277.

9. What is called the *essoign day* of the *term?* 277, 278.

10. What is the *quarto die post?* 278.

CHAP. XIX.—*Of Process.*

1. What is the *process;* and to distinguish it from what two other kinds is it called *original process?* 279.

2. Of what nine sorts is *original process?* 279–284, 287, 288, 290, 291.

3. What is the *summons;* and how is it made? 279, 280.

4. What is the *writ of attachment* or *pone;* and when is this the first and immediate *process?* 280.

5. What is the *writ* of *distringas*, or *distress infinite?* 280.

6. What is the *writ* of *capias ad respondendum;* and upon what species of complaint may it now be had by several statutes? 281, 282.

7. For what reason does the practice of commencing almost all *actions* by bringing an *original writ* of *trespass quare clausum fregit, vi et armis*, still continue? 281, 282.

8. Why are *writs* subsequent to the *original writ* called *judicial writs?* 282.

9. Is this regular and orderly method of *process* now gone through; or what is now usual in practice? 282.

10. When does a writ *testatum capias* issue; and what if the *action* be brought in one *county* and the *defendant* live in another? 283.

11. But what if a *defendant* abscond and the *plaintiff* would proceed to an *outlawry* against him? 283.

12. What are *alias* and *pluries writs*, and *writs of exigent*, or *exigi facias*, and *proclamation?* 283, 284.

13. What is the effect of *outlawry;* what is the *writ* of *capias utlegatum*; and how may *outlawry* be reversed? 284.

14. What is the usual method of proceeding in the *court of king's bench?* 285.

15. What is the origin of the *process of bill of Middlesex;* why is it so called; and what is it? 285.

16. When does a *writ of latitat* issue; and when may the *bill of Middlesex* in the *court of king's bench* be treated like the *capias ad respondendum* in the *court of common pleas?* 286.

17. What is the first *process* in the *court of exchequer;* and what does it allege? 286.

18. What is now become the effect of the *capias, latitat,* &c.; what if the *defendant* appear upon them; and what if he do not? 287.

19. But what if the *plaintiff* will make *affidavit* that the cause of *action* amounts to ten pounds or upwards; and what is required by statute 13 Car. II. st. 2, c. 2? 287.

20. What was the origin of the clause of *ac etiam* in a *bill of Middlesex* and *writ of capias;* and what is it? 288.

21. When, in an *arrest,* may the *bailiff* justify breaking open the house in which the *defendant* is, in order to take him? 288.

22. Who are constantly privileged from *arrests* and from *outlawries;* and how must an *appearance* be enforced against such persons? 288, 289.

23. Who are *pro tempore* privileged from *arrests;* and where can no *arrest* be made? 289.

24. What is the *king's writ of protection;* and what is enacted by the statute 25 Edw. III. st. 5, c. 19 as to the power of another *creditor* to proceed against a *debtor* of the *king?* 289, 290.

25. When may an *arrest* be made or *process* served upon a *Sunday?* 290.

26. What is *special bail* to the *sheriff,* or *bail below;* and what if the *sheriff* do not keep the *defendant* so as to be forthcoming in *court?* 290.

27. For what sum shall the *sheriff* take *bail,* by statute 12 Geo. I. c. 29? 290.

28. What is *bail to the action,* or *above;* and what may the *plaintiff* require of the *sheriff* if this be not put in? 290, 291.

29. Before whom must the *bail above* enter into what *recognizance;* and what if they be excepted to? 291.

30. How may *special bail* at all times be *discharged?* 292.

31. When is *special bail* only as of course required; and when by a *judge's order* or the particular directions of the *court?* 292.

32. When only is *special bail* demandable in *actions* against *heirs, executors,* and *administrators?* 292.

CHAP. XX.—*Of Pleading.*

1. What are *pleadings;* and of what four kinds? 293, 296, 299, 309.

2. What is the declaration, *narratio,* or *count?* 293.

3. In what *actions* must the *plaintiff lay* his *declaration,* or *declare* his *injury* to have happened, in the very *county* and place where it did really happen; and in what may he *declare* in what *county* he pleases? 294.

4. When will the *court* direct a change of the *venue* or *visne,* (that is, the *vicinia* or neighbourhood in which the *injury* is declared to be done)? 294.

5. What are different *counts* in the same *declaration;* and for what purpose are they designed? 295.

6. What was anciently understood by the word *suit?* 295.

7. When is a *nonsuit,* or *non prosequitur,* entered; and to what is that *plaintiff* liable who is *non pros'd?* 295, 296.

8. What is a *retraxit;* and how does it differ from a *nonsuit?* 296.

9. What is a *discontinuance;* and what does the statute 1 Edw. VI. c. 7 enact as to *discontinuance?* 296.

10. What is a *defence,* in its true legal sense? 296, 297.

11. What is *cognizance of the suit;* and when must it be claimed? 298.

12. What is an *imparlance;* and when is the *defendant* entitled to how many *imparlances?* 299.

13. What is a *view;* and when may it be demanded? 299.

14. What is *oyer;* and of what may it be craved? 299.

15. What is *praying in aid;* what is *voucher,* and when is it not allowed; and what is a *writ of warrantia chartæ?* 299, 300.

16. What is *praying age;* and when shall it not be had? 300, 301.

17. Of what two sorts are *pleas;* and when cannot *pleas* of the former sort be pleaded? 301.

18. Of what three kinds are *dilatory pleas?* 301, 302.

19. What effect upon a *suit* hath the death of one of the *parties;* and when can it be revived either by or against the *executors* or other *representatives* of the deceased *party?* 302.

20. What, by the statute 4 & 5 Anne, c. 16, is essential to the admission of a *dilatory plea;* what is a rule as to the admission of *exceptions* against a *declaration* or *writ;* and in what suit shall no abatement take place, by statute 8 & 9 W. III. c. 31? 302.

21. To what three things does each of these kinds of *dilatory pleas* conclude? 303.

22. What if these *dilatory pleas* be *allowed;* and what if they be *overruled?* 303.

23. In what two ways is a *plea to the action* made? 303.

24. In what instance is *confession* of the whole *complaint* made in a *plea to the action?* 303.

25. What is the effect of a *plea of tender* by the *debtor* and *refusal* by the *creditor?* 303.

26. In what two instances is one part of the *complaint confessed* and the rest *traversed* or *denied?* 304.

27. What is the effect of *paying money into court;* and upon what may it be done? 304.

28. What is a *motion?* 304.

29. Of what two kinds are *pleas* that totally *deny* the cause of *complaint?* 305.

30. What is the *general issue* or *general plea?* 305.

31. What is an *issue* in law? 305.

32. May *special matter* be given in evidence upon a *plea of general issue?* 305, 306.

33. What are *special pleas* in *bar* of the *plaintiff's* demand? 306.

34. What are the times limited by the several

statutes of limitation beyond which no *plaintiff* can lay his cause of *action?* 306, 307.

35. What is an *estoppel?* 308.

36. What are the five conditions and qualities of a *plea?* 308.

37. What if the *defendant* in an *assise* or *action of trespass* be desirous to refer the validity of his title to the *court* rather than the *jury?* 309.

38. When and what may the *plaintiff reply* to the *defendant's plea;* what is a *traverse* of it; what a *new* or *novel assignment;* and what a *confession* and *avoidance?* 309–311.

39. What are the remaining *processes* of *pleading?* 310.

40. What is called a *departure* in *pleading?* 310.

41. What is called *duplicity* in *pleading;* and what a *protestation;* and how hath Sir Edward Coke defined the latter? 311, 312.

42. In any stage of the *pleadings*, when either side advances or affirms any new matter, in what language does he aver it to be true; and in what different language do the *plaintiff* and the *defendant* tender an *issue* when either side traverses or denies the facts *pleaded* by his antagonist? 313.

43. But what if either *side plead* a *special* negative *plea*, not traversing or denying any thing that was before alleged, but disclosing some new negative matter? 313.

CHAP. XXI.—*Of Issue and Demurrer.*

1. What is *issue, exitus;* and upon what two matters? 314.

2. What is an *issue* upon matter of *law* called? 314.

3. What is a *demurrer;* and, in case of exceptions to the form or manner of *pleading*, what must the *party demurring* do, by statutes 27 Eliz. c. 5, and 4 & 5 Anne, c. 16? 314, 315.

4. Upon either a *general* or a *special demurrer*, what must the opposite *party* do in order to put the *parties* at *issue* in point of *law;* and who must determine that *issue?* 315.

5. What is an *issue* of *fact;* when is it *joined;* and what is the principal method by which it must be determined? 315.

6. What is *continuance;* what if the omission be on the part of the *plaintiff;* and what if it be on the part of the *defendant?* 316.

7. What is a *plea puis darrein continuance;* what is its effect; and when is it not allowed to be put in? 316, 317.

8. What are *paper-books;* and what is the *record?* 317.

CHAP. XXII.—*Of the several Species of Trial.*

1. What is *trial;* and what are the seven species of *trial* in civil cases? 330.

2. In what particular instance is *trial* by *record* used; what is it; and what may it *try?* 330, 331.

3. What is *trial* by *inspection* or *examination;* and when shall it be had? 331–333.

4. What is *trial* by *certificate*; and in what six cases shall it be had recourse to? 333–336.

5. What is *trial* by *witnesses, per testes;* and when only is it allowed in *our law?* 336.

6. What is *trial* by *wager of battel, vadiatio duelli;* in what cases was it used; what is the form of it; and by what has it been superseded? 337–341.

7. What is *trial* by *wager of law, vadiatio legis;* what is the manner of *waging law;* in what *actions* only is the *defendant* admitted to *wage his law;* who shall not be permitted to *wage law;* and how has this species of *trial* become obsolete? 341–348.

CHAP. XXIII.—*Of Trial by Jury.*

1. Of what antiquity is *trial by jury*, called also *trial per pais* or *by the country;* and what does *magna carta* declare concerning it? 349, 350.

2. Of what two kinds are *trials* by *jury* in civil causes? 351.

3. What is the first species of *extraordinary trial* by *jury?* 351.

4. What is another species of *extraordinary jury?* 351.

5. What are the eight *processes* of the *ordinary trial* by *jury?* 352, 356–358, 364, 365, 367, 375.

6. What is the writ of *venire facias;* and when and where must the *sheriff* return it by virtue of the statute 42 Edw. III. c. 11? 352, 353.

7. What are called *issuable terms*, and why; and what is the *sheriff's panel?* 353.

8. What, in the *common pleas*, is called a *writ of habeas corpora juratorum*, and, in the *king's bench*, a *distringas;* and what is the *entry* on the *roll*, or *record?* 354.

9. What if the *sheriff* be not an indifferent person; and who are called *elisors*, or *electors?* 354, 355.

10. What if, on the general day of trials, the *plaintiff* do not *enter* the record? 356.

11. What is called the *trial* by *proviso;* but why hath this practice begun to be disused since the statute 14 Geo. II. c. 17? 356, 357.

12. In case the *plaintiff* intend to try the cause, what *notice* of *trial* is he bound to give the *defendant;* and what if the *plaintiff* then change his mind and do not countermand the *notice* how many days before the trial? 357.

13. How may the *trial* be deferred, however, by either *party*? 357.

14. To whom does the *sheriff* return his *writ* of *habeas corpora*, or *distringas*, with what annexed? 357.

15. Of what two sorts are *jurors?* 357.

16. What is the *sheriff's* duty upon *motion* in *court* and a *rule* granted thereupon for a *special jury;* and how and by whom is it *struck?* 357, 358.

17. By the statute 3 Geo. II. c. 25, who is entitled to have a *special jury* struck upon what *trial;* and, by statute 24 Geo. II. c. 18, when shall the expense of a *special jury* not fall upon the party requiring it? 358.

18. What is a *common jury;* and what are the directions of the statute 3 Geo. II c. 25 concerning it? 358.

19. What is a *view;* and how and by whom shall it be appointed? 358.

20. Of what two sorts are *challenges* of *jurors?* 358.

21. What are *challenges* to the *array;* and upon what accounts may they be made? 359, 360.

22. Where one party to the *suit* is an *alien*, of whom shall the *jury* consist; but what if both *parties* be *aliens?* 360.

23. What are *challenges* to the *polls, in capita;* and to what four heads are they reduced by Sir Edward Coke? 361.

24. Can *judges* and *justices* be *challenged?* 361.

25. What is a *writ de ventre inspiciendo?* 362.

26. What, by a variety of statutes, is a *disqualification* for *juror* in point of *estate;* but what when the *jury* is *de medietate linguæ?* 362, 363.

27. Of what two sorts is a *challenge propter affectum*, for suspicion of bias or partiality; what if the causes of *challenge* of the first sort be true; and to whom is it given to try the validity of *challenges* of the second sort? 363.

28. With regard to what causes of *challenge* may a *juror* himself be examined on oath of *voir dire, veritatem dicere?* 364.

29. Who are *excused* from serving on *juries?* 364.

30. Who may pray a *tales*, and what is it; and for this purpose when must a *writ* of *decem tales, octo tales*, and the like, still be issued to the *sheriff;* but, by virtue of the statute 35 Hen. VIII. c. 16, when may the *judge* award a *tales de circumstantibus;* and what is it? 364, 365.

31. To what are the *jurors* sworn? 365.

32. What is the course of proceeding upon the trial? 366, 367.

33. What is the definition of *evidence?* 367.

34. Of what two kinds is *evidence* in the *trial* by *jury?* 367.

35. Of what two sorts are *proofs?* 367.

36. What two written *proofs* or *evidence* prove themselves; and what are the other two; and how must they be verified? 367, 368.

37. What is one general rule of *evidence* that runs through all the doctrine of *trials;* and upon what principle is *hearsay evidence* in general not admitted? 368.

38. To what transactions does the statute 7 Jac. I. c. 12 confine the admission of *books of account* to be read in *evidence* if the servant who was accustomed to make the *entries* in it be dead and his *handwriting* proved? 368, 369.

39. What is the *writ* of *subpœna ad testificandum;* but when is no *witness* bound to appear or to give *evidence?* 369.

40. Who are competent *witnesses?* 369, 370.

41. How many *witnesses* are sufficient *evidence* of any single fact? 370.

42. When is *positive proof* required; and when is *circumstantial* or *presumptive evidence* admitted? 371.

43. What weight have severally *violent presumption, probable presumption*, and *light presumption?* 371.

44. Need the *witness* tell all he knows of the matter in question, whether interrogated to every point or not? 372.

45. What if the *judge*, either in his directions or decisions, misstate the *laws*, by ignorance, inadvertence, or design? 372.

46. What is a *demurrer* to *evidence;* and by whom shall it be determined? 372.

47. But what practice has greatly superseded the recourse to either of these last *proceedings?* 373.

48. What are the advantages of *testimony ore tenus?* 373.

49. What is the modern doctrine as to such *evidence* as the *jury* may have in their own consciences by their private knowledge of facts? 374, 375.

50. What is the *summing up* of the *evidence* by the *judge?* 375.

51. How is the delivery of the *jury's verdict, veredictum*, accelerated; and what if the *jurors* eat or drink at all, or have any eatables about them, without consent of the *court?* 375.

52. What circumstances will set aside the *verdict?* 375, 376.

53. What if the *plaintiff* do not appear to the *verdict?* 376.

54. What is the form of a voluntary *nonsuit;* and why is it more eligible for the *plaintiff* than a *verdict* against him? 376, 377.

55. Of what two kinds is a *verdict;* and when is a *verdict* of the first kind of no force? 377.

56. What have the *jury* also to do if they *find issue* for the *plaintiff?* 377.

57. What is a *special verdict;* and by whom is it afterwards determined? 377.

58. What is another method of *finding* a species of *special verdict:* and what advantage has this over the other kind of *special verdict?* 378.

59. In both these cases, *must* the *jury* return a *special verdict;* and are they incompetent to decide the complicated question of *fact* and *law?* 378.

60. What are the four principal defects incident to a *trial* by *jury?* 382, 383.

61. What is a *subpœna duces tecum?* 382.

CHAP. XXIV.—*Of Judgment and its Incidents.*

1. What is a *postea?* 386.

2. What is *judgment;* and till when and till what can it not be *entered?* 386, 387.

3. What are causes of *suspending* the *judgment*, by granting a *new trial?* 387.

4. What if two *juries* agree in the same or a similar *verdict?* 387.

5. What is a *new trial;* upon what proceedings is it granted; and where is it not granted? 391, 392.

6. How has the *court*, in granting a *new trial*, an opportunity of supplying the defects in the *trial* by jury; and within what time must the *motion* for a *new trial* be made? 392.

7. From what causes do *arrests* of *judgment* arise? 393.

8. What is an invariable rule with regard to *arrests* of *judgment* upon matter of *law;* and will this rule hold *e converso?* 394.

9. What is a *repleader quod partes replacitent;* and when will the *court* award it? 395.

10. What is *judgment;* and of what four sorts? 395, 396?

11. Whose determination and sentence is the *judgment;* and what words constitute the *style* of the *judgment?* 396.

12. Of what two natures are all these four species of *judgments?* 396.

13. What is judgment of *respondeat ouster?* 396, 397.

14. What are the *interlocutory judgments* most usually spoken of; when only can they happen, when are they absolutely complete; and when, and for what purpose, must a *jury* be called in? 397, 398.

15. What is a *warrant of attorney to confess a judgment;* and what does the statute 4 & 5 W. and M. c. 20 require in order to its validity? 397, 398.

16. What is a *writ of inquiry* to *assess damages?* 398.

17. What are *final judgments;* and is the *party* against whom *judgment* is given liable to any *fine* to the *king* or *imprisonment* till that *fine* be paid? 398, 399.

18. Which *party* shall pay the *costs* of the *suit?* 399, 400.

19. Who are not liable to pay *costs?* 400.

20. What is enacted by statutes 43 Eliz. c. 6, 21 Jac. I. c. 16, and 22 & 23 Car. II. c. 9, § 136, to prevent trifling and malicious *actions*, for *words*, for *assault and battery*, and for *trespass*, with what two exceptions, by statutes 4 & 5 W. and M. c. 23 and 8 & 9 W. III. c. 11? 401.

21. What follows after *judgment*, unless what? 401.

CHAP. XXV.—*Of Proceedings in the Nature of Appeals.*

1. Of what four principal kinds are *proceedings* in the nature of *appeals* from the *proceedings* of the *king's court of law?* 402, 405, 406.

2. What is a *writ of attaint;* when, at *common law*, must it be brought; and on what issue only does it not lie? 402–404.

3. What *jury* are to try this *false verdict;* what are the qualifications of the *jurors*, by statute 15 Hen. VI. c. 5; and which party only is allowed to produce new matter, and why? 404.

4. What was the *judgment* by the common law if the *grand jury found the verdict* a *false* one? 404.

5. But what was enacted by several statutes as to the time when an *attaint* may be brought, and as to the punishment of the *attainted jurors?* 405.

6. But what has superseded the use of *attaints?* 405.

7. What is the *writ of deceit?* 405.

8. What is an *audita querela;* and for what two persons does it lie? 405, 406.

9. But what has rendered this *writ* almost useless? 406.

10. But what is the principal method of redress for erroneous *judgments* in the king's *courts of record?* 406.

11. What is the *writ* to amend errors in a *base court* not of *record?* 407.

12. Upon what matter only does a *writ of error* lie? 407.

13. Till when may the *record* be amended; and what is the effect of the statutes of *amendment* and *jeofails?* 407, 408.

14. What is required of him that brings the *writ*, if it be brought to reverse any *judgment* of an *inferior court of record*, where the damages are less than ten pounds, or if it be brought to reverse the *judgment* of any *superior court* after *verdict?* 410*.

15. From what *courts* lies the *writ of error* into the *king's bench?* 410*.

16. Whence lies the *writ of error* into the *court of exchequer-chamber;* and before whom? 410*.

17. Whence lies the *writ of error* in the *house of peers;* and thence whence? 410*, 411*.

CHAP. XXVI.—*Of Execution.*

1. What is *execution;* and how is it performed? 412.

2. What are *writs* of *habere facias seisinam* and *habere facias possessionem;* to whom are they directed; what is justifiable in their *execution;* and what is sufficient *execution?* 412.

3. What is a *writ de clerico admittendo;* and to whom is it directed? 412.

4. When does a special *writ* of *execution* issue to the *sheriff?* 412, 413.

5. What *writ* shall the *plaintiff* have where one part of the *judgment* is *quod nocumentum amoveatur;* what is the *writ of execution* upon a *replevin;* what shall the *defendant* have if the *distress* be *eloigned;* and what shall the *plaintiff* have after *judgment* in *detinue?* 413.

6. Of what five sorts are *executions* in *actions* where *money* only is recovered as a *debt* or *damages*, and not any specific *chattel?* 413.

7. What is the *writ* of *capias ad satisfaciendum;* and against whom does it not lie? 414, 415.

8. To whom shall the *capias* issue if an *action* be brought against a *husband* and *wife* for the *debt* of the *wife* when sole; and to whom if the *action* were brought against her before her *marriage?* 414.

9. What if *judgment* be recovered against a *husband* and *wife* for the contract or personal misbehaviour of the *wife* during her *coverture?* 414.

10. What exemption has the man who is taken in *execution* upon this *writ;* and what does the statute 21 Jac. I. c. 24 enact if the *defendant* die while charged in *execution* upon this *writ?* 414.

11. What *executory process* may be sued out for *costs?* 415.

12. What if, after a *defendant* is once in custody upon this *process*, he be seen at large? 415.

13. Of what two natures are *escapes;* and when shall the *sheriff* answer for the debt? 415.

14. Will a *rescue* of a *prisoner* in *execution* excuse the *sheriff?* 415.

15. But what does the statute 32 Geo. II. c. 28 enact in favour of *defendants* charged in *execution?* 415, 416.

16. Yet what powers have *creditors* over their *debtors* on the other hand? 416.

17. In what case may the *plaintiff* set out a writ of *scire facias* against the *bail;* and what is its effect? 416, 417.

18. What is a *writ* of *fieri facias;* against whom does it lie; what doors may be broken open in its *execution;* who must be first paid to what amount; and what further remedy has the *plaintiff* if part only of the *debt* be *levied* on a *fieri facias?* 417.

19. What is a *writ of levari facias;* and by what is its use superseded? 417.

20. What is a *writ* in the nature of a *levari* or *fieri facias*, to levy the *debt* and *damage de bonis ecclesiasticis;* to whom is it directed; and by what is it followed? 418.

21. What is the *writ* of *eligit;* what *lands* are not liable to be taken in *execution* upon a *judgment;* what in case of a debt to the *king*, by *magna carta*, c. 8; and in what case only can a *capias ad satisfaciendum* be had after an *eligit?* 418, 419.

22. What is an *extent*, or *extendi facias;* and upon what *prosecutions* may it be had? 419, 420.

23. What, by statute 33 Hen. VIII. c. 39, of all *obligations* made to the *king;* and what *lands* of a *debtor* does the *king's judgment*, or that of any of his *officers* mentioned in the statute 13 Eliz. c. 4, affect more than the *subject's?* 420.

24. By the *statute of frauds*, 29 Car. II. c. 3, from what day shall the *judgment* bind the *land* in the hands of a *bonâ fide* purchasor; and from what day shall the *writ* of *execution* bind the *goods* in the hands of a stranger or purchasor? 421.

25. When the *plaintiff's* demand is satisfied, what ought to be entered on the *record?* 421.

26. But within what time must all these *writs* be sued out? 421.

27. Yet, if this had not been the case, what will the *court* grant, in pursuance of statute Westminster 2, 13 Edw. I. c. 45; or what other remedy has the *plaintiff?* 421, 422.

CHAP. XXVII.—*Of Proceedings in the Courts of Equity.*

1. What four matters of *equity* are peculiar to the jurisdiction of the *court of chancery?* 426–428.

2. When has the *court of chancery* a right to appoint a *guardian;* and whither lies the *appeal* in all proceedings relative thereto? 427.

3. How only can the proceedings to inquire whether or no the *party* be an *idiot* or *lunatic* be redressed if erroneous? 427.

4. On the other hand, doth not the jurisdiction of the *court of chancery* fail to extend to some *causes* wherein relief may be had in the *court of exchequer* and the *duchy court of Lancaster?* 428, 429.

5. What is *equity* in its true and genuine meaning; and does *equity* differ from *law?* 429–436.

6. What are the five essential differences whereby the *courts of equity* are distinguished from the *courts of law?* 436.

7. What does a *court of equity*, in the way of *proof*, when facts or their leading circumstances rest only in the knowledge of the *party;* and, for want of this discovery at law, in what matters have the *courts of equity* acquired a concurrent jurisdiction with every other *court?* 437, 438.

8. What authority and jurisdiction have courts of equity in *interrogatories* administered to *witnesses;* and in what cases, on this account, do they exercise the same jurisdiction which might have been exercised at law? 438.

9. In what cases does the want of a more specific remedy then can be obtained in the *courts of law* give a concurrent jurisdiction to a *court of equity?* 438, 439.

10. What are the fifteen *proceedings* in the *courts of equity?* 442–445.

11. What is a *bill;* what does it always pray; and when does it pray also an *injunction?* 442.

12 What if the *bill* do not call all necessary *parties*, however remotely interested, before the *court;* by whom must it be signed; and what if it contain matter either scandalous or impertinent? 442, 443.

13. Where must the *bill* be filed; and when will the *court* grant an *injunction* immediately? 443.

14. What is the *process* of *subpœna;* and what if the *defendant* do not appear within the time limited by the rules of the *court*, and *plead*, *demur*, or *answer* to the *bill?* 443.

15. What are the respective *processes* of *contempt*, in their successive order; what if the *defendant* abscond; and what if he be taken? 444, 445.

16. What is the *process* against a *corporate body;* and what against a *peer;* and what against a *member* of the *house of commons?* 445.

17. What does the statute 5 Geo. II. c. 25 enact where the *defendant* cannot be found to be served with *process* of *subpœna?* 445.

18. What is a *demurrer* in *equity?* 446.

19. Of what three kinds are *pleas;* and may a *defendant plead*, *demur*, and *answer* too? 446.

20. Why are *exceptions* to *formal minutiæ* in the *pleadings* in *equity* not allowed? 446.

21. What is an *answer;* when is it given upon *oath*, and when not; and when upon *honour?* 446.

22. Before whom must the *defendant* be sworn to his *answer;* by whom must the *answer* be signed; and when may it be excepted to for insufficiency? 447, 448.

23. If the *defendant* have any relief to pray against the *plaintiff*, how must it be done? 448.

24. When may the *plaintiff* amend his *bill;* and when must he have recourse to a *supplemental bill?* 448.

25. What is a *bill* of *revivor;* and what a *bill* of *interpleader;* and what must be annexed to this last *bill?* 448.

26. What if the *plaintiff* choose to proceed to the *hearing* of the *cause* upon *bill* and *answer* only? 448.

27. What is a *replication;* and how does the *defendant* join *issue?* 448, 449.

28. How and by whom are *witnesses* examined; of what nature must the *interrogatories* be; to what are *examiners* and their *clerks* sworn; and how are they compellable to appear and submit to *examination?* 449.

29. What is a *bill to perpetuate the testimony of witnesses?* 450.

30. When may a *rule to pass publication of witnesses* be had? 450.

31. By whom and before whom may the *cause* be set down for a *hearing?* 450.

32. What if the *plaintiff* do not attend upon *subpœna* to hear *judgment;* and what if the *defendant?* 451.

33. When may a *plaintiff's bill* be dismissed for want of *prosecution?* 451.

34. What is the method of hearing *causes* in *court?* 451.

35. Of what two natures is the *chancellor's decree?* 452.

36. When does the *court of chancery* direct a *feigned issue* to be tried at the bar of the *court of king's bench*, or at the *assises;* and what is the *fiction?* 452.

37. What does the *court* refer to the opinion of the *courts of king's bench* or *common pleas*, upon a *case stated;* and what is done there in consequence? 452, 453.

38. What are referred by the *decree*, on the first *hearing*, to a *master in chancery;* and what is done by him in consequence? 453.

39. To what is the *master's report* liable? 453.

40. When and upon what is a *final decree*

made; and how is its performance enforced? 453.

41. Who may petition for a *re-hearing;* by whom must such *petition* be signed; what *evidence* is now admitted; and what may be supplied? 453, 454.

42. But, after the decree is once signed and enrolled, how only can it be rectified? 454.

43. When may a *bill of review* be had? 454.

44. How is an *appeal* to the *house of lords* effected; and what *evidence* only is admitted there? 454, 455.

BOOK IV.—OF PUBLIC WRONGS.

CHAP. I.—*Of the Nature of Crimes, and their Punishment.*

1. What are the six considerations in treating of *public wrongs*, or *crimes* and *misdemeanours?* 1, 2.

2. Why is the code of criminal law with us in England denominated the doctrine of the *pleas of the crown?* 2.

3. From what circumstances have the defects and disproportions in our criminal code arisen? 3, 4.

4. What is a *crime* or *misdemeanour;* and how has common usage distinguished the one from the other? 5.

5. In what does the distinction of *public wrongs* from *private*, of *crimes* and *misdemeanours* from *civil injuries*, principally consist? 5.

6. Which includes the other? 6.

7. In what *crimes* why cannot satisfaction be made both to the individual and the community? and in what how may it? 6, 7.

8. What double view, then, has the law in taking cognizance of all *wrongs* or unlawful acts? 7.

9. What are *punishments?* 7.

10. In whom was the right of punishing *crimes* against the *law of nature* vested by that law? 7, 8.

11. What right has the temporal legislator to inflict discretionary penalties for *crimes* against the *law of nature*, or *mala in se?* 7, 8.

12. What right has he to inflict *punishment* for *offences* against the laws of society, or *mala prohibita?* 8.

13. When only is a legislature warranted in inflicting the *punishment* of *death* for *offences* of human institution? 9, 10.

14. Is it found by experience that *capital punishments* are more effectual in preventing *crimes* than lighter penalties? 10.

15. What is the end or final cause of human *punishment?* 11.

16. In what three ways is the *end* of human *punishment* effected? 11, 12.

17. By what must the *measure* of human *punishment* be determined? 12.

18. Why is not the *lex talionis*, or law of retaliation, in all cases an adequate or permanent rule of *punishment?* 12, 13.

19. Does the punishment of *death* with *death* proceed upon the principle of retaliation? 13, 14.

20. In what class of *crimes* is the *lex talionis* more proper to be inflicted than in any other; and, upon this principle, what was enacted by statute 17 Edw. III. c. 18; and how long was this the law? 14.

21. What are some general principles drawn from the nature and circumstances of the *crime* that may be of some assistance in allotting it an adequate *punishment?* 15, 16, 17.

22. Why is *treason* in conspiring the *king's death* punished with greater rigour than even actually killing any private *subject?* 15.

23. Why, generally, is a design to transgress not so flagrant an enormity as the actual completion of that design; and why then, in the case of a treasonable conspiracy, will the bare intention to kill the *king* deserve the highest degree of severity? 15.

24. Why is it in more cases *capital* for a *servant* to rob his *master* than for a *stranger;* what greater crime is it for a *servant* to kill his *master* than in another; why is it *capital* to steal above the value of twelvepence privately from one's person, and only *transportation* to carry off a load of corn from an open field; and why, in the island of Man, was it formerly only *trespass* to take away a horse or an ox, and *capital misdemeanour* to steal a pig or a fowl? 16.

25. What is the sentiment of the Marquis Beccaria as to *severity of punishment?* 17.

26. What does a multitude of sanguinary laws argue in a government? 17.

27. What is the evil of making no distinction in the nature and gradations of *punishment?* 18.

28. How many *offences* have been declared by *act of parliament felonies without benefit of clergy:* and why does so large a list, instead of diminishing, increase the number of *offenders?* 18, 19.

CHAP. II.—*Of the Persons capable of committing Crimes.*

1. To what single consideration may all the several pleas and excuses which protect the committer of a forbidden act from the *punishment* which is otherwise annexed thereto be reduced? 20.

2. What two things must there be to constitute a *crime* against human laws? 21.

3. In what three cases does not the *will* join with *act?* 21.

4. What four species of defect in *will* fall under the first of these general heads; what two under the second; and what two under the third? 21, 22.

5. In what cases does the law privilege an *infant* under the age of twenty-one years; and in what under the age of fourteen only? 22.

6. By what is the capacity of doing ill measured, as the law has stood since the time of Edward the Third? 23.

7. At what age may an *infant* be guilty of *felony;* and though *prima facie* an *infant* shall be adjudged to be *doli incapax* under fourteen, yet with what *proviso* may he be convicted and suffer *death* under that age? 23, 24.

8. What is the rule of law as to *lunatics* which may be easily adapted also to *idiots?* 24.

9. If a man in his sound memory commit an *offence*, and before *arraignment* for it he become *mad*, why shall not he be *arraigned* for it; if after he have *pleaded* he becomes *mad*, why shall he not be *tried;* if after he be *tried* and found *guilty*, why shall not *judgment* be pronounced; and if after *judgment*, why shall *execution* be stayed? 24.

10. But what if there be any doubt whether the *party* be *compos* or not; and what if a *lunatic* have lucid intervals of understanding? 25.

11. How may madmen be restrained from going loose? 25.

12. Does drunkenness excuse a crime? 25, 26.

13. When is a man who commits an unlawful act by misfortune or chance excused from all guilt? 26, 27.

14. What ignorance or mistake excuses crime? 27.

15. What are the three species of necessity or compulsion which excuse crime? 28, 30.

16. When only is the constraint of a superior in a private relation allowed as an excuse for what crimes? 28, 29.

17. Why shall no plea of coverture, or presumption of the *husband's* coercion, excuse the *wife* in case of treason? 29.

18. In what one offence may a *wife* be indicted and set in the pillory *with* her *husband;* and why? 29.

19. For what offences only is *duress per minas* an excuse? 30.

20. If a man be violently assaulted, and have no other possible means of escaping death but by killing an innocent person, whom may he kill? 30.

21. Where a man by the commandment of the law is bound to arrest another for any capital offence, or to disperse a riot, and resistance is made to his authority, whom may he even kill, and why? 31.

22. May a man in extreme want of food or clothing justify stealing either to relieve his present necessities? 31, 32.

23. What one case is there in which the *law* supposes an incapacity of doing wrongs from the excellence and perfection of the *person?* 32, 33.

CHAP. III.—*Of Principals and Accessories.*

1. What are the two different degrees of *guilt* among persons that are capable of offending? 34.

2. In what two degrees may a man be *principal* in an *offence?* 34.

3. Must the *principal* in the second degree be actually immediately standing by, within sight or hearing of the fact? 34.

4. In cases of *murder* committed in the absence of the *murderer* by means which he had prepared beforehand, is the *murderer principal* in the first or second degree, or *accessory;* and why? 34, 35.

5. Who is an *accessory;* and of what two kinds are *accessories?* 35.

6. Why are all *principals* in *high treason?* 35.

7. In what crimes may there be *accessories?* 36.

8. Why are all *principals* in *petit larceny*, and in all crimes under the degree of *felony?* 36.

9. If a *servant* instigate a stranger to kill his *master*, is he guilty of being *accessory* to *petty treason?* 36.

10. Who is an *accessory before the fact?* 36, 37.

11. If A. command B. to beat C., and B. beat him so that he die, is A. *accessory* to the *murder?* 37.

12. If A. command B. to burn C.'s house, and he, in so doing, commit a *robbery*, is A. *accessory* to the *robbery?* 37.

13. If A. command B. to poison C., and B. stab or shoot him, is A. *accessory* to the *murder?* 37.

14. Who is an *accessory after the fact;* and what two things are necessary to make one? 37, 38.

15. Does the relief of a *felon* in gaol, with clothes or other necessaries, make a man an *accessory after the fact?* 38.

16. Who are made *accessories* (when the *principal felony* admits of *accessories*) by the statutes 5 Anne, c. 31, and 4 Geo. I. c. 11? 38.

17. What if one wound another mortally, and, before death ensue, a person assist or receive the delinquent? 38.

18. What if the *parent* assist or receive the *child*, the *child* the *parent*, the *brother* the *brother*, the *master* the *servant*, the *servant* the *master*, the *husband* the *wife*, or the *wife* the *husband*, who have any of them committed a *felony?* 38, 39.

19. How are *accessories* to be treated, considered distinct from *principals?* 39.

20. For what four reasons, then, are such elaborate distinctions made between *accessories* and *principals?* 39, 40.

21. In what cases are *accessories after the fact*, by the statutes, still allowed the *benefit of clergy;* and in what cases is that *benefit of clergy* denied to the *principals* and *accessories before the fact?* 39.

22. Is an *acquittal* of receiving or counselling a *felon* an *acquittal* of the *felony* itself? 40.

23. Can one *acquitted* as *principal* be *indicted* as an *accessory* either *before* or *after the fact?* 40.

CHAP. IV.—*Of Offences against God and Religion.*

1. Of what five species are *crimes* and *misdemeanours* which are either directly or by consequence injurious to *civil* society and therefore punishable by the laws of England? 42, 43.

2. Of such *crimes* and *misdemeanours* as more immediately offend Almighty God by openly transgressing the precepts of religion either natural or revealed, what constitutes that guilt in action which human tribunals are to censure? 43.

3. What eleven crimes are of this species? 43, 44, 50, 59, 60, 62–64.

4. What is *apostasy;* and in whom only can it take place? 43.

5. As a penalty for *apostasy*, what is enacted by statute 9 & 10 W. III. c. 32? 44.

6. What is *heresy;* what was the writ *de hæretico comburendo;* what did the statute 29 Car. II. enact as to *heresy;* and, as a penalty for *heresy*, what is enacted by the statute 9 & 10 W. III.? 44–46, 49, 50.

7. Of what two kinds are the *offences* against *religion* which affect the *established church?* 50.

8. What are the penalties for reviling the ordinances of the church by statutes 1 Edw. VI. c. 1, and 1 Eliz. c. 1 and 2? 50, 51.

9. Of what two classes are *non-conformists;* what penalties are imposed upon those of the first class by statutes 1 Eliz. c. 2, 23 Eliz. c. I., and 3 Jac. I. c. 4; and what are suspended by the statute 1 W. and M. st. 1, c. 18, commonly called the *toleration act*, confirmed by statute 10 Anne, c. 2, from which of those of the second class, with what three *provisos?* 52, 53.

10. What are dissenting teachers to subscribe in order to be exempted from the penalties of the statutes of Car. II. 13 & 14, c. 4, 15, c. 6, 17, c. 2, and 22, c. 1; and from what particular penalties of the first and third of those statutes (with what exceptions) are they exempted by subscribing the declaration of the act 19 Geo. III.? 53, 54.

11. What, by the same statute 1 W. and M., if any person shall wilfully, maliciously, or contemptuously disturb any congregation assembled in any *church* or permitted *meeting-house*, or shall misuse any preacher or teacher there? 54.

12. But what does the statute 5 Geo. I. c. 4 enact as to any *mayor's* or principal *magistrate's* appearing at any *dissenting meeting?* 54.

13. Why do not the reasons for a general toleration of *Protestant dissenters* hold equally strong as to *papists?* 54, 55.

14. Into what three classes may *papists* be divided? 55.

15. What are the penalties and disabilities of the first class of *papists?* 55.

16. What if any person send another abroad to be educated in the *popish religion*, or to reside in any *religious house* abroad for that purpose, or contribute to his maintenance when there? 55.

17. What if these errors be aggravated by *apostasy* or perversion? 55.

18. To what additional disabilities, penalties, and forfeitures is the second class of *papists* subject? 56.

19. What is the effect of refusing to make the declaration against *popery* enjoined by statute 30 Car. II. st. 2, when tendered by the proper magistrate? 56.

20. What are the penalties against the third class of *papists;* and of what are all persons harbouring them guilty? 57.

21. Are these laws enforced now; and whence is their origin? 57.

22. In respect of whom is the statute 11 & 12 W. III. repealed to what extent by the statute 18 Geo. III. c. 60? 58.

23. But now, by statute 31 Geo. III. c. 32, from what *Roman Catholics* are all these restrictions and penalties removed; and how are *Roman Catholic ministers, schoolmasters*, and *congregations* tolerated? 58.

24. What do the *corporation* and *test acts* enact? 58, 59.

25. To whom does the statute 7 Jac. I. c. 2 apply a like test? 59.

26. What is *blasphemy;* and how is it punishable at *common law?* 59.

27. How are *profane* and *common swearing* and *cursing* punishable, by the statute 19 Geo. II. c. 21; and what is enacted against *profanity* on the *stage*, by statute 3 Jac. I. c. 21? 59, 60.

28. What is *witchcraft, conjuration, enchantment*, or *sorcery;* and what is declared as to it by statute 9 Geo. II. c. 5? 60–62.

29. How is the pretence to using *witchcraft*, telling fortunes, or discovering stolen goods by skill in the occult sciences, punished? 62.

30. Who are *religious impostors;* and how are they punishable? 62.

31. Why is *simony* to be considered as an offence against *religion;* who are punishable for it by statute 31 Eliz. c. 6; and how? 62.

32. What other corrupt elections and resignations are punished by the same statute; and how? 63.

33. What is *Sabbath-breaking;* and how are what instances of it punishable by statutes 27 Hen. VI. c. 5 as to *fairs* or *markets*, 1 Car. I. c. 1 as to *unlawful exercises*, and 29 Car. II. c. 7 as to *work?* 63, 64.

34. How is *drunkenness* punished by statute 4 Jac. I. c. 5? 64.

35. When is *lewdness* an indictable offence; and how is it punished? 64, 65.

36. In what event may who be punished for having *bastard children*, by statute 7 Jac. I. c. 4; and how? 65?

CHAP. V.—*Of Offences against the Law of Nations.*

1. WHAT is the *law of nations;* and upon what principle is it founded? 66.

2. By what is this law enforced in *England?* 67.

3. What is the remedy for *offences* against this *law* by whole *states* and *nations?* 68.

4. What if the individuals of any *state* violate this *law?* 68.

5. What are the three principal *offences* against this *law* animadverted on as such by the *municipal laws* of *England?* 68.

6. How may the violation of *safe-conducts*, or *passports* expressly granted by the *king* or his *ambassadors* to the *subjects* of a foreign *power* in time of mutual *war*, be punished; and what is enacted as to *offences* against *strangers* at *sea*, or in *port*, by statute 31 Hen. VI. c. 4? 68–70.

7. What is enacted by the statute 7 Anne, c. 12 in order to enforce the *law of nations* as to the *rights* of *ambassadors?* 70, 71.

8. What is the *offence* of *piracy* by *common law;* how only is it punishable since the *statute of treasons*, 25 Edw. III. c. 2; and what offences are made *piracy* by statutes 11 & 12 W. III. c. 7, 8 Geo. I. c. 24, and 18 Geo. II. c. 30? 71–73.

CHAP. VI.—*Of High Treason.*

1. INTO what four kinds may those *offences* be distinguished which more immediately affect the *royal person*, his *crown* or *dignity*, and which are in some degree a breach of the duty of *allegiance*, whether natural and innate, or local and acquired by residence? 74.

2. What is *treason proditio;* how is the appellation generally used by the *law;* and of what two kinds is *treason?* 74, 75.

3. Under what seven distinct branches are all kinds of *high treason* comprehended by the statute 25 Edw. III. c. 2? 76, 81–84.

4. Is a *queen regnant* or a *king consort* within

the words of the *act;* is a *king de facto* and not *de jure;* is a *king de jure* and not *de facto;* what is the true construction of the statute 11 Hen. VII. c. 1; and is a *king* who has resigned his *crown*, abdicated his *government*, or subverted the *constitution*, any longer the object of *treason?* 76–78.

5. What is *compassing* or *imagining* the death of the *king;* and how must this act of the mind be demonstrated before it can possibly fall under any judicial cognizance? 78, 79.

6. What are held to be *overt acts* of *treason* in *imagining* the *king's* death? 79.

7. Are *words spoken*, *treason?* 80.

8. Are *words written*, *treason?* 81.

9. What does the phrase "the *king's companion*" mean, to violate whom is declared by the statute to be the second species of *treason;* and when is it *treason* in both *parties?* 81.

10. What is held as to the violation of a *queen* or *princess dowager;* and why? 81.

11. What *offences* of *taking up arms* does the third species of *treason* include? 81, 82.

12. To what does an *insurrection* to pull down *all enclosures*, *all brothels*, and the like, amount; and to what does a tumult to pull down *a particular house* or lay open *a particular enclosure?* 82.

13. What if two *subjects* quarrel and levy *war* against each other? 82.

14. When does a bare *conspiracy* to levy *war* amount to *treason?* 82.

15. How must the fourth species of *treason*, or that of adherence to the *king's* enemies, be proved? 82.

16. In what light is giving assistance to foreign *pirates* or *robbers treason?* 83.

17. Under what description is adherence or aid to our own fellow-subjects in actual rebellion at home *treason?* 83.

18. What is held as to relieving a *rebel* fled out of the kingdom; and why? 83.

19. In what events shall a man's joining with either *rebels* or *enemies*, *in* the kingdom, be excused? 83.

20. To what offence does the taking wax which bears the impression of the *great seal* off from one *patent* and affixing it on another amount? 83, 84.

21. What *money* is meant by the statute to counterfeit which is the sixth species of *treason?* 84.

22. Which of the *king's officers* of *justice* are within the statute which declares the "slaying of them in their places doing their offices" *treason?* 84.

23. What does the *act* say as to "other like cases of *treason*" or *constructive treasons?* 85.

25. Under what three heads are comprised the *high treasons* created by subsequent statutes and not comprehended under the description of statute 25 Edw. III.? 87.

25. In what three cases relating to *papists* is the offence of *high treason* declared to be committed, by the statutes 5 Eliz. c. 1, 27 Eliz. c. 2, and 3 Jac. I. c. 4; and what is the reason of distinguishing these *overt acts of popery* from all others which were considered in a preceding chapter as *spiritual offences?* 87, 88.

26. With regard to *treasons* relative to the *coin* or other *royal signatures*, what two *offences* are declared to be *high treason* by statute 1 Mar. st. 2, c. 6; and what one in consequence of the former, with regard to *importing coin*, by statute 1 & 2 P. and M. c. 11? 89.

27. Is it *high treason* to counterfeit foreign money taken here by consent? 89.

28. What instances of *falsifying* the *coin* are declared to be *high treason* by statutes 5 Eliz. c. 11, and 18 Eliz. c. 12? 90.

29. What *offences*, as to implements of and preparations for coinage, are declared to be *high treason* by statute 8 & 9 W. III. c. 26, made perpetual by 7 Anne, c. 25; and within what times must all prosecutions on this *act* be commenced? 90.

30. What species of *coining* is made *high treason* by statute 15 & 16 Geo. II. c. 28; but in what case shall the offender be pardoned? 90, 91.

31. What *offences* are made *high treason* with a view to the security of the *Protestant succession*, with regard to the late *Pretender* or his sons, by statutes 13 & 14 W. III. c. 3, and 17 Geo. II. c. 39, and generally by statutes 1 Anne, st. 2, c. 17, and 6 Anne, c. 7? 91, 92.

32. What *offences* are made *high treason* by the statute 33 Geo. III. c. 27, called the *traitorous correspondence act;* and what else does the statute enact? 92.

33. Of what six parts does the *punishment* for *high treason* consist; but what parts may be discharged by the *king?* 92, 93.

34. How is the *punishment* milder for *male offenders* in case of *coining?* 93.

35. But is the *punishment* of *females* the same in *treasons* of every kind? 93.

CHAP. VII.—*Of Felonies injurious to the King's Prerogative.*

1. WHAT is *felony*, in the general acceptation of our *English law?* 94, 95.

2. What is the etymology of the word, according to Sir Henry Spelman; how is this etymology confirmed by the feodal writers; and wherefore are *suicide*, *homicide*, *petit larceny*, *robbery*, *rape*, and *treason*, *felonies* by the ancient law? 95–97.

3. As there are *felonies* without *capital punishment*, may *capital punishments* be inflicted where the *offence* is no *felony?* 97.

4. But to what usage do the interpretations of the *law* now conform, and, in compliance therewith, in what light does the present *commentator* intend to consider *felony?* 98.

5. Of what five kinds are such *felonies* as are more immediately injurious to the *king's prerogative?* 98.

6. Of the various *offences* relating to the *coin*, as well *misdemeanours* as *felonies*, declared by a series of statutes, what are the several penalties for melting down sterling money, by statute 9 Edw. III. st. 2; for melting down current silver money, by statute 13 & 14 Car. II. c. 31; for importing false *money;* for forging any foreign *coin*, although it be not made current here by *proclamation;* for having to do with *clippings* or *filings* of the *coin*, for blanching *copper* for sale, or dealing in any malleable composition resembling *gold*, or buying, at a less rate than it imports to be of, any counterfeit or diminished milled

money of this kingdom, not being cut in pieces, (an operation which is in what case directed, and in what cases allowed and required, by certain statutes, to be performed;) for tendering any counterfeit *coin*, knowing it to be so; for doing so, having more in custody, or repeating the offence within ten days after; and for counterfeiting copper halfpence or farthings, or dealing in it (not being cut in pieces or melted) at a less value than it imports to be of? 98–100.

7. What is enacted by statutes 3 Hen. VII. c. 14, and 9 Anne, c. 16, as to *felonies* against the *king's council?* 100, 101.

8. In what cases is it made *felony* to serve foreign *states*, by statutes 3 Jac. I. c. 4, 9 Geo. II. c. 30, and 29 Geo. II. c. 17? 101.

9. What is enacted by the statute 31 Eliz. c. 4 as to *felony* in embezzling the *king's* armour or warlike stores; what effect upon this statute has that of 22 Car. II. c. 5; how are other inferior embezzlements and *misdemeanours* punished by several statutes; and what is enacted by statute 12 Geo. III. c. 24? 101, 102.

10. What is enacted by statutes 18 Hen. VI. c. 19, and 5 Eliz. c. 5, as to desertion from the *king's armies* in time of *war*, whether by land or sea; what effect upon this statute has that of 2 & 3 Edw. VI. c. 2; and how are other inferior *military offences* punishable by the same statutes? 102.

CHAP. VIII.—*Of Præmunire.*

1. Why is the *offence* of *præmunire* so called; and whence did it take its original? 103.

2. What does the *statute of præmunire*, 16 Ric. II. c. 5, enact; and who are also subjected to the penalties of *præmunire* by statute 2 Hen. IV. c. 3? 112.

3. What *offences* are made liable to the pains of *præmunire* by the statutes of Hen. VIII. and Eliz.? 115.

4. To what penalty is the importing or selling *mass-books* or other *popish books* liable, by statute 3 Jac. I. c. 5, § 25? 115.

5. To what twelve other *offences*, some of which bear no relation to the original *offence*, have the penalties of *præmunire* been applied by various statutes? 116, 117.

6. How is the *punishment* of *præmunire* shortly summed up by Sir Edward Coke; except in the case of transgressing what statute may the *king*, by his *prerogative*, remit the whole or any part of the *punishment;* and what does the statute 5 Eliz. c. 1 provide as to the consequences of an *attaint* by *præmunire?* 117, 118.

CHAP. IX.—*Of Misprisions and Contempts affecting the King and Government.*

1. What are *misprisions* (*mespris*) and *contempts;* and of what two sorts? 119.

2. Of what three kinds are *negative misprisions?* 120, 121.

3. What is *misprision of treason;* but what circumstances make this offender guilty of *high treason?* 120.

4. What positive *misprision of treason* is created by statute 13 Eliz. c. 2? 120.

5. What is the *punishment* for *misprision of treason?* 120.

6. What is *misprision of felony;* and how is it punished by the statute Westm. 1, 3 Edw. I. c. 9? 121.

7. What is the *punishment* for *misprision* of *treasure-trove?* 121.

8. Of what five kinds are *positive misprisions*, or *contempts*, and *high misdemeanours*, the last four consisting, in general, of such *contempts* of the *executive magistrate* as demonstrate themselves by some arrogant and undutiful behaviour towards the *king* and *government?* 121–124.

9. What offences are included under the *misprision* of the *mal-administration* of such high officers as are in public trust and employment; and how is it usually punished? 121, 122.

10. What are *contempts* against the *king's prerogative?* 122.

11. Whose duty is it, and when, to join the *posse comitatus*, or *power of the county*, according to the statute 2 Hen. V. c. 8? 122.

12. How are *contempts* against the *king's prerogative* punished? 122.

13. What are *contempts* and *misprisions* against the *king's person* and *government;* and how may they be punished? 123.

14. What are *contempts* against the *king's title* not amounting to *treason* or *præmunire;* and how are they punished? 123.

15. What *offence* is it, and how punishable by statute 13 Eliz. c. 1, to maintain that the *common laws* of this realm not altered by *parliament* ought not to direct the right of the *crown* of *England?* 123.

16. What are the penalties inflicted by statute 1 Geo. I. st. 2, c. 13, for refusing or neglecting to take the *oaths* appointed by *statute for better securing the government*, and yet acting or serving in a public office, place of trust, or other capacity, for which the said oaths are required to be taken; and what if *members*, on the *foundation* of any *college* in the two *universities*, who by this statute are bound to take the *oaths*, do not register a *certificate* thereof in the *college register* within one month after? 123, 124.

17. What are *contempts* against the *king's palaces* or *courts of justice;* and how are they, a *rescue* from them, and an *affray* or *riot* near them, but out of their actual view, punishable? 124, 125.

18. How are threatening or reproachful words to any *judge* sitting in the *courts* punishable; and how is an *affray* or *contemptuous behaviour* in the *inferior courts* of the *king?* 126.

19. How are such as are guilty of any injurious treatment to those who are immediately under the protection of a *court of justice* punishable? 126.

20. How are endeavours to dissuade a *witness* from giving *evidence*, disclosures of examination before a *privy council*, advice to a *prisoner* to stand mute, or disclosures by one of the *grand jury* to any person indicted of the *evidence* against him, construed and punished? 126.

CHAP. X.—*Of Offences against Public Justice.*

1. Into what five species may those *crimes* and *misdemeanours* that more especially affect the commonwealth be divided? 127, 128.

2. What are the twenty-two *offences* against *public justice*, beginning with those that are most

penal, and descending gradually to such as are of less malignity? 128–137, 139–141.

3. What is enacted by statute 8 Hen. VI. c. 12 as to embezzling or vacating *records*, by statute 21 Jac. I. c. 26, as to acknowledging any *proceedings* in the *courts* in the name of another person not privy to the same, and, by statute 4 W. and M. c. 4, as to personating any other person as *bail?* 128.

4. What is enacted by statute 14 Edw. III. c. 10 if any gaoler compel any *prisoner* to become an *approver* or an *appellor?* 128, 129.

5. What is the *offence* of obstructing the *execution* of lawful *process* in *criminal cases;* and what is enacted by several statutes as to opposing the *execution* of any process in pretended privileged places within the *bills of mortality?* 129.

6. Who are punishable for the *escape* of a person arrested upon *criminal process;* how, and when? 129, 130.

7. How is *breach of prison* by the *offender* himself punished by the statute *de frangentibus prisonam*, 1 Edw. II.? 130, 131.

8. What is *rescue;* how is it punishable, and when; what is enacted by statutes 11 Geo. II. c. 26, and 24 Geo. II. c. 40, as to *rescues* of any retailers of spirituous liquors, and by statute 16 Geo. II. c. 31, as to assisting *prisoners* to escape; and what if any person be charged with any of the *offences* against the *black act*, 9 Geo. I. c. 22, and, being required by order of the *privy council* to surrender himself, neglect to do so for forty days? 131.

9. Who are punishable for an *offender's* returning from *transportation*, and how? 132.

10. What is enacted by statute 4 Geo. I. c. 11 as to the *offence* of taking a reward under pretence of helping the owner to his stolen goods? 132.

11. In the *offence* of receiving stolen goods knowing them to be stolen, which makes the *offender accessory* to the theft, of what other punishment has the *prosecutor*, by statutes 1 Anne, c. 9, and 5 Anne, c. 31, the choice before the thief be taken and convicted; and what is enacted as to receivers and possessors of certain metals, by statute 29 Geo. II. c. 30, and as to knowing receivers of stolen plate or jewels taken by *highway-robbery* or *burglary?* 132, 133.

12. What is *theft-bote*, and how is it punished; and what is enacted by statute 25 Geo. II. c. 36 as to advertising a reward for the return of things stolen with "no questions asked"? 133, 134.

13. What is *common barretry;* how is it punished; and what is enacted by statute 12 Geo. I. c. 29 in case an *attorney* shall have been convicted of this *offence?* 134.

14. What is the punishment for *suing* in a false name in the *superior courts*, and what in the *inferior*, by statute 8 Eliz. c. 2? 134.

15. What is the *offence* of *maintenance;* when is it not an offence; and what is the *punishment* for it when it is by *common law*, and by statute 32 Hen. VIII. c. 9? 134, 135.

16. What is *champerty* (*campi partitio*); and what has the *law's* abhorrence of it led it to say of a *chose in action* by *common law*, and of a pretended *right* or *title* to *land*, by statute 32 Hen. VIII. c. 9? 135, 136.

17. What is enacted by statute 28 Eliz. c. 5 as to compounding *informations* upon *penal statutes?* 136.

18. In what two ways may conspirators to indict an innocent man of *felony* be punished? 136, 137.

19. How are threats of accusation in order to extort money punishable by statute 30 Geo. II. c. 24? 137.

20. How is *perjury* defined by Sir Edward Coke; what is *subornation* of *perjury;* how are they now punished at *common law*, with an added power in the court to inflict what penalties, by statute 2 Geo. II. c. 25; and how may they be punished by statute 5 Eliz. c. 9? 137, 138.

21. When is *bribery* an *offence* against *public justice;* in whom and how is it punished; and what is enacted on this subject by a statute 11 Hen. IV.? 139, 140.

22. What is *embracery;* and in whom and how is it punished? 140.

23. How was the *false verdict* of *jurors* anciently considered, and how punished? 140.

24. In what *public officers* is negligence an *offence* against *public justice;* and how is it punishable? 140.

25. How is the oppression and tyrannical partiality of *magistrates* prosecuted and punished? 141.

26. When is extortion an abuse of *public justice;* and what is the punishment for it? 141.

CHAP. XI.—*Of Offences against the Public Peace.*

1. Of what two species are *offences* against the *public peace;* and of what two degrees are both these kinds? 142.

2. What are the thirteen kinds of *offences* against the *public peace?* 142–150.

3. What does the statute 1 Geo. I. c. 5 enact as to the riotous assembling of twelve persons or more, and not dispersing upon proclamation? 143.

4. What does the statute 9 Geo. I. c. 22 enact as to appearing armed, or hunting in disguise? 143, 144.

5. What does the same statute, amended by statute 27 Geo. II. c. 15, enact as to sending any demanding or threatening letter? 144.

6. What, by several late statutes, are the penalties for destroying or damaging any *lock*, *sluice*, or *flood-gate*, or any *turnpike-gate*, or its appurtenances, or for rescuing such destroyers or damagers? 144, 145.

7. What are *affrays* (*affraier*); wherein do they differ from *assaults;* by whom, and how, may they be suppressed; and what is their punishment? 145.

8. What is enacted by statute 5 & 6 Edw. VI. c. 4 as to *affrays* in a *church* or *churchyard?* 146.

9. What are *riots*, *routs*, and *unlawful assemblies;* and of how many persons must they be constituted; how are they punished by *common law;* and what is enacted for their suppression by statute 13 Hen. IV. c. 7? 146, 147.

10. What is *tumultuous petitioning;* and what is enacted for its prevention by statute 13 Car. II. st. 1, c. 5? 147, 148.

11. What is *forcible entry* or *detainer;* and how, by several statutes, may it be suppressed and punished? 148, 149.

12. What is the *offence* of going unusually armed; and how is it prohibited by the statute of Northampton, 2 Edw. III. c. 3? 149.

13. When is the *offence* of spreading false news punishable, and how? 149.

14. How is the *offence* of *pretended prophecy* punished by statute 5 Eliz. c. 15? 149.

15. In whom are challenges to fight punishable, and how; and what, by statute 9 Anne, c. 14, if the challenge, or any *assault* or *affray*, arise on account of any money won at gaming? 150.

16. What are *libels* which tend to the breach of the peace; what is a publication of them, in the eye of the *law;* what if they be true, and what if they be false; what is the difference between a *libel* in a *civil action* and a *libel* in a *criminal prosecution;* and what is the punishment of *criminal libels?* 150, 151.

17. Though it hath been long held that the truth of a *libel* is no justification in a *criminal prosecution*, yet what general rule has the *court* of *king's bench* laid down as to granting an *information* for a *libel?* 151.

CHAP. XII.—*Of Offences against Public Trade.*

1. Of what two degrees are *offences* against *public trade?* 154.

2. What are the thirteen kinds of these *offences?* 154, 156–160.

3. What is *owling;* and what are its penalties, by several statutes? 154.

4. What is *smuggling;* and how is it punished by statute 19 Geo. II. c. 34? 154, 155.

5. What are the several species of *fraudulent bankruptcy* taken notice of by the *statute law;* and how are they punished? 156.

6. What, by statute 21 Jac. I. c. 19, if the *bankrupt* cannot make it appear that he is disabled from paying his *debts* by some casual loss; and what, by statute 32 Geo. II. c. 28, and 33 Geo. III. c. 5, if a prisoner charged in execution for *debt* (to what amount?) neglect or refuse on demand to deliver up his *effects?* 156.

7. What is the penalty for *usury;* what if any scrivener or broker take more than five shillings *per cent. procuration-money*, or more than twelvepence for making a *bond;* and what is enacted on this subject by statute 17 Geo. III. c. 26? 156, 157.

8. What *offences* may be referred to the head of *cheating;* what is the general punishment for all frauds of this kind if indicted at *common law;* and what frauds are punished by the statutes 33 Hen. VIII. c. 1 and 30 Geo. II. c. 24? 157, 158.

9. How are the three *offences* of *forestalling*, *regrating*, and *engrossing* described by statute 5 & 6 Edw. VI. c. 14; and what is the general penalty for these offences by *common law?* 158, 159.

10. What are *monopolies;* and how are they punished? 159.

11. How are combinations among victuallers or artificers to raise the prices of commodities punished by statute 2 & 3 Edw. VI. c. 15? 159, 160.

12. How is the *offence* of exercising a trade without having served an apprenticeship punished by statute 5 Eliz. c. 4? 160.

13. What is enacted by several statutes of Geo. II. and Geo. III. to prevent the seduction of our artists abroad, and the destruction of our home manufactures? 160.

CHAP. XIII.—*Of Offences against the Public Health and the Public Police or Economy.*

1. What are the two *offences* against the public health of the nation? 161, 162.

2. What is enacted by statute 1 Jac. I. c. 31 as to any person infected with the *plague*, or dwelling in any infected house; and what is the present *law* as to *quarantine?* 161, 162.

3. What is enacted by statutes 51 Hen. III. st. 6 and 12 Car. II. c. 25, § 11 to prevent the selling of unwholesome provisions and wine? 162.

4. What is meant by the *public peace and economy?* 162.

5. What are the nine *offences* against the *public peace and economy?* 162–166, 169–171, 174.

6. What is enacted by the statute 26 Geo. II. c. 33 for the prevention of the *offence* of *clandestine marriages?* 162, 163.

7. What is *bigamy*, or more properly *polygamy;* what is its effect upon the *second marriage;* and how is it punished by statute 1 Jac. I. c. 11, with an exception to what five cases? 163, 164.

8. How are wandering *soldiers* and *mariners*, or persons pretending so to be, punished by statute 39 Eliz. c. 17? 164, 165.

9. How are persons calling themselves *Egyptians*, or *gypsies*, now punished, by statute 23 Geo. III. c. 51? 167.

10. What are *common nuisances;* and of what seven sorts? 167, 168.

11. Who may be *indicted*, and what shall be equivalent to such *indictment*, for annoyances in *highways*, *bridges*, and *public rivers*, whether by positive obstructions or want of reparation; and what is a *purpresture?* 167.

12. What if *innkeepers* refuse to entertain a *traveller* without a very sufficient cause? 167.

13. How may *eaves-droppers* be punished? 168.

14. How may a *common scold* (*communis rixatrix*)? 168.

15. Into what three clases are *idle persons* divided, and how is each class punished by statute 17 Geo. II. c. 5; and to what are persons harbouring *vagrants* liable? 169, 170.

16. What one sumptuary *law* against *luxury* is still unrepealed? 170.

17. What is enacted by statute 16 Car. II. c. 7 if any person by playing or betting shall lose more than 100*l.* at one time; what does the statute 9 Anne, c. 14 enact as to all securities given for money won at play, if any person at one sitting lose 10*l.* at play, and if any person by cheating at play win the same sum; what does the statute 13 Geo. II. c. 19 enact to prevent the multiplicity of *horse-races;* and what, by statute 18 Geo. II. c. 34, if any person win or lose at play, or by betting, 10*l.* at one time, or 20*l.* within twenty-four hours? 172, 173.

18. Who are guilty of the *offence* of destroying the *game* upon the old principles of the *forest-law*, and who by the *game-laws;* and what are the four *qualifications* for killing game, as they are usually called, or, more properly, the exemptions from the penalties inflicted by the *statute law?* 174, 175.

19. What are the punishments for *unqualified persons* transgressing the *game-laws* in what ways; and how may those punishments be inflicted? 175.

20. What is enacted for the preservation of *game* by statute 28 Geo. II. c. 2? 175.

CHAP. XIV.—*Of Homicide.*

1. Of what three principal kinds are those *crimes* and *misdemeanours* which in a more peculiar manner affect and injure individuals or *private subjects?* 177.

2. Of *crimes* injurious to the *persons* of *private subjects*, what is the most principal and important? 177.

3. Of what three kinds, and of what three degrees of guilt, is *homicide?* 177, 178.

4. In what three cases is *homicide justifiable?* 178, 179.

5. What *offence* is it wantonly to kill the greatest of malefactors? 178.

6. What if *judgment* of *death* be given by a *judge* not authorized by lawful commission, and *execution* be done accordingly? 178.

7. What if even the *judge* execute his own *judgment;* and what if an *officer* behead one who is adjudged to be hanged, or *vice versâ?* 179.

8. Of what six kinds are *justifiable homicides*, committed for the advancement of *public justice?* 179, 180.

9. But, in all these first five cases, what apparent necessity must there be on the *officer's* side? 180.

10. When is it lawful to kill any person who attempts a *burglary;* and what is the uniform principle that runs through all *laws* as to repelling *crimes* by *homicide?* 180, 181.

11. What is Mr. Locke's doctrine on this subject, and how is it received by the *commentator?* 181, 182.

12. Wherein does *excusable* differ from *justifiable homicide;* and of what two sorts is the former? 182.

13. In what cases does homicide *per infortunium*, or *misadventure*, happen? 182.

14. In what cases, however, is the slayer guilty of *manslaughter* and not *misadventure* only; but when are deaths in *tilts* or *tournaments*, *boxing*, or *sword-playing* only *misadventure?* 183.

15. What is *homicide* in *self-defence*, or *se defendendo;* what is *chance-medley*, or *chaud-medley;* and what must appear to excuse *homicide* by the *plea* of *self-defence?* 183, 184.

16. What seems to be the true criterion to distinguish *homicide* upon *chance-medley*, in *self-defence*, from *manslaughter* in the legal sense of the word? 184, 185.

17. What *civil* and *natural relations* are comprehended under the excuse of *se defendendo*, and why? 186.

18. Is there not one species of *homicide se defendendo* where the party slain is equally innocent with him who occasions his death; and upon what principle is this *homicide* excusable? 186.

19. In what circumstances do the two species of *homicide* by *misadventure* and *self-defence* agree; and what does the law's high value for the life of a man always intend? 186, 187.

20. What is the penalty for *homicide?* 188.

21. What is *felonious homicide*, and of what two kinds? 188.

22. What is *self-murder*, or *felo de se;* does it admit of *accessories;* when, and in whom, may it happen, and when in a real *lunatic?* 189, 190.

23. How is *self-murder* punished? 190.

24. What if a *husband* and *wife* be possessed jointly of a *term* of *years* in *land*, and the *husband* drown himself; and why? 190.

25. How do the two degrees of guilt in *killing another* divide the *offence;* and what is the difference between either division of it? 190.

26. How is *manslaughter* therefore defined; and of what two branches is it? 191.

27. When is it *voluntary manslaughter;* and what circumstance makes it amount to *murder?* 191.

28. In what, therefore, does *voluntary manslaughter* differ from *excusable homicide, se defendendo*? 192.

29. In what does *involuntary manslaughter* differ from *homicide excusable by misadventure?* 192.

30. But what circumstances will make *involuntary manslaughter* amount to *murder?* 192, 193.

31. What is the punishment of *manslaughter?* 193.

32. But is there not one species of *manslaughter* which is punished as *murder* by statute 1 Jac. I. c. 8; and how is this statute construed? 193, 194.

33. How is *murder* defined, or rather described, by Sir Edward Coke? 195.

34. What if a person be indicted for one species of killing, or for killing with one weapon, and it proves to have been another? 196.

35. May a man be guilty of *murder* although no stroke be struck by himself, or no killing primarily intended? 196.

36. Within what time after the stroke received must the party die in order to make the killing *murder?* 197.

37. When is it *murder* to kill a *child* in its *mother's* womb; and what is enacted by the statute 21 Jac. I. c. 27 as to a mother's concealing the death of her *bastard child;* but what is now required upon *trials* for this *offence?* 198.

38. What constitutes *malice prepense*, *malitia præcogitata;* and when is *malice express*, and when *implied*, in *law?* 198–201.

39. Who are guilty of *murder* in *deliberate duelling?* 199.

40. If two or more come together to do an unlawful act against the *king's peace*, and one of them kill a man, in whom is it *murder?* 200.

41. What if one intend to do another *felony*, and undesignedly kill a third man? 201.

42. Unless in what cases may it be taken for a general rule that all *homicide* is *malicious?* 201.

43. What is the punishment of *murder;* and what is enacted on that subject by statute 25 Geo. II. c. 37? 201, 202.

44. What is *petit treason* (*parva proditio*); and by what three ways may it happen, according to statute 25 Edw. III. c. 2? 203.

45. Of what crime is a *servant* guilty who kills his *master* whom he has left upon a grudge conceived against him during service; and whom is it *petit treason* in a *clergyman* to kill? 203.

46. May a person indicted of *petit treason* be

found guilty of *manslaughter* or *murder;* and how many witnesses are necessary in case of *petit treason?* 204.

47. What is the punishment for *petit treason,* and what in a *woman,* by statute 30 Geo. III. c. 48? 204.

48. What is the punishment for the aiders, abettors, and counsellors of *petit treason?* 204.

CHAP. XV.—*Of Offences against the Persons of Individuals.*

1. Of what two degrees of guilt are other *offences* against the persons of individuals? 205.

2. What are the four *felonies?* 205, 208, 210, 215.

3. What amounts to *mayhem, mayhemium;* and how is it punished by statutes 5 Hen. IV. c. 5, 37 Hen. VIII. c. 6, and 22 & 23 Car. II. c. 1, called the *Coventry* act? 205–207.

4. What is enacted by statute 9 Geo. I. c. 22 as to the offence of maliciously shooting at any person? 207.

5. What is enacted by statutes 3 Hen. VII. c. 2 and 39 Eliz. c. 9 as to the *offence* of forcible *abduction* and *marriage* of a *female,* or, as it is vulgarly called, *stealing an heiress?* 208.

6. What four things have been determined in the construction of the first of these statutes; what has been determined as to the *will* of the *woman;* and what general rule of *law* may be violated in punishing this *offence?* 208, 209.

7. What is enacted by the statutes 4 & 5 Ph. and M. c. 8 and 26 Geo. II. c. 33 as to an inferior degree of the same kind of *offence?* 209, 210.

8. What is the crime of *rape;* and what is enacted as to its punishment by statute 18 Eliz. c. 7? 210, 212.

9. Who is presumed by the law incapable to commit a *rape?* 212.

10. Can a *rape* be committed upon a *concubine* or *harlot?* 212, 213.

11. What has been determined as to the competency and credibility of *witnesses* upon an *indictment* of *rape;* and what has been now settled as to hearsay evidence of the declarations of a *child* who hath not capacity to be sworn? 213, 214.

12. What is the punishment for the *crime against nature?* 215, 216.

13. What are the five inferior *offences* or *misdemeanours* against the *personal security* of the *subject?* 216.

14. What are the public penalties for *assault, battery,* and *wounding;* what other ignominious corporal penalties are inflicted in the case of *assaults* with intent to *murder,* or to commit either of the *crimes* last spoken of; and, when both parties are consenting to the last *crime,* what is it usual to charge? 216, 217.

15. What is enacted by the statute called *articuli cleri,* 9 Edw. II. c. 3, as to the offence of *beating* a *clerk* in *orders?* 217, 218.

16. As to the public *offence* of *false imprisonment,* how is the sending of any *subject* of this realm a *prisoner* beyond the seas punished; what does the statute 43 Eliz. c. 13 declare as to this kind of *offence* in the four northern counties; and how are inferior degrees of *false imprisonment* punishable by *indictment?* 218.

17. What is *kidnapping;* how is it punished at *common law;* and what does a clause of the statute 11 & 12 W. III. c. 7 enact to prevent the leaving of kidnapped persons abroad? 219.

CHAP. XVI.—*Of Offences against the Habitations of Individuals.*

1. What are the only two *offences* that mor immediately affect the habitations of individuals, or *private subjects?* 220.

2. What is *arson* (*ab ardendo*)? 220.

3. What is such a *house* as may be the subject of *arson?* 221.

4. When is wilfully setting fire to one's own house *arson;* and when a high *misdemeanour?* 221.

5. What if a *landlord* or *reversioner* set fire to his own house of which another is in possession under *lease?* 221.

6. What amounts to the *burning* which constitutes *arson;* and what is enacted by the statute 6 Anne, c. 31 if any *servant* negligently set fire to a *house* or *outhouses?* 222.

7. How is *arson* punished in whom? 222, 223.

8. What is *burglary, burgi latrocinium;* what may a man do to protect his house which he is not permitted to do in any other case; and how is a *burglar* defined by Sir Edward Coke? 223, 224.

9. At what *time* must the *burglary* be committed; and what is held as to the *light* by which it is committed? 224.

10. What is Sir Edward Coke's definition of the place in which a burglary must be commited; and why does it not seem extensive enough; and when may a *burglary* be committed in a *barn, stable,* or *warehouse?* 224, 225.

11. When is a *lodging* the *mansion-house* of the *lodger;* and can *burglary* be committed in the *shop,* parcel of another man's *house,* which I hire to work or trade but not to lie in, or in a *tent* or *booth* erected in a *market* or *fair,* in which I do lodge? 225, 226.

12. As to the manner of committing *burglary,* what must there be to complete the *offence;* and what if a hole be broken one night, and the same breakers enter the next night through the same? 226.

13. In what cases may *burglary* be committed without *breaking,* or *loosing* of *fastenings?* 226, 227.

14. What is sufficient to constitute the *entry* which is *burglarious;* and what is declared as to the precedence of the *entry* and the *burglary* by statute 12 Anne, c. 7? 227.

15. What is the law as to the *intent* of *burglary?* 227, 228.

16. How is *burglary* punished in whom? 228.

CHAP. XVII.—*Of Offences against Private Property.*

1. What are the three offences against *private subjects* which more immediately affect their *property,* two of which are attended with a *breach* of the *peace?* 229.

2. Into what two sorts is *larceny,* by contraction for *laticony, latrocinium,* distinguished by the *law?* 229.

3. When is *simple larceny* called *grand,* and when *petit, larceny?* 229.

4. What is *simple larceny?* 229.

5. In what cases may a *carrier* of *goods* commit the *offence* of *larceny* upon those goods? 230

6. What is enacted by statutes 33 Hen. VI. c. 1 and 21 Hen. VI. c. 7 in cases of *servants* embezzling their *master's goods?* 230, 231.

7. What is the *offence* of embezzling goods of which the offender had not the possession, but only the care or use? 231.

8. Under what circumstances may a man be guilty of *felony* in taking his own *goods?* 231.

9. What is a sufficient *asportation* of *goods* to constitute a *larceny?* 231.

10. Who are indemnified by the requisite to a *larceny* that it must be *felonious*, that is, done *animo furandi?* 232.

11. Why can no *larceny* be committed, by the rules of *common law*, of things that adhere to the *freehold;* and why is the severance of them merely *trespass* by *common law;* but in what cases may the taking them away amount to *larceny?* 232, 233.

12. And now, by statute 4 Geo. II. c. 32, how are what *offences* of this nature punished; and what is enacted by three statutes of Geo. III. as to the *offence* of stealing any trees, roots, shrubs, or plants? 233, 234.

13. What instance of stealing out of *mines* is punished by statute 25 Geo. II. c. 10; and how? 234.

14. Why is it no *felony* to steal writings relating to a *real estate?* 234.

15. Upon what footing are *bonds*, *bills*, and *notes* put by the statute 2 Geo. II. c. 25; and what is enacted as to embezzlements at the Bank of England, South Sea Company, and post-office, by statutes 15 Geo. II. c. 13, 24 Geo. II. c. 11, and 7 Geo. III. c. 50? 234, 235.

16. When may *larceny* be committed of *animals feræ naturæ;* and what is enacted on this subject by statutes 9 Geo. I. c. 22, 16 Geo. III. c. 30, and 5 Geo. III. c. 14? 235, 236.

17. Of what *animals domitiæ naturæ* can *larceny* be committed; and what is enacted by statute 10 Geo. III. c. 18 as to *dog-stealing?* 236.

18. Can *larceny* be committed if the owner be unknown? 236.

19. When only is stealing a *corpse felony?* 236, 237.

20. How is *simple larceny*, whether *grand* or *petit*, punished; and how is the punishment for the latter *offence* mitigated? 238, 239.

21. But in what cases of *simple larceny* is the *benefit of clergy* taken away by statute; and why? 239, 240.

22. What is *mixed*, or *compound*, *larceny?* 240.

23. What is *larceny* from the *house;* in what four domestic aggravations of *larceny* above the value of twelvepence is the benefit of clergy denied, and to whom; in what two *larcenies* to the value of five shillings, and in what one to the value of forty shillings? 241, 242.

24. Of what two sorts is *larceny* from the *person?* 242.

25. How is the *offence* of privately stealing from a man's *person* punished? 242.

26. What three requisites are there to the *offence* of open and violent *larceny* from the *person*, or *robbery;* and how, and in whom, is it now in all cases punished? 243, 244.

27. What is the *malicious mischief* which the law considers as a *public crime?* 244.

28. What is enacted by statute 22 Hen. VIII. c. 11 as to destroying the powdike in the fens of Norfolk and Ely; what *offence* is it to destroy the sea-banks, river-banks, public navigations, and bridges erected by virtue of many *acts of parliament;* what does the statute 43 Eliz. c. 13 enact for preventing rapine on the northern borders, and what is *blackmail;* what is enacted by the statutes 22 & 23 Car. II. c. 7 as to burning or destroying corn, hay, &c., or killing cattle; 4 & 5 W. and M. c. 23 as to burning on any waste between Candlemas and midsummer; 1 Anne, st. 2, c. 9 and 4 Geo. I. c. 12 as to destroying ships to the prejudice of the owners and insurers; 12 Anne, st. 2, c. 18 as to damaging ships in distress; 1 Geo. I. c. 46 as to setting on fire underwood; 6 Geo. I. c. 23 as to defacing the garments of persons passing in the streets; by the *Waltham black-act*, extended to what by 9 Geo. III. c. 29; by 6 Geo. II. c. 37 and 10 Geo. II. c. 32 as to the cutting down banks, cutting hop-binds, or firing coal-mines; 11 Geo. II. c. 22 as to deterring buyers of corn, seizing corn-carriages or horses, or spoiling corn; 28 Geo. II. c. 19 as to firing furze in any forest or chase; 6 Geo. III. c. 36 & 48 and 13 Geo. III. c. 33 as to destroying trees or plants; 9 Geo. III. c. 29 as to the destroying mine-engines or enclosure-fences; and 13 Geo. III. c. 38 as to destroying the Plate-Glass Company's property? 245–257.

29. What is *forgery*, or the *crimen falsi?* 247.

30. What *forgeries* have been capitally punished by a multitude of statutes since the *Revolution*, when paper credit was first established? 248, 249.

31. What do several statutes of Geo. III. enact as to *forgeries* of standard plate-marks, frauds on the *stamp-duties*, counterfeiting the Plate-Glass Company's seal, and forging the superscription of a letter in order to avoid the payment of the postage? 249.

32. What is enacted by statute 2 Geo. II. c. 25 as to the *forgery* of deeds, wills, notes, &c.; and by statutes 7 Geo. II. c. 22 and 18 Geo. III. c. 18 as to acceptances of bills of exchange, or the number or principal sum of any accountable receipt for any security for money, or any order for the payment of money for the delivery of goods? 249, 250.

CHAP. XVIII.—*Of the Means of preventing Offences.*

1. How may *crimes* and *misdemeanours* be prevented? 251.

2. In what does this security consist? 252, 253.

3. Who may demand it; to whom may it be granted; what is a writ called a *supplicavit;* and how ought *feme-coverts* and *infants* to find security? 253, 254.

4. In what four ways may a *recognizance* be discharged? 254.

5. For what causes is a *recognizance* for the *peace* grantable; what is called *swearing the peace* against another; and what if the party do not find such *sureties* as the *justice* shall require? 254, 255.

6. How may such *recognizance* be forfeited; when does a trespass upon the lands or goods of another, and when do mere reproachful words, forfeit such *recognizance?* 255, 256.

7. Whom are the *justices* empowered by the statute 34 Edw. III. c. 1 to bind over to their *good abearance*, or *behaviour*, towards the *king* and his *people;* who are holden to be comprised under the general words of this expression; and what if the *justice* commit a man for want of *sureties?* 256.

8. How may such *recognizances* be forfeited? 257.

CHAP. XIX. —*Of Courts of a Criminal Jurisdiction.*

1. In discussing the method of inflicting punishments, what two things are to be considered? 258.

2. Of what two natures are the several *courts* of *criminal jurisdiction?* 258.

3. In what degree are these *criminal courts* independent of each other; and why are they so; and which are the twelve *public* ones, ranking them for this reason according to their dignity? 258, 259, 261, 265, 268, 269, 271, 273–275.

4. Who are tried by the *high court of parliament*, how, and for what *offences;* and what is enacted by statute 12 & 13 W. III. c. 2 as to any *plea* of *pardon* under the *great seal?* 259–261.

5. For what is the *court* of the *lord high steward* of *Great Britain* instituted; how, and to whom, is the office now granted; what is the only *plea* a *peer* may *plead* in the *court* of *king's bench;* what is the form of proceeding in case of a trial in the *court* of the *lord high steward;* and what does the statute 7 W. III. c. 3 enact as to the number of *peers* who shall vote on the *trial?* 261–263.

6. Where is the trial of an indicted *peer* properly during the *session of parliament;* and what different authority has the *lord high steward* when he sits in the *high courts of parliament*, and when he sits in his own *court?* 263.

7. Have *bishops* a right to sit in the *court* of the *lord high steward;* and what do they, in point of fact? 264, 265.

8. What is the cognizance of the *crown side* of the *court of king's bench;* and what is the effect of the coming of this *court* into any *county?* 265.

9. What was the *court* of *starchamber;* and whither hath reverted all that was good and salutary of its jurisdiction? 266, 267.

10. When was the *court of chivalry* a *criminal court;* and what used to be its jurisdiction then? 268.

11. What *criminal* cognizance has the *court of admiralty;* and what is the method of its *trials* by statute 28 Hen. VIII. c. 15? 268, 269.

12. Before whom, and when, are the *courts* of *oyer* and *terminer*, and general *gaol-delivery*, held? 269.

13. By virtue of what five several authorities do the *judges* sit at what is usually called the *assizes*, two of which are of a *civil* nature and have been before explained? 269.

14. Who are bound to attend the third, which is the *commission* of the *peace?* 270.

15. To whom are the fourth and fifth *commissions* of *oyer* and *terminer*, and general *gaol-delivery*, directed; who are of the *quorum*, and what are they empowered to do? 270.

16. When are special commissions of *oyer* and *terminer* and *gaol-delivery* issued? 271.

17. Can a man act as *judge*, or other *lawyer*, in these commissions, within his own *county*, where he was born or has inhabited? 271.

18. When, and before whom, must the *court* of general *quarter sessions* of the *peace* be held; and what is its jurisdiction and mode of proceeding; is there any appeal from its *orders* upon *motion;* and who has the custody of its *records* or *rolls?* 271, 272.

19. What other *quarter sessions* are kept in most *corporation* towns; and in what one instance only have they, by statute 8 & 9 W. III. c. 30, the same authority as the general *quarter sessions* of the *county;* and for what purposes, in both *corporation towns* and *counties*, is a *special* or petty session held, by whom? 272, 273.

20. What is the *sheriff's tourn*, or *rotation;* and when is it held? 273.

21. What is the *court-leet*, or *view of frankpledge;* when, and before whom, is it held; whence is its origin; what is the jurisdiction of both the *sheriff's tourn* and this *court;* who are obliged to attend them; what has occasioned them to grow into disrepute; and where hath their business greatly devolved? 273, 274.

22. What is the object of the jurisdiction of the *court* of the *coroners?* 274.

23. To what is the *court* of the *clerk of the market* incident; what is the object of its jurisdiction; whence is the officer called the *clerk;* and what punishments has he authority to inflict? 275.

24. What are the three *private* or *special courts* of *criminal* jurisdiction? 276, 277.

25. For what purpose was the *court* of the *lord steward, treasurer*, or *comptroller* of the *king's household* instituted by statute 3 Hen. VII. c. 14; and what is the course of its *proceedings?* 276.

26. For what purpose was the *court* of the *lord steward* of the *king's household*, or, in his absence, of the *treasurer, comptroller*, and *steward* of the *marshalsea*, erected by statute 33 Hen. VIII. c. 12; and what is the course of its *proceedings?* 276.

27. What is the jurisdiction of the *criminal courts* of the two *universities*, or their *chancellors' courts;* what is the jurisdiction of the *court* of the *lord high steward* of the *university* (of Oxford, by charter of 7 June, 2 Hen. IV., confirmed by statute 13 Eliz. c. 29); by whom must he be nominated and approved; and what is the course of proceeding when any *indictment* is found against any person privileged by the *university?* 277, 278.

CHAP. XX.—*Of Summary Convictions.*

1. Into what two kinds are the *proceedings* in the *courts* of *criminal* jurisdiction divisible? 280.

2. What is meant by a *summary proceeding;* and what are the three branches of *summary proceedings?* 280–283.

3. By whom are all *trials* of *offences* and *frauds* contrary to the *laws* of *excise* and other branches of the *revenue* determined? 281.

4. What *offences* are punished in a *summary*

way by *justices* of the *peace;* and to what three mischievous effects does the system give rise? 281, 282.

5. What is the process of these *summary convictions;* but what check has the *common law* thrown upon them which is now held to be an absolute requisite to them? 282, 283.

6. Of what two sorts are the *contempts* which are immemorially punished in the *summary* way of *attachment* by the *superior courts* of *justice?* 283.

7. Of what seven kinds are the principal instances of either sort? 284, 285.

8. Why is the *attachment* for the species of *contempt* arising from the disobedience to any *rule* or *order* of *court* by *parties* to any *proceeding* not affected by a general *act* of *pardon;* and how may obedience, by statute 10 Geo. III. c. 50, be enforced against any person having privilege of *parliament*? 285.

9. What does the statute of Westminster 2, 13 Edw. I. c. 39, ordain as to resistance of the *process* of the *king's courts?* 286.

10. What if the *contempt* be committed in the face of the *court;* and what is the course of proceeding in matters that arise at a distance? 286, 287.

11. What if the *party* refuse to answer the *interrogatories upon oath* of the *court?* 287.

12. What if the *party* can clear himself upon *oath;* but what if he *perjure* himself? 287.

CHAP. XXI.—*Of Arrests.*

1. Under what twelve general heads, following each other progressively, may the regular and ordinary *proceedings* in the *courts* of *criminal* jurisdiction be distributed? 289.

2. What is *arrest;* who are liable to it in *criminal* cases; what charges will justify it; and in what four ways may it be made? 289.

3. By whom may a *warrant* be granted, and in what cases ordinarily; upon what only should it be granted; what is requisite to its legality; what is a *special*, and what a *general, warrant;* and when, by statute 24 Geo. II. c. 44, is the *officer* who executes a *warrant* indemnified? 290, 291.

4. Whither does a *warrant* from a *justice* of the *court* of *king's bench* extend; and where is it *teste'd*, or *dated?* 291.

5. But what must take place before the *warrant* of a *justice* of the *peace* in one *county* can be executed in another; and what is enacted on this subject by statute 13 Geo. III. c. 31? 291, 292.

6. By what five *officers* may *arrests* be executed without warrant? 292.

7. When is any *private person* bound to make an *arrest*, on what pain; and what is he justified in doing in order to such *arrest;* but what if the *arrest* be only upon suspicion? 293.

8. What is *arrest* by *hue* (from *huer*, to shout) and *cry* (*hutesium et clamor*); what does the statute of Winchester, 13 Edw. I. c. 1 & 4, direct relative to this matter; what is the foundation of an *action* against the *hundred* in case of any loss by *robbery;* what does the statute 27 Eliz. c. 13 enact as to the sufficiency of *hue and cry;* and what that of Geo. II. c. 16 if an *officer* refuse or neglect to make it; by whom may it be raised; what powers has the *constable* in its prosecution; and what if it be wantonly and maliciously raised without cause? 293, 294.

9. What rewards and immunities are bestowed on such as apprehend *felons*, by statutes 4 & 5 W. and M. c. 8 and 8 Geo. II. c. 16, as to *highwaymen;* by statutes 6 & 7 W. III. c. 17 and 15 Geo. II. c. 28 as to *offenders* against the *coinage*, by statutes 10 & 11 W. III. c. 23 and 5 Anne, c. 31 as to *burglars;* by statute 6 Geo. I. c. 23 as to helpers of others to their stolen goods, for reward; by statutes 14 Geo. II. c. 6 and 15 Geo. II. c. 34 as to sheep-stealers; and by statutes 16 Geo. II. c. 15 and 8 Geo. III. c. 15 as to premature returners from transportation? 295.

CHAP. XXII.—*Of Commitment and Bail.*

1. What is the *justice* before whom a *prisoner* is brought bound to do by statute 2 & 3 Ph. and M. c. 10; and in what cases only is it lawful totally to discharge him? 296.

2. When must he be *committed* to prison; and when ought *bail* to be taken? 296, 297.

3. What *offence* is it by the *common law*, as well as by the statute Westminster 1 and the *habeas corpus act*, to refuse or delay to *bail* any person *bailable;* and what is expressly declared as to *excessive bail* by statute 1 W. and M. st. 2, c. 1? 297.

4. On the other hand, what if the *magistrate* take insufficient *bail?* 297.

5. Upon what ten accusations are persons clearly not admissible to *bail* by the *justices?* 298, 299.

6. Upon what three accusations do persons seem to be in the discretion of the *justices* whether bailable or not? 299.

7. Upon what three accusations must persons be *bailed* upon offering sufficient security? 299.

8. But who may *bail* for any *crime* whatsoever, except only persons committed by whom? 299, 300.

9. This imprisonment being only for safe custody, what is the *gaoler* not justified in doing? 300.

CHAP. XXIII.—*Of the several Modes of Prosecution.*

1. In what two ways are *offenders prosecuted*, or formally accused? 301.

2. By one of what two *proceedings* is the former way of *prosecution?* 301.

3. What is a *presentment*, properly speaking? 301.

4. What is an *inquisition of office;* and of what two kinds? 301, 302.

5. What is an *indictment?* 302.

6. Of whom are the *grand jury* composed; by whom are they instructed, or *charged;* and what *evidence* only are they to hear? 302, 303.

7. In what case only can the *grand jury* inquire of a fact done out of that *county* for which they are sworn; and what is enacted by the statute 2 & 3 Edw. VI. c. 24 when a man is wounded in one *county* and dies in another; by statute 2 Geo. II. c. 21 if the stroke or poisoning be in England and the death out of it, or *vice versâ;* by several statutes of Hen. VIII. and Edw. VI. where *treason* is committed out of the realm; by

two statutes of Hen. VIII. as to *offences* against the *coinage* committed in Wales; by statute 33 Hen. VIII. c. 23 as to *trials* for *murder* by the *king's special commission;* by statute 10 & 11 W. III. c. 25 as to *capital crimes* committed in *Newfoundland;* by statute 9 Geo. I. c. 22 as to *offences* against the *black-act;* by statutes 8 Geo. II. c. 20 and 13 Geo. III. c. 84 as to *felonies* in destroying *turnpikes* or *river-works;* by statute 26 Geo. II. c. 19 as to stealing from *vessels wrecked* or *in distress;* by statute 12 Geo. III. c. 24 as to destroying the *king's ships* out of this realm; and by statute 13 Geo. III. c. 63 as to *misdemeanours* committed in India? 303, 305.

8. In what cases is the *offence* to complete in two *counties* or parts of the *kingdom*, that the offender may be *indicted* in either? 305.

9. What do the *grand jury* if, having heard the *evidence*, they think the accusation groundless; may a fresh *bill* be preferred; and what do they if they be satisfied of the truth of the accusation? 305.

10. But what number of the *grand jury* must agree in order to *find* a *bill?* 306.

11. What three things must be precisely and sufficiently ascertained in an *indictment?* 306.

12. What is enacted by statute 1 Hen. V. c. 5 as to the identification of the *person;* in what case is a mistake in the *time* and *place* not held to be material; but when is it very material that the *indictment* should name the *time?* 306.

13. In what *crimes* must particular words of art be used which are so appropriated by *law* to express the precise ideas which it entertains of the *offence* that no other words, however synonymous they may seem, are capable of doing it? 307.

14. In what cases, in *indictments* for *murder*, need not the length and depth of the *wound* be expressed; and when is it necessary that the thing which is the subject or instrument of the *offence* should be expressed? 307.

15. By one of what two *proceedings* is the method of *prosecution* without any previous *finding* by a *jury?* 308, 312.

16. What was the *proceeding* when a *thief* was taken with the *mainour;* and when does a similar *process* remain to this day? 307, 308.

17. Of what two sorts are *informations;* and what are the limitations of *prosecutions* upon *penal statutes*, by statute 31 Eliz. c. 5? 308.

18. Of what two kinds are the *informations* which are exhibited in the name of the *king* alone; by whom are they respectively *filed;* what are their respective objects; and by whom must they be *tried*, and by whom punished? 308, 309.

19. But to what are these *informations* confined? 310.

20. What is enacted by statute 4 & 5 W. and M. c. 18 as to *informations* exhibited by the *master* of the *crown-office;* but what as to *informations* at the *king's* own *suit*, filed by the *attorney-general?* 311, 312.

21. Is there not still another species of *information*? 312.

22. What is the method of *criminal prosecution* which is merely at the *suit* of the *subject* by *appeal;* and why has it fallen into disuse? 312, 313.

23. What is the origin of an *appeal;* and what was a *weregild?* 313, 314.

24. What are the only two *appeals* now in force? 314.

25. For what *crimes* against the *parties* themselves may *appeals* be instituted; what is the only *crime* against one's *relation* for which an *appeal* can be brought; and by what *relations* only can this be brought? 314.

26. What if the *wife* marry again, before, pending, or after *judgment* of her *appeal;* when shall the *heir*, and when shall the *wife*, not have the *appeal;* what if there be no *wife*, and the *heir* be accused of the *murder;* and within what time, by the statute of Gloucester, must all *appeals* of *death* be sued? 314, 315.

27. If the *appellee* be acquitted, can he be afterwards *indicted* for the same *offence;* and if a man be acquitted on an *indictment* of *murder*, or *found guilty*, and pardoned by the *king*, what, in strictness, ought to happen, by virtue of the statute 3 Hen. VII. c. 1; but what if he have been *found guilty* of *manslaughter* on an *indictment*, and have had the *benefit of clergy* and suffered the *judgment* of the *law?* 315.

28. What shall the *appellor* suffer, by virtue of the statute of Westminster 2, if the *appellee* be acquitted? 316.

29. If the *appellee* be *found guilty*, what *judgment* shall he suffer, with what remarkable difference from the consequences of a *conviction* by *indictment?* 316.

CHAP. XXIV.—*Of Process upon an Indictment.*

1. If the *offender* have fled, or secrete himself, in *capital* cases, or have not, in smaller *misdemeanours*, been bound over to appear at the *assises* or *sessions*, may an *indictment* be preferred against him in his absence; can he be tried although he do not personally appear; and what is the express provision of statute 28 Edw. III. c. 3? 318.

2. What is the proper *process* to bring in an *offender*, or an *indictment* for any *petty misdemeanour* or on a *penal statute?* 318.

3. What if, by the *return* to such *process*, it appear that the *party* hath *lands* in the *county;* and what if the *sheriff* return that he hath none in his *bailiwick?* 318, 319.

4. But what happens on *indictments* for *treason* or *felony;* and what is now the usual practice in the case of *misdemeanours?* 319.

5. When shall the *offender* be put in *exigent*, in order to his *outlawry;* and what is the form and consequence of this *proceeding?* 319.

6. What is the punishment for *outlawries* upon *indictments* for *misdemeanours;* but to what does an *outlawry* in *treason* or *felony* amount? 319.

7. Who may arrest an *outlaw*, on a *criminal prosecution;* and when is the whole *outlawry* illegal and may be reversed? 320.

8. When may a *writ* of *certiorari facias* be had; what is its effect; and for what four purposes is this frequently done? 320, 321.

9. At whose instance may a *certiorari* be granted; and when is it generally refused? 321.

10. When, and how, must *indictments found* by the *grand jury* against a *peer*, or in places of exclusive jurisdiction, be delivered into the *court* of *parliament*, or into that of the *lord high steward*, or to the courts of such exclusive jurisdiction? 321.

CHAP. XXV.—*Of Arraignment and its Incidents.*

1. WHAT is *arraignment (ad rationem ponere;* in French, *ad reson*, or, abbreviated, *à resne)*? 322.

2. Why is the *prisoner* called upon to hold up his hand; and what if he refuse to do so? 323.

3. In what cases, by statute 1 Anne, c. 9, may the *accessory* be proceeded against as if the *principal felon* had been attainted; and why? 324.

4. One of what two circumstances is *incident* to every *arraignment?* 324.

5. In what three cases is a *prisoner* said to *stand mute?* 324.

6. What ought the *court* to do if the *prisoner* say nothing; and what if he appear to be *dumb ex visitatione Dei*, in which case, can *judgment* of death be given against him? 324, 325.

7. But what hath long been clearly settled if he be *found* to be *obstinately mute*, in *high treason, petit larceny*, and all *misdemeanours;* and what, by the ancient law, in *appeals* or *indictments* for other *felonies* or *petit treason?* 325.

8. What was *trina admonitio;* was the *benefit of clergy* allowed to an *obstinate mute;* and what was the *sentence* of *peine (prisone) forte et dure?* 325, 327.

9. Was the *trial by rack* ever attempted to be introduced into England? 326.

10. To what did *standing mute* amount, in all cases, by the *common law;* did the *prisoner* derive any advantage from suffering *death* by the *sentence* of *peine forte et dure* over that of *judgment* upon *trial;* and what was enacted in abolition of this *sentence* by statute 12 Geo. III. c. 20? 328, 329.

11. What is the consequence of the *prisoner's simple confession* of the *indictment?* 329.

12. But what is confession by way of *approvement;* who is the *approver* or *prover, probator*, and who is the *appellee;* in what *offences* only can an *approvement* be; to what does it amount; and what if the *appellee* be acquitted? 329, 330.

13. Why has the admission of *approvements* been long disused by *courts of justice;* and how is all the good arising from the method of *approvements* provided for by several statutes in the cases of *coining, robbery, burglary, housebreaking, horse-stealing*, and *larceny* to the value of 5*s*. from *shops, stables*, &c., and by statute 29 Geo. II. c. 30 in case of *metal-stealing?* 330, 331.

14. What is the usual practice, too, of *justices of the peace* as to admitting what is generally termed *king's evidence?* 331.

CHAP. XXVI. *Of Plea and Issue.*

1. WHAT is the *plea* of the *prisoner;* in what cases does he *plead;* and of what five kinds is the *plea?* 332.

2. What was the *plea of sanctuary;* when might a *criminal* claim *sanctuary;* what did it superinduce; and when was the whole privilege abolished? 332, 333.

3. Was there not another *declinatory plea*, which was used to be *pleaded* before *trial* or *conviction?* 333.

4. What is a *plea* to the *jurisdiction;* and when may it be made? 333.

5. When is a *demurrer* to the *indictment* incident to *criminal* cases; what if the point of *law* be adjudged against the *prisoner;* and why are *demurrers* to *indictments* seldom used? 333, 334.

6. For what principally is a *plea* in *abatement;* but why, in the end, does little advantage accrue to the *prisoner* by means of these dilatory *pleas?* 334, 335.

7. What are *special pleas* in *bar;* of what four kinds as applicable to both *appeals* and *indictments?* 335.

8. Upon what universal maxim of the *common law* is the *plea* of *autrefoits acquit* grounded; is an *acquittal* on an *appeal* a good *bar* to an *indictment* on the same *offence*, and *vice versâ*, taking into consideration what was enacted by the statute 3 Hen. VII. c. 1 to prevent the practice of not trying any person on an *indictment* of *homicide* till after the year and day within which *appeals* may be brought were past, by which time it often happened that the *witnesses* died or the whole was forgotten? 335, 336.

9. When, and of what, is the *plea* of *autrefoits convict* a good *plea* in *bar?* 336.

10. Of what is the *plea* of *autrefoits attaint* a good *plea* in *bar;* and wherefore does it differ from the former two *pleas?* 336.

11. But what four exceptions are there to this general rule, wherein, *cessante ratione, cessat et ipsa lex;* and from these instances what invariable requisite to the validity of a *plea* of *autrefoits attaint* may we collect? 336, 337.

12. What is one advantage that attends *pleading* a *pardon* in *bar* or in *arrest* of *judgment* before *sentence* is past, which gives it by much the preference to *pleading* it after *sentence* or *attainder?* 337.

13. Wherein do *special pleas* in *bar* differ in *criminal prosecutions* and in *civil actions*, and why; and when a *prisoner's plea* in *bar* is *found* or *adjudged* against him, what shall he have; for what is the only *plea* in consequence whereof *death* can be inflicted? 338.

14. In cases of what *indictments* can there be no *special justification* put in by way of *plea*, and why; and why is the *general issue not guilty, non culpabilis* or *nient culpable*, the most advantageous *plea* for a *prisoner?* 338, 339.

15. How does the commentator explain the abbreviations of "*non cul.*," which was formerly used to be written upon the *minutes* when the *prisoner* had *pleaded not guilty*, and "*cul. prit.*," the *replication* on behalf of the *king*, by which *issue* was joined, and which, from the circumstance of the *clerk of the arraigns* immediately inquiring of the prisoner, "*cul. prit*, how wilt thou be tried?" is commonly understood as if he had fixed an opprobrious name on the prisoner? 339, 340.

16. But what is Mr. J. Christian's conjecture as to the word *prit?* See his note to this chapter.

17. To what only has this form of inquiry reference at present; what can be the only *trial* upon *indictments* since the abolition of *ordeal;* and therefore what if the *prisoner* refuse to put himself upon the *inquest* in the usual form? 340, 341.

18. When the *prisoner* has put himself upon his *trial*, (and in what words is this done?) what does the *clerk* answer? 341.

CHAP. XXVII.—*Of Trial and Conviction.*

1. What was *trial* by *ordeal;* of what two sorts; and what when they were performed by *deputy?* 342, 343.

2. How was *fire-ordeal* performed? 343.

3. How was *water-ordeal;* and in what practice may relics of it be traced? 343.

4. How was this *trial* abolished? 345.

5. What was *trial* by the *corsned?* 345.

6. In what *criminal* cases may the *trial* by *battel* be demanded; what is the difference between this *trial*, on a *writ of right*, and on these *criminal* cases; and therefore who may *counterplead* and refuse the *wager* of *battel*, and compel the other *party* to put himself upon the *country;* and when may the *crime* itself be sufficient cause of such refusal? 346, 347.

7. Wherein do the *oaths* of the two *combatants* differ in *waging battel* upon *appeals*, and upon *writs of right?* 347, 348.

8. When shall a *peer* be tried by the *court of parliament* or the *lord high steward*, and when by a *jury;* and in what two things only does the *trial* by these *courts* differ from the *trial per patrium*, or by *jury?* 348, 349.

9. What is the *sheriff's* duty when a *prisoner*, on his *arraignment*, has *pleaded not guilty*, and, for his *trial*, hath put himself upon the *country*, which *country* the *jury* are; what if the *proceedings* are before the *court of king's bench*, and then where is the *trial* had; and what before *commissioners of oyer and terminer* and *gaol-delivery?* 350, 351.

10. What is customary when persons *indicted* of smaller *misdemeanours* have *pleaded not guilty* or *traversed* the *indictment?* 351.

11. In cases of *high treason* (except in counterfeiting the *king's coin* or *seals*, as much of the latter *act* as relates to which is repealed by statute 16 Geo. III. c. 53) or *misprision of treason*, what is enacted by statutes 7 W. III. c. 3 and 7 Anne, c. 21? 351, 352.

12. By whom, and what kind, may *challenges* of *jurors* be made when the *trial* is called on? 352.

13. What are *challenges for cause;* and in *criminal*, or at least in *capital*, cases, what other species of *challenge* is allowed to the *prisoner*, and for what two reasons? 353.

14. What is enacted as to the denial of this privilege to the *king*, by statute 33 Edw. I. st. 4? 353.

15. But what is the boundary of the *prisoner's peremptory challenges* by the *common law;* and how does it deal with one who *peremptorily* challenges beyond that boundary? 354.

16. But, by statute 22 Hen. VIII. c. 14, how many *peremptory challenges* can any person arraigned for *felony* be permitted to make; and what if the *prisoner* challenge more than that number? 354.

17. May a *tales* be awarded in *criminal prosecutions?* 354, 355.

18. What is done when the *jury* is sworn, if it be a *cause* of any consequence; but when only shall *counsel* be allowed a *prisoner* upon his *trial*, upon the *general issue*, in any *capital crime*, and upon what principle? 355.

19. But for what purpose do the *judges* never scruple to allow a *prisoner counsel;* and what is directed by statute 7 W. III. c. 3 and 20 Geo. II. c. 30, lest this indulgence should be intercepted by superior influence, in the case of *state criminals?* 355, 356.

20. In what five leading points, by several statutes and resolutions, has a difference been made between *civil* and *criminal evidence?* 356, 358, 359.

21. What hath been holden in the construction of the statute 7 W. III. c. 3, by which it is enacted that the *confession* of the *prisoner*, which shall not countervail the necessity of proof of *treasons* by two *witnesses*, must be in *open court?* 357.

22. What two rules does Sir Matthew Hale lay down as to admitting presumptive *evidence* cautiously? 359.

23. What was declared by statute 1 Anne, st. 2, c. 9 as to *witnesses* for the *prisoner?* 360.

24. What is the difference between the *verdict* in *civil and criminal* cases? 360.

25. What if the *verdict* be notoriously wrong; and what hath been done in many instances where, contrary to *evidence*, the *jury* have found the *prisoner guilty?* 361.

26. What if the *jury find* the *prisoner not guilty;* but what is he said to be if the *jury find* him *guilty?* 361, 362.

27. In what two ways may *conviction* accrue? 362.

28. When shall the *prosecutor* be allowed the expenses of *prosecution* and a compensation for his trouble and loss of time, out of what; and when shall all persons appearing upon *recognizance*, or *subpœna*, to give *evidence*, be paid their *charges*, and an allowance for their trouble and loss of time, by several late statutes? 362.

29. When shall the *prosecutor* have restitution of his *goods*, by statute 21 Hen. VIII. c. 11, out of what, and by what *process?* 362, 363.

30. Why does this *writ* of *restitution* reach the stolen *goods* notwithstanding they have been sold to a third person in *market-overt;* when may the *party* robbed regain the *goods* without such *writ* of *restitution;* and what if the *felon* be *convicted* and *pardoned*, or be allowed his *clergy?* 363.

31. When, and why, does the *court* permit the *defendant* to *speak with the prosecutor* before *judgment*, and, if the prosecutor then declare himself satisfied, inflict but a trivial punishment; but when should this practice never be suffered, and why? 363, 364.

CHAP. XXVIII.—*Of the Benefit of Clergy.*

1. After trial and conviction, what is the principal intervening circumstance that suspends or arrests *judgment?* 365.

2. In what had *clergy*, the *privilegium clericale*, or, in common speech, the *benefit of clergy*, its original; and of what two principal kinds were the exemptions which were granted to the *church?* 365.

3. When was it finally settled in the reign of Hen. VI. that the *prisoner* might claim his benefit of *clergy?* 366.

4. In process of time, who was accounted a *clerk*, or *clericus;* and what distinction was therefore drawn by statute 4 Hen. VII. c. 13, and virtually restored, after a temporary abolition by two statutes of Hen. VIII., by statute 1 Edw. VI. c. 12, which enacted what? 367.

5. What became of the *offenders* after they had had the benefit of their *clergy* and were discharged from the sentence of the *law* in the *king's courts?* 368.

6. But what happened when, upon very heinous and notorious circumstances of guilt, the *temporal courts* delivered over to the *ordinary* the *convicted clerk, absque purgatione facienda?* 369.

7. For avoiding these *perjuries* and abuses, what does the statute 18 Eliz. c. 7 enact; and how long did the law continue thus altered only, by an indulgence to whom of the benefit of *clergy* without the test? 369, 370.

8. What was enacted by statute 5 Anne, c. 6 upon the considerations that learning was no extenuation of guilt, and that the lenity of *clergy* was an encouragement to commit the lower degrees of *felony;* in what cases did the statutes 4 Geo. I. c. 11 and 6 Geo. I. c. 23 give the *courts* a discretionary power to commute the penalties of *burning in the hand*, or *whipping*, for *transportation* for seven years? 370.

9. But now, by statute 19 Geo. III. c. 74, for what have the *judges* a discretionary power to commute the penalty of *transportation* (with what exception?); what if the *offenders* escape a first, and what if a second, time; and for what (with what exceptions?) may the *court* commute the penalty of *burning in the hand?* 370, 371.

10. To what persons is the benefit of *clergy* to be allowed at this day? 371, 372.

11. For what *crimes* is the benefit of *clergy* to be allowed? 372, 373.

12. What is declared by statute 28 Hen. VIII. c. 15 as to the allowance of the benefit of *clergy* in the *marine law?* 373.

13. Unless what is *clergy* now allowable in all *felonies*, whether new-created or by *common law?* 373.

14. Where *clergy* is taken away from the *principal*, is it from the *accessory?* 373.

15. Where *clergy* is taken away from the *offence*, is a principal in the second degree excluded from his *clergy*? 373.

16. Where it is taken away only from the *person committing* the *offence*, are his aiders and abettors excluded from the *clergy?* 373.

17. What are the consequences of allowing this benefit of *clergy*, which affect the present interest and future capacity of the *party*, whether *commoner* and *layman*, or *peer* and *clergyman?* 374.

18. What does he forfeit by his *conviction;* and to what is he restored by the *burning* its substitute, or *pardon?* 374.

19. Of what *felonies* is he not discharged by the *burning* its substitute, or *pardon*, by statutes 8 Eliz. c. 4 and 18 Eliz. c. 7? 374.

CHAP. XXIX.—*Of Judgment and its Consequences.*

1. WHAT, upon a *capital charge*, is the *prisoner* asked by the *court* when the *jury* have brought in their *verdict guilty;* and what happens in case the *defendant* be found *guilty* of a *misdemeanour*, the *trial* of which happens in his absence? 375.

2. But, whenever he appears in person, what may he offer in *arrest* or stay of judgment at this period? 375.

3. Is not a defective *indictment* aided by a *verdict*, as defective *pleadings* in *civil* cases are? 375.

4. What is the effect of a *pardon* when *pleaded* in *arrest* of *judgment;* and what when it is not *pleaded* till after *sentence?* 376.

5. What if all *motions* in *arrest* of *judgment* fail? 376.

6. Of what parts of *capital judgments* has the humanity of the English nation authorized an almost general mitigation? 376, 377.

7. How far is the punishment for every *offence* ascertained by our English law? 377, 378.

8. What has the *bill of rights* declared as to *fines* and *punishments?* 378, 379.

9. What has *magna carta*, c. 14, determined concerning *amercements* for misbehaviour by the *suitors* in matters of *civil right;* and what has it directed in order to ascertain this *amercement?* 379.

10. Who were *affeerors;* what is the difference between an *amercement* and a *fine;* what is the reason why *fines* in the *king's courts* are frequently denominated *ransoms;* and what is holden where any statute speaks both of *fine* and *ransom?* 379, 380.

11. Upon *judgment* of either of what two things, on a *capital crime*, shall a man be said to be *attainted* (*attinctus, stained* or *blackened*)? 380, 381.

12. What are the incapacities of a man *attaint?* 380.

13. What is the great difference between a man *convicted* and *attainted?* 381.

14. What are the two consequences of *attainder?* 381.

15. How is *forfeiture* twofold? 381.

16. How far backwards does *forfeiture* of *real estates* relate? 381.

17. What is forfeited from the *wife*, if the *husband* be *attainted* of *treason*, by the express provision of statute 5 & 6 Edw. VI. c. 11; and if the *wife* be so, shall the *husband* be *tenant by the curtesy* of the *wife's land?* 381, 382.

18. But what if a *traitor* die before *judgment* pronounced, or be killed in open rebellion, or hanged by *martial law?* 382.

19. In what consideration is the natural justice of *forfeiture*, or *confiscation* of *property*, founded? 382.

20. What is provided in certain *treasons* relating to the *coin;* and, in order to abolish hereditary punishment entirely, what was enacted by statute 7 Anne, c. 21; and how was the operation of the indemnifying clauses in this statute still further suspended by statute 17 Geo. II. c. 39? 384, 385.

21. What does the *offender* forfeit in *petit treason* and *felony;* and what is called the *king's year, day*, and *waste?* 385.

22. Do these *forfeitures* actually take place; are they incident to a *felo de se;* and how far backwards do they relate? 386.

23. To what two other instances besides those already spoken of does the *forfeiture* of the profits of *land* during life extend? 386.

24. When does the *forfeiture* of *goods* and *chattels* accrue? 386.

25. How is *forfeiture* for *flight*, on an accusation of *treason*, *felony*, or *petit larceny*, now looked upon? 386, 387.

26. What three remarkable differences are there between the *forfeiture* of *lands* and that of *goods* and *chattels*, the second as to *outlawry*, and the third as to its relation backwards; but what (particularly by statute 13 Eliz. c. 5) if a *traitor's* or *felon's chattels* be collusively, and not *bonâ fide*, parted with, merely to defraud the *crown*, and why? 387, 388.

27. What are the consequences of *corruption of blood?* 388.

28. In what *offences* is *corruption of blood* saved; what will be the virtual effect of the statute of 7 Anne (the operation of which is postponed by the statute 17 Geo. II.); but why will the *corruption of blood* still continue for many sorts of *felony?* 389.

CHAP. XXX.—*Of Reversal of Judgment.*

1. In what two ways may *judgments*, with their several consequences, be set aside? 390.

2. By what three means may a *judgment* and *attainder* be reversed? 390–392.

3. For what may a *judgment* be falsified, reversed, or avoided, *without a writ of error;* why cannot these matters be assigned for *error* in the *superior court;* and when may a *diminution* of the *record* be alleged? 390.

4. Where does a *writ of error* lie, and for what may it be brought? 391, 392.

5. On what are *writs of error* allowed to reverse *judgment* in case of *misdemeanours;* and how, in *capital cases,* to reverse attainders, when by whom are they generally brought? 392.

6. When is an *act* of *parliament* to reverse the *attainder* granted; and how is its effect different from that of a reversal by *writ of error?* 392.

7. What is the effect of falsifying or reversing an *outlawry;* and wherein does it differ from that of falsifying or reversing a *judgment* upon *conviction?* 392, 393.

8. Upon the latter event taking place, what if the *party's estates* have been granted away by the *crown?* 393.

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CHAP. XXXI.—*Of Reprieve and Pardon.*

1. What is a *reprieve*, from *reprendre*, to *take back;* and on what two accounts may it be? 394.

2. What is a *reprieve ex arbitrio judicis;* and when may it be granted or taken off? 394.

3. What is the first case of *reprieve* granted *ex necessitate legis;* and what must the *judge* direct in case the *plea* of *pregnancy*, in a *woman capitally convicted*, be made in stay of *execution;* when is it a sufficient stay; and how long? 395.

4. What if the *woman* have once had the benefit of this *reprieve*, and been delivered, and afterwards become pregnant again? 395.

5. What is the second cause of regular *reprieve?* 395, 396.

6. What is it the invariable rule to demand of the *prisoner* when any time intervenes between the *attainder* and the award of *execution;* and what if the party plead *diversity* of *person*, that he is not the same that was *attainted*, and the like? 396.

7. When only, in these collateral *issues*, shall time be allowed the *prisoner* to make his *defence* or produce his *witnesses;* and what is held as to *challenges* of the *jury* by the *prisoner?* 396.

8. What is declared by statute 27 Hen. VIII. c. 24 as to *pardon?* 397.

9. What *offences* may the *king* pardon, excepting what four? 398, 399.

10. What restriction is there that affects the prerogative of pardoning in case of *parliamentary impeachments?* 399, 400.

11. What must be the *form* of a complete irrevocable *pardon;* and what will be the effect of a *warrant* under the *privy seal* or *sign-manual?* 400.

12. What circumstance will vitiate the whole *pardon?* 400.

13. Will a *pardon* of *all felonies* pardon a *conviction* or *attainder* of *felony?* 400.

14. What is enacted by the statute 13 Ric. II. st. 2, c. 1 as to the *pardon* of *treason*, *murder*, or *rape?* 400.

15. Under these restrictions, how is it a general rule that a *pardon* shall be taken? 401.

16. What is a *conditional pardon?* 401.

17. What is the difference between a *pardon* by *act* of *parliament*, and by the *king's charter* of *pardon?* 402.

18. When has a man waived the benefit of his *pardon?* 402.

19. What discretionary power does the statute 5 & 6 W. and M. c. 13 give the *judges* of the *court* over a *criminal pleading pardon* of *felony?* 402.

20. What is the effect of a *pardon* by the *king?* 402.

21. But what only can restore or purify the *blood*, if the *pardon* be not allowed till after *attainder;* yet when may the *attainted's son* be his *heir?* 402.

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1. By whom must *execution* be performed; and under what *warrant* in the *court* of the *lord high steward*, under what in the *court* of the *peers* in *parliament*, and under what at the *assises?* 403.

2. Within what time is the *sheriff* to do *execution* in the country; but what is the form of proceeding, and what is the *warrant*, in *London*, and what if the *prisoner* be *tried* at the *bar* of, or brought by *habeas corpus* into, the *court* of *king's bench?* 404.

3. And, throughout the kingdom, what is enacted by 25 Geo. II. c. 37 in case of *murder?* 404.

4. Can the *sheriff* alter the manner of the execution, by substituting one *death* for another? 404.

5. May the *king*, or may he, remit any part of the *sentence?* 405.

6. What if, upon execution of judgment to be hanged by the neck till he is dead, the *criminal* revives? 406.

CHAP. XXXIII.—*Of the Rise, Progress, and Gradual Improvements of the Laws of England.*

1. What few points which bear a great affinity

and resemblance to some of the modern doctrines of our English law may be collected from Cæsar's account of the tenets and discipline of the ancient Druids in Gaul, who were sent over to Britain to be instructed? 408.

2. Why is it impossible to trace out *when* the several mutations of the *common law* were made; and whence the great variety of our ancient established customs? 408–410.

3. What did Alfred for the *constitution* and *laws?* 410, 411.

4. What was the *Dane-lage*, what the *West-Saxon-lage*, and what the *Mercen-lage?* 412.

5. What did Edgar; and what is the most probable original of the *common law?* 412.

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7. What five alterations in our *laws* did the Norman invasion work? 415–418.

8. What did William Rufus; and what did Henry I.? 420, 421.

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